

ARTICLE

CARVING OUT A GREATER ROLE FOR CIVIL LITIGATION AS AN ENVIRONMENTAL LAW ENFORCEMENT TOOL IN ZIMBABWE'S 2013 CONSTITUTION

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1

INTRODUCTION

Zimbabwe has long recognised the need for legal protection of the environment. To this end, environmental laws have been a feature of Zimbabwean law since the attainment of independence in 1980. The enforcement of these laws has traditionally been approached in two ways.

The most basic approach, carried over from the common law of delict, has been through civil litigation. This approach is based on recognition of the fact that where an act of pollution has caused personal injury or damage to someone's property, the victim can use the delictual remedy of Aquilian action.¹ Further, Zimbabwean law recognises a general duty of care, akin to the good neighbourliness (*sic tuo utere*) principle in international law.² A person would be regarded as having breached this duty, and thus a right, where he/she failed to foresee and guard against harm which the reasonable person would have foreseen and guarded against.³

Importantly, however, in Zimbabwe, as in other jurisdictions, it has always been recognised that this civil litigation based approach suffers from inherent

deficiencies.⁴ Most notably, the approach can be anthropocentric, backward looking, and in some instances, is not sufficiently preventative.⁵ As such, efforts have been made to remedy these deficiencies through the turn to statute-based and state-led enforcement procedures, most notably, those contained in the 2007 Environmental Management Act, the leading statute on environmental issues prior to the coming into effect of the 2013 Constitution.⁶ To this end, the Act, much like similar environmental protection framework legislation in other jurisdictions, carries a 'range of procedures and actions employed by the State, its competent authorities and agencies to ensure that organisations or persons, potentially failing to comply with environmental laws or regulations can be brought or returned into compliance and, or, punished through civil administrative or criminal action.'⁷

In many respects, this two-pronged approach to enforcement has worked relatively well. However, over time it has become apparent from the dearth of environmental cases being brought to the courts that civil litigation is an under-utilized enforcement tool in the country. It was in this context that, in 2013, Zimbabwe enacted a new Constitution which, in section 73 provides a right to a clean environment, and, in section 62 provides a right to access to information. Complementarily, section 85 of the Constitution makes extensive provision for access to

1 On the Zimbabwean law of delict generally, see G Feltoe, *A Guide to the Zimbabwean Law of Delict* (3rd edn Legal Resources Foundation 2006). Also, the application of this body of law is quite like that in South African law. As such, for a detailed account, see M Kidd, *Environmental Law* (Juta 2008) 133-34.

2 On the good neighbourliness principle, see Principles 2, 18, and 19 of the Rio Declaration on Environment and Development, A/CONF.151/26. In this respect, Zimbabwe has adopted an approach similar to other jurisdictions. See Feltoe (n 1) 26. See also, Sompong Sucharitkul, 'The Principles of Good-neighborliness in International Law' (1996),

<<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1559&context=pubs>> accessed 29 May 2015; Hendrik A Strydom, 'The Legal Principles Relating to Climate Change' <<http://www.eolss.net/sample-chapters/c14/E1-36-10-00.pdf>> accessed 29 May 2015.

3 Feltoe (n 1) 26.

4 Feltoe (n 1); Tumai Murombo, 'Balancing Interests Through Framework Legislation in Zimbabwe' in M Faure and W du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (PULP 2011) 557.

5 Teall Crossen, 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 11; Loretta Feris and Dire Tladi, 'Environmental Rights' in D Brand and C Heyns (eds), *Socioeconomic Rights in South Africa* (PULP 2005) 249, 251; Michael Mason, 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12 *Global Governance* 283, 288.

6 See Environmental Management Act [Chap 20:27]; Constitution of Zimbabwe Amendment (20) Act 2013.

7 See Gregory Rose, 'Gaps in the Implementation of Environmental Law at the National, Regional and Global Level' (2011) <www.unep.org/delc/Portals/24151/FormattedGapsEL.pdf> accessed 29 May 2015.

justice where any of these rights should be infringed or be under threat of infringement. The turn to substantive and procedural environmental rights in this manner, in theory at least, is a move that promises to invigorate civil litigation's role as a complement to state-led enforcement efforts in Zimbabwean law.

As such, this paper considers the extent to which the inclusion of justiciable environmental rights in the Constitution could invigorate recourse to civil litigation as a complementary tool to state-led enforcement efforts in Zimbabwe. In pursuing this objective, the paper is presented in two sections. In the first section, mindful of the fact that civil litigation has always formed part of Zimbabwean law, the paper explores the rationale behind the turn to civil litigation as a complementary tool to state-led enforcement efforts in Zimbabwe prior to the 2013 Constitution. Following from this, it then considers why this avenue was under-utilized in efforts to enforce environmental law. Second, and against this backdrop, the paper considers the extent to which the inclusion of justiciable environmental rights in the 2013 Constitution could reasonably address the reasons which precluded the turn to civil litigation as a complementary enforcement tool in Zimbabwe. The paper concludes with an analysis of the possible impact of the inclusion of justiciable environmental rights in the Constitution in invigorating recourse to civil litigation as a complementary enforcement tool in Zimbabwean law.

2

CIVIL LITIGATION-THE PRE-2013 ZIMBABWEAN CONSTITUTION EXPERIENCE

The approach to the enforcement of environmental law in Zimbabwe is best understood when it is considered that the country adopts a command-and-control approach to environmental protection. This approach is based on a standards system in terms of which quality standards are established in the first instance, with other regulatory standards such as emissions, process, and product standards being

subsequently determined.⁸ Importantly, the determination of these standards has commonly been a science-led exercise. It has traditionally followed therefore, that determining whether there has been compliance with standards, and thus, law, has often required scientific knowledge and expertise.⁹

To account for all this, in the context of the command-and-control approach to regulation, enforcement of environmental law in Zimbabwe has been led by environmental officers who are knowledgeable about the relevant science, and are employed by the Environmental Management Agency, a statutory institution deriving its authority from the Environmental Management Act.¹⁰ In addition to the efforts of Agency officers, enforcement efforts have also been led by state agents, schooled in the law, with police officers being empowered to fine those found to be acting in a manner that is inconsistent with the law.¹¹ The enforcement techniques and procedures at the disposal of the Agency and police officers include, but are not limited to, extensive inspection powers as well as a penalties regime firmly rooted in the polluter pays approach.¹² Therefore, the Agency, and police officers, have been equipped and empowered to ensure that organisations or persons failing, or potentially failing, to comply with environmental laws or regulations are brought or returned to compliance or punished for their non-compliance through administrative or criminal action.

Importantly for the present purpose, despite the pronounced state involvement in the enforcement of environmental law detailed above, sight has not been lost of the critical role that civil litigation could play as an enforcement tool in Zimbabwean law. To this end, section 4(1) of the Environmental Management Act grants anyone who resides, or operates, in Zimbabwe, the right to a clean environment that is not harmful to human

⁸ See ss 10 and 140. On standards generally, see P Sands and J Peel, *Principles of International Environmental Law* (Cambridge University Press 2012) 122-24.

⁹ See s 37.

¹⁰ See s 9.

¹¹ See ss 37 and 68(3).

¹² See, for example, ss 37 and 137 of the Environmental Management Act.

health.¹³ Where such a right is violated, an injured party has the option of initiating civil litigation against the perpetrator of the harm and in that way, enforcing the law.¹⁴ This turn to civil litigation as an enforcement tool is also incorporated throughout the rest of the Act, with various provisions bestowing the right to bring third party civil proceedings against perpetrators of environmental harm, to adversely affected members of the public.¹⁵ Drawing from this, it is clear therefore that, well before the turn to the inclusion of environmental rights in the Constitution, legislators envisioned a situation in which civil litigation would complement state-led efforts to enforce Zimbabwean environmental laws.

It became apparent with the passage of time that despite the provision of civil litigation as an enforcement tool, citizens were not utilizing it. By way of establishing the reason for the same, and as a precursor to the discussion on whether the turn to environmental rights in the Constitution can invigorate recourse to civil litigation as a complementary enforcement tool, this paper considers first, the soundness of the rationale for the turn to civil litigation as a complement to state-led enforcement in Zimbabwe, and second, from a practical perspective, why civil litigation remained under-utilized as an enforcement tool in Zimbabwe.

2.1 Rationale Behind the Turn to Civil Litigation

The turn to civil litigation as a complement to other enforcement efforts in Zimbabwe, as in other

jurisdictions, was presumably pursued for at least three reasons.¹⁶ First, it was presumably based on the realisation that state-led enforcement of environmental law was susceptible to being compromised by conflicting interests. This is an issue which has been extensively canvassed under capture theory.¹⁷

The theory is based on the argument that regulators are prone to being ‘captured’ by the regulated parties.¹⁸ For instance, such ‘regulatory capture’ can occur ‘when special interests co-opt policymakers or regulatory agencies to further their own ends.’¹⁹ This situation needs to be accounted for in Zimbabwe’s political climate where the Environmental Management Agency’s standing as the dedicated regulator had somewhat been corrupted over the years. This was largely because enforcement was often compromised by competing political interests.²⁰

16 On the rationale behind the turn to civil litigation, see Matthew D Zinn, ‘Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits’ (2002) 21 *Stanford Environmental Law Journal* 81, 84; Dinah Shelton, ‘Human Rights, Health & Environmental Protection: Linkages in Law and Practice’ (2002) <www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> accessed 8 July 2015. See also, Eugene C McCall and Ryan W Trail, ‘Citizen Suits to Enforce Federal Environmental Laws’ (2001) <www.mccallenv.com/websites/mccallenv/images/Citizen%20Suits%20to%20Enforce%20Federal%20Environmental%20Laws.pdf> accessed 8 July 2015.

17 See DJ Fiorino, *The New Environmental Regulation* (MIT Press 2007) 3-38; Adam Thierer, ‘Regulatory Capture: What the Experts Have Found’ (2010) <http://techliberation.com/2010/12/19/regulatory-capture-what-the-experts-have-found/> accessed 8 July 2015. See also, Janet Alexander ‘An Introduction to Class Action Procedure in the United States’ (2001) <https://law.duke.edu/grouplit/papers/classactionalexander.pdf> accessed 8 July 2015.

18 Zinn (n 16) 81.

19 Thierer (n 17).

20 See Thabani Dube, ‘EMA Under the Spotlight’ *The Zimbabwean* (Harare, 3 October 2012) <www.thezimbabwean.co/life/environment/61278/ema-under-spotlight.html> accessed 8 July 2015; Mthulusi Mathuthu, ‘Chinese Mall Opens Despite Warnings From Environmentalists’ *Nehanda Radio* (Harare, 18 December 2013) <http://nehandaradio.com/2013/12/18/chinese-mall-opens-despite-warnings-from-environmentalists/> accessed 8 July 2015.

13 See s 4(1) on ‘Environmental rights and principles of environmental management’, which provides as follows:

- (1) Every person shall have a right to—
 - (a) a clean environment that is not harmful to health; and
 - (b) access to environmental information, and protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures that—
 - (i) prevent pollution and environmental degradation; and
 - (ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

14 This approach has been bolstered by the fact that the Act is based on the ‘polluter pays principle’ as expounded in s 4(2)(g).

15 See, for example, ss 57(2)(b), 63(3)(b), and 73(2)(b).

'Capture' could also occur in other ways. For instance, the state mandated regulator, that is, Zimbabwe's Environmental Management Agency, was typically staffed with environmental inspectors and officers who, while exercising their responsibilities, encountered conflicts of interest. Importantly, and as was the case in other jurisdictions, it was not inconceivable that 'such officers could leave the Agency and find high-level jobs in the same industry that they had been responsible for regulating. While it was difficult to prove a causal relationship between regulatory decisions and future employment, careful attention to the interests of regulated parties could be a highly lucrative career-building strategy for inspectors and officers.'²¹ In the Zimbabwean context therefore, inspectors' and officers' own self-interest may have influenced their capacity, or desire, to effectively enforce laws.²² Consequently, it is also necessary to account for the fact that inspectors, officers, and the Agency would not always be motivated to enforce the law in a manner which would lead to the best environmental results.²³

In this context, the turn to civil litigation was desirable to the extent that, being initiated by people who were predominantly driven by self-interest, it was to a marked extent, immunised from the conflicts of interests confronting traditional state-led enforcement, which featured heavy reliance on the integrity of officers and inspectors. To this end, the logic applied in Zimbabwe, as in other jurisdictions was that 'the countervailing force of citizen plaintiffs can disrupt the cosy environment of cooperative enforcement, pushing it away from capture, by providing surrogate enforcement or encouraging more stringent agency enforcement.'²⁴

Second, the rationale behind the turn to civil litigation in Zimbabwean law can be traced to the fact that the courts were limited to apportioning fines

based on a restrictive and prescriptive fines regime. Here, it is worthwhile to note that in Zimbabwean law, fines for environmental offences have traditionally ranged from five United States Dollars to a maximum of five thousand United States Dollars regardless of the extent of the harm occasioned upon the environment.²⁵ In this context, provision of civil litigation made sense to the extent that, depending on the courts' jurisdictional competencies, turning to it, in theory at least, allowed the courts greater flexibility to levy greater punitive damages against perpetrators of environmental harm than the fines prescribed in the Environmental Management Act. As such, the possibility of imposing greater financial awards means that civil litigation carries great potential to draw attention to environmentally harmful activities at a significantly higher rate than what could be achieved using state-led efforts through the Environmental Management Agency. The financial incentives attached to bringing successful environmental law based civil litigation would encourage citizens to play an enhanced surveillance role in a manner that would enhance enforcement efforts.

Third, and following from the above, the financial disincentive attached to having to pay out significant awards could have the desirable effect of deterring perpetrators, and potential perpetrators of civil litigation from violating the laws, or persisting in carrying out environmentally deleterious activity.²⁶ As such, civil litigation could enhance enforcement efforts because of this deterrent value. The deterrent effect will also be enhanced to the extent that the success of civil claims could in some instances be predicated upon acceptance by a perpetrator of harm having been caused to the environment.²⁷ This admission of guilt could expose perpetrators to criminal prosecution, thus, deterring them from engaging in, or persisting with, environmentally

21 SC Hackett, *Environmental and Natural Resources Economics: Theory Policy and Sustainable Society* (Routledge 2011) 178.

22 For a discussion on the effects of capture generally, see, for example, Will Reisinger, Trent Dougherty and N Moser, 'Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up The Slack?' (2010) 20 *Duke Environmental Law and Policy Forum* 1, 3.

23 Zinn (n 16) 84.

24 *ibid.*

25 See the Environmental Management Act. See also, Rajah Naome et al, 'Challenges in Implementing an Integrated Environmental Management Approach in Zimbabwe' (2012) 3 *Journal of Emerging Trends in Economics and Management Sciences* 408.

26 This can be inferred from ss 4(1), 57(2)(b), 63(3)(b), and 73(2)(b) of the Environmental Management Act.

27 However, it is also worth noting that the language in the Environmental Management Act seems to suggest that such claims would ideally commence once criminal prosecutions for environmental harm would have run their course. See ss 57(2)(b), 63(3)(b), and 73(2)(b).

harmful activities for fear of facing both civil litigation and possible prosecution.²⁸

2.2 Zimbabwe's Civil Litigation Experience

The rationale behind recognising civil litigation as a complementary enforcement tool was certainly sound based on the three reasons above. However, and despite accounting for the fact that civil litigation as an enforcement technique has inherent deficiencies such as the fact that it can be backward looking and as such, may not yield extensive environmental rewards, it is interesting to note that this avenue was grossly under-utilized as a tool to state-led enforcement techniques in Zimbabwean law.²⁹ This is apparent from the fact that there has been a dearth of cases in which this avenue has been relied on to enforce Zimbabwean environmental law. Importantly, there seems to be four reasons for this.

2.2.1 Publicity and Education

One of the most basic reasons seems to be the fact that, at the institutional level, Zimbabwean authorities limited recourse to civil litigation through limited efforts to publicise its existence, and, to educate the public about its importance. This was a particularly important omission in the Zimbabwean context because environmentally deleterious activities have traditionally been largely regarded as *malum prohibitum* as opposed to *malum in se*.³⁰ Thus, it has always been socially acceptable

among most of the public to act in a manner inconsistent with the environmental protection provisions enshrined in the Environmental Management Act, as long as they do not get caught. Even if the perpetrators should get caught and fined, they are hardly perceived as having committed a morally reprehensible act. Indeed, it is well known in Zimbabwe that some perpetrators of environmentally deleterious acts prefer to pay fines than to take corrective measures with little to no moral reprobation.³¹

In this context, it was important to publicise the existence of a civil litigation avenue to enforcing environmental law. It was even more important to educate people on the procedure to bring such litigation should they suffer harm. Certainly, it could be argued that the public had been made aware of this avenue to the extent that they seek redress where they have suffered significant harm due to the environmentally deleterious activities of another. However, it is doubtful that citizens' knowledge of this avenue derived from education on, and knowledge of, relevant provisions in the Environmental Management Act.³² It was more likely that knowledge of this avenue was derived from people's existing knowledge of the law of delict, a body of law with which they were more acquainted. As such, it was important to establish civil litigation as a complementary enforcement tool in order to heighten social awareness on the wrongfulness of undertaking environmentally deleterious activities.

There were also other clearer indicators of institutional reluctance to encourage civil litigation. For example, the Environmental Management Agency has seemingly always encouraged citizen participation in enforcement through the provision of a dedicated webpage alerting citizens to the important role they play in enforcing environmental law. What is interesting to note for the present purpose however, is that the page does not encourage citizens to undertake civil litigation. Instead, the

28 On deterrence generally, see Neil Gunningham, Dorothy Thornton and Robert Kagan, 'Motivating Management: Compliance in Environmental Protection' (2002) 27 *Law and Policy* 289, who explored the specific mechanisms that might drive general deterrence in environmental crimes. Based on their survey, they submitted that many officials indicated that learning about someone else's fine focused their attention on environmental issues or altered their long-term compliance motivations.

29 On the deficiencies of civil litigation, see Feris and Tladi (n 2) 249, 251; Crossen (n 5) 11; Mason (n 5) 288.

30 A crime is *malum in se* if it is intrinsically bad, evil, or morally wrong. Alternatively, a crime is *malum prohibitum* simply because society has labelled it as such, via statutory law. See Richard Gray, 'Eliminating the (absurd) Distinction Between *malum in se* and *malum prohibita* Crimes' (1995) 73 *Washington University Law Quarterly* 1369, 1370.

31 Bernard Chiketo 'Zimbabwe's Troubled Waters: Chemical Pollution in the Marange District' (2012) <<http://allafrica.com/stories/201210060470.html>> accessed 8 July 2015.

32 See ss 4(1)(b), 4(2)(c)& (d), and 52(i).

webpage encourages citizens to engage the Agency so that it enforces laws on their behalf.³³

2.2.2 *Standing*

Recourse to civil litigation as an enforcement tool was also discouraged by limiting access to courts.³⁴ This was secured in two ways. In the first instance, standing was limited through the insistence on granting access to courts to victims of environmentally harmful action. For instance, section 4 of the Environmental Management Act grants everyone a right to a clean environment. However, it remained unclear who had *locus standi* to enforce this right beyond an individual whose right to a clean environment has been breached. Similarly, section 4(2)(g) of the Act places emphasis on polluters paying for the harm caused by them. However, it was unclear whether anyone could bring civil litigation in an effort to make the polluters pay. Importantly, this lack of clarity was compounded by the fact that the language of other provisions in the Environmental Management Act, which could be interpreted as granting the public an avenue to pursue civil litigation such as sections 57(2)(b), 63(3)(b), and 73(2)(b) make reference to terms such as restitution and reparation. These terms are traceable to the civil law of delict.³⁵ This body of law typically applied such terms when referencing compensation to direct victims of some harmful act. This suggested that under the Environmental Management Act, it was victims of harm, that is, directly affected persons, who had a right of action against perpetrators.

Second, standing was limited by precluding the turn to such avenues as public interest litigation unless a direct interest in the issue at hand could be shown.³⁶

33 See Environmental Management Agency website < www.ema.co.zw/index.php/feedback.html > accessed 8 July 2015.

34 See ss 4, 57(2)(b), 63(3)(b), and 73(2)(b).

35 See Feltoe (n 1) 133-34.

36 On the benefits of public interest litigation and the ways in which different jurisdictions have utilised this avenue, see Bharat Desai, 'Enforcement of the Right to Environment Protection Through Public Interest Litigation in India' (1993) 33 *Indian Journal of International Law* 27. See also, Alexander (n 17); Christoph Schwarte, 'Profiles of Tools and Tactics for Environmental Mainstreaming' Environmental Mainstreaming Initiative' (2009) < [www.environmental-mainstreaming.org/documents/EM%20Profile%20No%203%20-%20Public%20Interest%20Litigation%20\(6%20Oct%2009\).pdf](http://www.environmental-mainstreaming.org/documents/EM%20Profile%20No%203%20-%20Public%20Interest%20Litigation%20(6%20Oct%2009).pdf) > accessed 8 July 2015.

In the context of regulating environmental protection this was problematic because it is often the case that environmental issues relate more often to the diffuse interests of a group of people than to ascertainable rights of individuals.³⁷ Further, it was undeniably the case that individuals going about their routines were best placed to identify environmentally unlawful, and often harmful, activities being perpetrated even when the occurrence of such harm would not directly affect these individuals. Depriving such individuals or organizations of the opportunity to bring public interest litigation also limited the extent to which civil litigation could be relied on as a complementary enforcement tool.

2.2.3 *Financial Discouragement*

The appeal of, and thus the turn to, civil litigation was also seemingly limited by the state through financial discouragement. This was particularly important considering first, that Zimbabweans have traditionally not been litigious people, and second, that pursuing civil litigation has always been an expensive affair in Zimbabwe. As such, it has always been known that without institutional assistance, very few people would either be able or willing to take on the costs of civil litigation. Motivated people have always been better served trying to make the Environmental Management Agency, as the regulator, bring offending parties into compliance with the law.³⁸

Despite this knowledge, the state did little to institute financial mechanisms to encourage civil litigation. If anything, the turn to civil litigation was discouraged through limited financial assistance in bringing civil litigation based claims to court. In

37 See Sunil Pandey, 'Public Interest Litigation: Instrument of Environmental Protection: An Appraisal' (2006) 1 *Journal of Environmental Research and Development* 97, 98.

38 For instance, the Environmental Management Agency as the regulator encourages this through a dedicated page which allows people to anonymously bring to light violations of environmental laws and regulations with the Agency seemingly promising to subsequently undertake appropriate enforcement action. See Environmental Management Agency website < www.ema.co.zw/index.php/feedback.html > accessed 8 July 2015.

addition, and as noted previously, litigants were deprived of the opportunity to bring public interest litigation. Such public interest litigation has traditionally proven to be useful means of limiting or accommodating court costs.³⁹ Furthermore, there were none of the assurances found in other jurisdictions that litigants would not be exposed to prohibitive costs orders against them should their claims fail. This was a particularly important and well established gap in the institutional framework because in Zimbabwe, as in other jurisdictions,

The fear, if unsuccessful, of having to pay the costs of the other side (often a governmental instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.⁴⁰

Importantly, it could be argued that the absence of financial assistance mechanisms was not merely an oversight considering that section 48 of the Environmental Management Act makes provision for an Environmental Fund which was established with the coming into force of the Act. The functions of the fund have been limited to such endeavours as the standardisation of environmental management, financing the extension of environmental management services to under-serviced areas, and facilitating, for the benefit of Zimbabwe, the transfer of environmental management services technology from foreign providers of such technology.⁴¹ It is not a stretch to argue that, had the state wished to encourage civil litigation, functions of the fund could have been extended to assisting litigants in bringing cases to court.

39 See Alexander (n 17). See also, Magelah Peter, 'Public Interest Litigation and the Environment' (2008) <www.eoearth.org/view/article/155602> accessed 8 July 2015.

40 Justice Toohey, 1989 *Address to a Conference of the Australian National Environmental Law Association* in Ben Christman, 'Going Green at the Gill Review? The Potential Implications of the Scottish Civil Courts Review for Environmental Justice in Scotland' (2010) 1 *Aberdeen Student Law Review* 1, 30.

41 See ss 52 (a-j) of the Environmental Management Act.

2.2.4 Environmental Courts

Yet another issue to consider in seeking to understand why civil litigation was an under-utilized complementary enforcement avenue is that Zimbabwe never had dedicated environmental courts.⁴² One of the advantages attaching to such courts, even though they may be scarce, is that, being staffed by knowledgeable personnel means that they are empowered to levy damages or punishment reflective of the harm caused.⁴³ Importantly, those Zimbabwean courts tasked with hearing civil litigation based cases, much like similarly situated courts in other jurisdictions, appeared,

reluctant to entertain such suits, either because they viewed citizen plaintiffs as presumptively intermeddlers, or because they were unwilling to scrutinize the *quasi*-political judgments inherent in agency enforcement. To be sure, cooperative enforcement would force courts to face a complex ongoing relationship between regulator and regulatee fraught with weighty policy questions and considerable social-psychological tension. A court in such cases would find deference to the agency far easier than its scrutiny.⁴⁴

Certainly, it may be unreasonable to argue that environmental courts should have been created considering the resistance to such courts the world over.⁴⁵ However, considering judicial attitudes in criminal cases, where courts have often shown

42 Robert Carnwath, 'Environmental Enforcement: The Need for a Specialist Court' (1992) *Journal of Planning and Environmental Law* 799.

43 George Pring and Catherine Pring, 'Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment' (2009) 11 *Oregon Review of International Law* 301; George Pring and Catherine Pring, 'Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Environment, Climate Change, and Sustainable Development' <http://conference.unitar.org/yale/sites/conference.unitar.org/yale/files/Pring_Paper.pdf> accessed 8 July 2015.

44 Zinn (n 16) 85.

45 *ibid*.

apathy, and a lack of expertise in the environmental cases,⁴⁶ it is not difficult to conclude that courts' attitudes to environmental cases played an important role in dissuading citizens from pursuing civil litigation as an enforcement tool as is apparent from the dearth of civil litigation based environmental cases.

3

THE 2013 CONSTITUTION

It is against this backdrop, where civil litigation was a recognised complementary tool but was discouraged to the extent that it was under-utilized, that Zimbabwe enacted a new Constitution in 2013. The turn to a codified Constitution was driven by the need to establish a clear and accessible Constitution to replace the previous codified Constitution which had become bulky, unclear and inaccessible.⁴⁷ In addition, that former Constitution had increasingly become shrouded in controversy, largely due to extensive amendments to its provisions.⁴⁸ Most importantly, the old

constitutional setup had become the centre of political contestations, and resultantly, could not be regarded as the embodiment of constitutionalism in Zimbabwe. It is hardly surprising therefore that in the time since it came into effect, the Zimbabwean Constitution has been rightly celebrated for its symbolic value as the beacon of hope and change.

More interestingly for the present purpose, Chapter 4 of the Constitution - the Declaration of Rights - provides for an extensive array of substantive and procedural environmental rights which build on the rights in section 4 of the Environmental Management Act. Specifically, section 73(1)(a) provides that 'every person has the right to an environment that is not harmful to their health or well-being.' This reads very much like section 4(1)(a) of the Act which provides that 'every person shall have a right to a clean environment that is not harmful to health.' Similarly, section 73(1)(b) of the Constitution provides that 'every person has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting economic and social development.' This reads very much like section 4(1)(c) of the Environmental Management Act which provides that 'every person shall have a right to protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative policy and other measures that: (i) prevent pollution and environmental degradation; and (ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.' Finally, section 62 of the Constitution grants to every citizen the right of access to information in much the same way that section 4(1)(b) of the Act provides that 'every person shall have a right to access to environmental information.'

Importantly however, and in seeking to establish the extent to which environmental rights in the Constitution could invigorate recourse to civil litigation as a complement to state-led enforcement, it is useful to note, judging from the experiences in other jurisdictions, that the Constitution brings one

⁴⁶ For instance, in the case of *S v Rukonhi* (MH 1078/11), the Environmental Management Agency imposed a statutory USD 200 fine on the accused which he failed to pay. When the matter was taken to court, the court only imposed a USD 50 fine, or, ten days imprisonment in case of default. Similarly, in the case of *S v Matote* (B 546/13), the accused was found guilty of cultivating in a wetland in contravention of s 20(1)(a) of Statutory Instrument 7 of 2007, a subsidiary piece of legislation giving effect to provisions in the Environmental Management Act. In terms of s 20(3) of Statutory Instrument 7 of 2007, the appropriate penalty in such a case was a fine up to level 10 which is USD 700. In court however, the accused only charged with paying an USD 80 fine, or three months imprisonment in case of default. See Faith Ndlovu, 'A Critique of Prosecution as a Way of Enforcing Environmental Law in Zimbabwe - A Case Study of Masvingo' (LLB Dissertation, Midlands State University 2015).

⁴⁷ 1980 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

⁴⁸ At least 19 amendments were made to the Lancaster House Constitution.

notable development which promises to change the stature of civil litigation as a complementary enforcement tool.⁴⁹ Specifically, section 85(1) of the Constitution provides access to courts in environmental matters to persons acting in their own interests, on behalf of another person, as a group or class, in the public interest, and as an association acting in the interests of its members.

3.1 Possible Impact of the Constitution

In theory, and based on the experiences in other jurisdictions, the turn to justiciable environmental rights is a potentially important development in Zimbabwean law which promises to invigorate recourse to civil litigation as an enforcement tool.⁵⁰ Perhaps the most interesting example of the impact of this turn to justiciable rights can be found in the approach to rights-based litigation in the European Union where, despite the fact that the European Convention on Human Rights does not feature a dedicated right to a clean environment, it has been recognised that human rights protected by the Convention may be directly affected by adverse environmental factors.⁵¹ To this end, 'toxic smells from a factory or rubbish tip might have a negative impact on the health of individuals. As such, public authorities may be obliged to take measures to ensure that human rights are not seriously affected by adverse environmental factors.'⁵² If these authorities should not do so, they face the threat of civil

litigation.⁵³ As such, these positive obligations ensure that states act in, at the very least, a manner consistent with environmental law. Separately, the stature of fundamental rights has been leveraged as a means of deterring perpetrators from non-compliance with the law.⁵⁴ This all plays a role in enforcing laws through limiting state violations of environmental law.⁵⁵

Whether similar developments will follow in the Zimbabwean context however is presently a matter of some debate. However, it is worth noting that civil litigation has always been recognised as a complementary enforcement tool in Zimbabwean law, but due to the aforementioned reasons, the avenue was under-utilized. As such, it is possible to assess the potential of justiciable environmental rights on recourse to civil litigation through an analysis of the extent to which environmental rights in the Constitution address the reasons which accounted for civil litigation being an under-utilized enforcement tool prior to the 2013 Constitution. To this end, and guided by the previous discussion, four factors are worth noting.

First, and considering that lack of publicity and education played a role in limiting recourse to civil litigation as an enforcement technique, it is worth noting that the inclusion of environmental rights in the Constitution has been a more widely publicised affair than the similar right which was contained in the Environmental Management Act.⁵⁶ In itself, information is the key to educating the public on the value of civil litigation as an important enforcement tool. Indeed, the fact that lawyers and the police, actors who play a critical role in advising citizens on the law and their rights in Zimbabwean society, are increasingly becoming aware of these

49 For a general discussion on some of the practices across the world, see Shelton (n 16). See also, Zinn (n 16) 85; Reisinger (n 22) 3.

50 See, for the South African experience, Feris and Tladi (n 2) 249. See also, Steven Budlender, Gilbert Marcus and Nick Ferreira, 'Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons' (2014) <www.atlanticphilanthropies.org/sites/default/files/uploads/Public-interest-litigation-and-social-change-in-South-Africa.pdf> accessed 8 July 2015. Also, for a discussion on the approach in Argentina, Colombia, and Costa Rica, see Shelton (n 16) 23.

51 See generally, Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

52 See Council of Europe Publishing 'Manual on Human Rights and the Environment' (2012) <www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf> accessed 8 July 2015.

53 See, for example, *Lopez Ostra v Spain* 20 EHRR (1994) 277; *Guerra v Italy* 26 EHRR (1998) 357; *Fadeyeva v Russia* 45 EHRR (2007) 10; *Öneryildiz v Turkey* 41 EHRR (2005) 20.

54 Shelton (n 16) 24.

55 Boyle (n 51) 615; Shelton (n 16) 23.

56 The process of drafting the Constitution was a very publicised affair in Zimbabwe. Various efforts were made to encourage all citizens to participate in the drafting process. See Innocent Chirisa and Archimedes Muzenda, 'Environmental Rights as A Substantive Area of the Zimbabwean Constitutional Debate: Implications for Policy and Action' (2013) 2 *Southern Peace Review Journal* 104.

rights, promises to change discourse surrounding civil litigation's role as an enforcement technique.⁵⁷ It is certainly possible that, where citizens were previously more focused on what the Environmental Management Agency could do for them, they may increasingly begin to be advised to pursue civil litigation on their own.

Quite separately, it is also useful to consider that the inclusion of environmental rights in the Zimbabwean Constitution's Declaration of Rights carries great potential for changing societal conceptions with respect to the importance of environmental protection. Indeed, and borrowing from literature based on the experiences in other jurisdictions, it has previously been noted that inclusion of such rights in constitutions,

elevates the entire spectrum of environmental issues to a place as a fundamental value of society, to a level equal to other rights and superior to ordinary legislation. In the absence of guaranteed environmental rights, constitutionally-protected property rights may be given automatic priority instead of balanced against...and environmental concerns. Other rights may similarly be invoked to strike down environmental and health measures that are not themselves rights-based.⁵⁸

Certainly, the inclusion of justiciable environmental rights in the Constitution does not necessarily mean that violations of provisions in the Environmental Management Act will begin to be seen as morally reprehensible. However, such actions, where they cause harm to people, may grow to be seen as unconstitutional. This may provide people reluctant to pursue civil litigation with the requisite motivation to pursue this avenue as part of a drive to protect their constitutional right.

Second, whereas previously, access to court was reserved for individuals who had suffered some harm from exposure to an unclean environment, section

85(1) of the Constitution now grants to virtually every citizen seeking to enforce any rights in the Constitution's Declaration of Rights acting individually, as part of a class action or through public interest litigation, access to courts.⁵⁹ This holds the potential to prompt greater recourse to civil litigation as an enforcement tool because, in contrast to the pre-Constitutional position, such public interest litigants can bring court action despite not being victims of environmentally harmful action.⁶⁰ Even more importantly for enforcing environmental laws and regulations, such access will be granted in the case of anticipated environmental harm which allows for actions to be brought in a preventative manner. Such preventive action addresses anticipated harm which may not have occurred and thus, serves an enforcement function.⁶¹

Third, and with respect to financial discouragement, the elevation of environmental rights to constitutional status has several potential financial implications.⁶² For instance, while it may be an avenue that is limited by the availability of resources, other states have

⁵⁹ Section 85(1) on 'Enforcement of fundamental human rights and freedoms' provides as follows:

- (1) Any of the following persons, namely—
 - (a) any person acting in their own interests;
 - (b) any person acting on behalf of another person who cannot act for themselves;
 - (c) any person acting as a member, or in the interests, of a group or class of persons;
 - (d) any person acting in the public interest;
 - (e) any association acting in the interests of its members;is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

⁶⁰ Alexander (n 17).

⁶¹ To this end, s 85(1) of the Constitution grants a right of access to court to anyone who alleges that a right contained in the Declaration of rights 'is likely to be infringed.'

⁶² It is worth noting that Zimbabwe is a signatory to the Rio Declaration (UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)). Article 10 of that Agreement establishes an obligation on signatory states to facilitate Public Participation, an important pillar of which is facilitating access to justice. See George Pring and Catherine Pring, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals' (2009) <www.eufje.org/images/DocDivers/Rapport%20Pring.pdf> accessed 8 July 2015.

⁵⁷ See also, Simon Bronitt and Philip Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319.

⁵⁸ Shelton (n 16) 24.

taken the elevation of environmental protection in stature to suggest an obligation to financially assist those seeking to bring civil litigation based environmental claims in meeting the costs of doing so. In the United States, for example, this has been achieved through recourse to 'fee-shifting' clauses which 'allow litigants the opportunity to commence legal actions with some assurance that they will recover their expenses if they prevail. Such clauses provide a positive incentive to bring meritorious claims, while at the same time dissuading frivolous lawsuits, for which no court would grant cost recovery to a plaintiff.'⁶³ Quite similarly, in Scotland, the step was taken to ensure that individuals or environmental pressure groups bringing environmental cases against public bodies would be able to apply for a protective expenses order, limiting their liability for the other side's costs to £5,000. In addition, a cap has also been placed on the public body's liability for the applicant's expenses.⁶⁴

In any case, in the Zimbabwean context, putting in place measures to assist those wishing to bring civil litigation claims is not wholly inconceivable when it is considered that section 48 of the Environmental Management Act makes provision for an Environmental Fund which has already been established. In contrast to the previous situation, functions of the fund could be extended, from a former focus on the standardisation of environmental management, financing the extension of environmental management services to under-served areas, and facilitating, for the benefit of Zimbabwe, and the transfer of environmental management services technology from foreign providers of such technology to include the provision of funds, relative to availability, to litigants wishing to undertake civil litigation.⁶⁵

Fourth, the inclusion of environmental rights in the Constitution coupled with the provision that courts

are tasked with implementing the Constitution also places a greater obligation on courts to become more knowledgeable about environmental rights than before and to take environmental cases more seriously.⁶⁶ At the extreme, this may lead to courts becoming very active in environmental protection, as they have done in India.⁶⁷

Importantly, it is reasonable to consider that as Zimbabwean courts become more acquainted with environmental issues as a constitutional concern, they may be encouraged to alter the scale with which damages levied against those causing harm to the environment are determined. This could be an important development considering that it was likely that before the new Constitution, courts unconcerned with environmental issues would receive guidance in this regard from the fines scale in the Environmental Management Act. After the 2013 Constitution it is reasonable to expect courts, bound to enforce the Constitution, to alter this approach and instead, turn to a scale which would facilitate the greatest possible enjoyment of all rights embodied in the Constitution.

Unfortunately, there have been no cases as yet which would support this claim. However, it is probably only a matter of time until increased awards for rights-based claims are granted by courts. Insofar as enforcement of environmental law is concerned, such a shift in attitude holds the promise of motivating the public to turn to civil litigation as a means of enforcement to a greater extent than they have done previously.

4 CONCLUSION

The enforcement framework in Zimbabwe's approach to environmental protection has significantly been dominated by recourse to efforts

63 Reisinger (n 22) 29. For a perspective on Australia, see New South Wales: Consultation Paper by the Law Reform Commission, 'Security For Costs and Associated Costs Orders' (2011) < www.lawreform.lawlink.nsw.gov.au/agdbase/vr/lrc/documents/pdf/cp13.pdf > accessed 8 July 2015.

64 Scotland's Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013.

65 See ss 52 (a-j) of the Environmental Management Act.

66 See ss 162-164 of the Constitution.

67 See Desai (n 36) 27-40; Michael Faure and AV Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21 *Fordham Environmental Law Review* 239; Pandey (n 37) 97.

by the Environmental Management Agency. This is not necessarily a point of criticism. The central role which the Agency plays in regulation makes it a suitable first port of call when the need to enforce laws and regulations arises. However, an undesirable consequence of frequent recourse to this approach is that it limits other enforcement techniques which can play a complementary role, most notably, civil litigation.

This paper has argued that the inclusion of environmental rights in the 2013 Constitution holds significant promise for enhancing the enforcement of environmental laws and regulations in Zimbabwe. Importantly, it is still too premature to determine whether this will be achieved in practice. Much will depend on variables which are quite unpredictable. However, the fact that the environmental rights in the 2013 Constitution seemingly address matters of institutional discouragement and standing, with the promise of addressing other problematic issues which led to the avenue of civil litigation being under-utilized as an enforcement tool, such as financial discouragement and courts reluctant to take environmental matters seriously, certainly suggests that there is the real possibility that recourse to civil litigation as a method of enforcing environmental law will grow in the post-2013 constitutional era.

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