

Chapter 30:

The Environmental Management Act (2011): a basis for the growth of an environmental ethos and good environmental governance in Zambia?

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1 Introduction

The Republic of Zambia is located in south-central Africa. It is bordered to the north by Tanzania and the Democratic Republic of Congo; the west by Angola; the south by Namibia, Botswana and Zimbabwe; and east by Malawi and Mozambique. With a total land surface area of 751,610 square kilometres and a population of 16.8 million people, the population density in Zambia is among the lowest in sub-Saharan Africa, representing one of the most land resource abundant countries in the region. It therefore follows that this vast stretch of land is home to a huge variety of natural resources that are accordingly exploited for their benefit to the human populace. Zambia, however, also has one of the highest rates of urbanisation in sub-Saharan Africa that has led to numerous attendant challenges such as the proliferation of shanty settlements, which in turn present numerous other environmental problems. With a high population growth rate and human development dependent on the surrounding natural environment, the depletion of natural resources is ever on the increase. Against this background, it is a recognised common task to advance environmental law to ensure that it aids in arresting national, regional and global environmental degradation.

This chapter critically evaluates the development of environmental legislation in Zambia with a view to assessing whether, and how, it is catalytic in the development of an ‘environmental ethos’ in the country. Central questions addressed include ‘what is an environmental ethos’ and ‘what are some of its constituent elements’? The chapter begins by analysing the historical development of the now repealed Environmental Protection and Pollution Control Act (1990) (EPPCA) and its successor the Environmental Management Act¹ (2011) (EMA). The purpose of this analysis is to identify the key environmental themes that these two laws embody, and it extends to consider the relevance of the legal provisions towards shaping the environmental discourse in Zambia. The chapter then briefly discusses some aspects of the constitutional framework

1 Act 12 of 2011.

within which EMA, as an Act of parliament, operates. Thereafter, the chapter proceeds to evaluate these key environmental themes with a view to understanding their practical impact on the development of an environmental ethos in Zambia.

2 History of environmental regulation in Zambia

This section discusses environmental legislation in three general phases: pre-1990; post-1990; and post-2011. These phases are segmented on the basis that the pre-1990 phase had no clear-cut environmental legislation; while the other two phases are defined by two clear pieces of environmental framework legislation, the EPPCA and EMA respectively. These phases accordingly merit segmented discussion with a view to understanding the specific issues characterising each phase.

2.1 Pre-1990 phase

The conservation of natural resources in Zambia has existed since the 1950s.² It has been argued by some commentators that pre-political independence legislation in Zambia was preoccupied with preserving colonial practices that ensured that resource allocation and exploitation were maintained as opposed to the sustainable use of environmental resources.³ These views lend credence to the argument that at this stage of Zambia's political development, the understanding of environmental issues including the sustainable use of natural resources was rather rudimentary. With the advent of various environmental challenges, such as desertification and other environmental health problems, the need to develop policies and strategies to protect the environment and human health arose.

Although Zambia has been independent since October 1964, it was only in the late 1980s that tangible legislative efforts were taken to promote environmental protection. It can be argued that one reason for this was the 'hangover' from the pre-political independence era that focused on preserving a colonial approach towards resource allocation and exploitation.⁴ The launch of the National Conservation Strategy (NCS) for Zambia in 1985 can be viewed as a key preliminary step towards protecting the environment. This was the country's first attempt to develop an environmental policy and laid the groundwork for national legislation and administrative structures dealing with environmental issues.⁵ The NCS also recommended, amongst other issues: the

2 Phiri (2006); and Bass (1998: 8).

3 Mulonda (2000: 1-3); and Jere (1999: 1-6).

4 Aongola et al. (2009: 32).

5 Ibid: 34.

enactment of a comprehensive environmental law framework; the development of environmental input in development planning processes through the environmental assessment of projects; and the promotion of community participation in natural resources management.⁶ These recommendations resulted in the enactment of the EPPCA.

2.2 Post-1990 phase

The enactment of the EPPCA in 1990 provided a single and comprehensive national legislative and administrative structure for environmental protection in Zambia. This milestone made the country one of the few in Southern Africa at the time with a comprehensive environmental law and relevant institutional structures. The EPPCA was divided into 12 parts that focussed, amongst other things, on the protection and control of pollution and the establishment of the Environmental Council of Zambia (the main body to realise the objectives of the EPPCA).

It can be argued that the aim of the EPPCA was to harmonise the needs of human beings and the environment by reducing damage to the environment. During this period, environmental damage was mainly due to mining activities especially in the Copperbelt mining towns. Before the enactment of the EPPCA, each industry or authority was responsible for monitoring pollution associated with its activities or those undertaken in their area.⁷ In reality, however, this did not occur and in 1992, the government formed the Ministry of Environment and Natural Resources, which in itself, demonstrated the importance of coordinated environmental efforts by the government. The implementation of the EPPCA, however, was to be one of the biggest challenges. The economic crisis in Zambia at the time resulted in environmental issues remaining relegated to the background in spite of the declared policy of the government.⁸

In 1994, the National Environmental Action Plan (NEAP) was developed as a comprehensive plan to curtail growing environmental degradation in the country. The NEAP updated the provisions and aspirations of the NCS by introducing the right of citizens to a clean and healthy environment, local community and private sector participation in natural resources management and mandatory environmental impact assessments (EIAs) for major development projects in all sectors.⁹ The overall objective of the NEAP was to integrate environmental concerns into the social and economic development planning processes of the country. The NEAP identified key

6 Saidi (2010: 6).

7 For instance, the Mines and Mineral Act, the Factories Act and the Town and Country Planning Act were to guide respective organisations in the monitoring and controlling levels of pollution.

8 See generally: Kakonge (2009); and Adams (1990).

9 Ministry of Environment and Natural Resources (1994: 31-33).

environmental problems and issues, such as water, air and land pollution particularly that stemming from the mining and manufacturing sectors.¹⁰

Building on the NCS and NEAP, the government developed the National Policy on Environment (NPE) in 2007 to “harmonise various strategies, and rationalise legislation relating to the use and management of the environment in order to attain an integrated approach towards development”.¹¹ The NPE was developed through a comprehensive research and consultative process that sought to integrate decentralisation, community participation and privatisation as components of sustainable development in Zambia. The express purpose of the NPE was to create “a comprehensive framework for effective natural resource utilization and environmental conservation which would be sensitive to the demands of sustainable development”.¹² The NPE had seven specific objectives, most of which have found expression in Zambia’s contemporary environmental legislation. These were as follows:

1. Promote the sound protection and management of Zambia’s environment and natural resources in their entirety, balancing the needs for social and economic development and environmental integrity to the maximum extent possible, while keeping adverse activities to the minimum.
2. Manage the environment by linking together the activities, interests and perspectives of all groups, including the people, non-governmental organisations and government at both the central and decentralised local levels.
3. Accelerate environmentally and economically sustainable growth in order to improve the health, sustainable livelihoods, income and living conditions of the poor majority with greater equity and self-reliance.
4. Ensure broad-based environmental awareness and commitment to enforce environmental laws and to the promotion of environmental accountability.
5. Build individual and institutional capacity to sustain the environment.
6. Regulate and enforce environmental laws.
7. Promote the development of sustainable industrial and commercial processes having full regard for environmental integrity.

2.3 Post-2011 phase

EMA was enacted on 15 April 2011 and introduced innovative provisions in line with global and integrated environmental management principles. Part I of EMA states that the law takes precedence over other sector-specific legislation. It furthermore includes: a right to a clean, safe and healthy environment; a duty on citizens to protect the environment; and a set of principles that govern environmental management in Zambia. These aspects are explained more fully below.

10 Chipungu & Kunda (1994: 51).

11 Ministry of Environment and Natural Resources (1994: 31-33).

12 Chabwela (2005).

Part I includes the Preamble that outlines the purpose of the law as facilitating "...the implementation of international environmental agreements and conventions to which Zambia is a party". This means that the practice of environmental law and management in Zambia must be in substantial conformity with international agreements to which Zambia is a party. This read together with the provisions of Section 3 of EMA confirms that environmental well-being should take precedence over other considerations.

Section 3 of EMA provides that subject to the Constitution, where there is any inconsistency between the provisions of EMA and the provisions of any other written law relating to environmental protection and management, which is not a specific subject related to law on a particular environmental element, the provisions of EMA shall prevail to the extent of the inconsistency.

Section 4(1) of EMA provides for a right to a clean and healthy environment. The right is enshrined subject to the Constitution. Section 4(3) provides that "a person may, where the right in subsection (1) is threatened or is likely to be threatened as a result of an act or omission of any person, bring an action against the person whose act or omission is likely to cause harm to human health or the environment". The construction of this provision emphasises that a person may bring an action where the right to a clean, safe and healthy environment is threatened or is likely to be threatened. The import of this construction is that any juridical person may commence an action in the event of both threatened and actual environmental damage. It may also be argued that this provision does not refer to any actual damage being suffered by the person seeking to utilise the right. The action by the affected person, "may seek to prevent, stop or discontinue any activity or omission which threatens, or is likely to cause harm to, human health or the environment".¹³ Section 4 provides other remedial measures such as compelling a public officer to take certain steps to prevent the contravention,¹⁴ undertake an environmental audit of offending activities or omissions,¹⁵ and take other appropriate measures.¹⁶ Interestingly, Section 4(3) raises debates about locus standi in environmental proceedings, an issue that will be dealt with later in this chapter.¹⁷

Sections 5 and 6 of EMA present further innovations in remarked departure from the erstwhile EPPCA. Section 5 imposes upon 'every person' a duty to safeguard and enhance the environment and to inform the Zambia Environmental Management Agency (ZEMA) of anything that 'affects' or 'may affect' the environment. This innovation is welcome, although the provision remains unclear as to whether there would be any sanction for a person who does not fulfil the prescribed duty. This lack of clarity on sanctions for non-compliance is likely to affect enforcement of the otherwise

13 Section 4(4)(a) of EMA.

14 Section (4)(4)(b) of EMA.

15 Section (4)(4)(c) of EMA.

16 Section 4(4)(d-f) of EMA.

17 See part 3.1 below.

innovative provisions.¹⁸ Further, the realisation of the aspiration in this provision is lost against the backdrop of insufficient environmental awareness in Zambia. Section 6 of EMA introduces principles that must govern environmental management in Zambia with a view to achieving its overarching purposes.¹⁹

Part II of EMA creates ZEMA as a corporate body with the function of carrying out “all such things as are necessary to ensure the sustainable management of natural resources, protection of the environment and prevention and control of pollution”.²⁰ This part of EMA also makes provision for the powers of inspectors and prosecutors,²¹ which include powers of arrest without a warrant of persons reasonably believed to have committed an environmental offence.²² Inspectors appointed under EMA are granted immunity from acts performed in good faith in the exercise of any of the powers, functions or duties conferred upon them.²³ Arguably, the rationale for such a provision is that the inspectors should not be hindered in the performance of their official environmental duties by considerations that may render them potentially liable for wrongdoing in their individual capacity.

Integrated environmental management (IEM) is provided for in Part III of EMA. IEM is defined as “a philosophy that is concerned with finding the right balance (sometimes called the ‘golden mean’) between development and the environment in a holistic manner with acknowledgement of interconnections in both the physical and human systems”.²⁴ This means that IEM is holistic in terms of both the mode and manner of addressing the vast range of environmental issues in a jurisdiction. Sections 20-30 of EMA make provision for two main techniques for achieving IEM in Zambia, namely reporting²⁵ and environmental assessments.²⁶

Part IV of EMA is dedicated to environmental protection and pollution control. An integrated pollution prevention and control approach is promoted throughout this part

18 See generally on the use of civil or criminal sanctions to ensure compliance in environmental law: Dimento (1993); Öberg (2011); China ASEAN Environmental Cooperation Centre and United Nations Environment Programme (2014); Kidd (2002); Gunningham (2011); Lambrechts (2016); and Watson (2005).

19 Notable amongst these principles are: the environment is the common heritage of present and future generations; the polluter pays principle; the precautionary principle; access to information; and community participation.

20 Section 9(1) of EMA.

21 Section 15 of EMA.

22 Section 16(1)(a) of EMA.

23 Section 19 of EMA.

24 See generally on IEM: Margerum & Born (2000: 5-7); Margerum (1999: 151); Cairns (1991: 7); and Retief & Sandham (2001).

25 According to Sections 20 and 21 of EMA, the main reports and plans provided for are the State of the Environment Report (every five years) and the National Environmental Action Plan (every ten years).

26 Section 23 of EMA provides for strategic environmental assessments in relation to policies, programmes and plans that could have an adverse effect on environmental management or the sustainable management and use of natural resources.

of the Act. This approach looks at environmental protection and pollution control from the perspectives of land, water, air, ionising radiation, noise, pesticides and toxic substances. There is also provision for emergency preparedness and the declaration of environmental emergency situations.²⁷ Furthermore, this part of EMA canvasses natural resources management and makes specific mention of mechanisms to promote the protection of hills and landscapes, promote the conservation of natural resources and prohibit the import and introduction of invasive alien species.²⁸

Part V of EMA addresses international matters in environmental protection and covers international agreements and transboundary environmental management programmes. These provisions relating to international matters are especially important in any transboundary environmental issue that the country may from time to time be engaged in.

Parts VI and VII of EMA deal with issues related to promoting environmental democracy,²⁹ namely: access to environmental information (including its analysis, research and dissemination); and public participation in environmental decision-making through public reviews and hearings. Part VIII of EMA creates the Environment Fund, which according to Section 97, the purpose of which is to, *inter alia*, mitigate or restore environmental degradation and facilitate research. It is unclear from this provision how and by whom use of the Environment Fund may be made.

Enforcement provisions are provided for under Part IX of EMA and include environmental audits and monitoring.³⁰ Other enforcement mechanisms provided for are prevention measures, protection measures, environmental restoration measures, compliance measures and cost orders. A protection order may require the person on whom it is served to, *inter alia*, take any measures to: avoid, remedy or mitigate any adverse effects and to stop the activity that is resulting, or is likely to result, in an adverse effect; control the activity; assess the actual or anticipated extent of the adverse effect; remedy any adverse effects caused by the activity; or prevent a recurrence of the activity.³¹ Sections 107, 108, 110 and 111 of EMA are relevant with regard to the general issue of access to environmental justice and it can be argued that these provisions reflect the need to embrace community participation in ensuring environmental wellbeing.

According to Section 108, a person may initiate the issue of an order by the Director-General of ZEMA by setting out factual details disclosing the need for remedial measures to be undertaken in the environmental interest. Section 109 of EMA makes provision for prosecutions to be initiated by the public. In the event that the Director-General decides not to commence the prosecution provided for under this section, a

27 Sections 41 and 42 of EMA.

28 Sections 74-83 of EMA.

29 See generally on environmental democracy: Jasanoff (1996); and Wates (2005).

30 Sections 101 and 102 of EMA.

31 Sections 103-107 of EMA.

member of the public may proceed to do so.³² In such a case, EMA provides that no costs shall be awarded by the courts against the person initiating the proceedings unless “the court finds that the primary motivation for the prosecution was not a concern for the public interest or the enhancement, protection and conservation of the environment”.³³ In a similar vein to the provision on granting immunity to environmental inspectors, this section ensures that members of the public do not abuse the leeway given by EMA to initiate legal proceedings for the mere purpose of settling other scores unrelated to environmental wellbeing.

Section 110(1) of EMA provides for the initiation of a civil matter for damages by any person where there is an act or omission in contravention of the Act. Pursuant to this section, a person may also sue for damages in respect of an act or omission that constitutes a contravention of EMA or that is likely to have an adverse effect, whether or not that person or any other person has suffered, or is likely to suffer, any loss or harm from the act or omission.

Part X provides for administrative mechanisms such as reviews and appeals. Under Sections 112–114, appeals against decisions made by ZEMA lie to the ZEMA Board. Sections 115 and 116 of EMA provide for appeals against the ZEMA Board to the Minister. This is an innovation that was not available under the EPPCA. EMA has also introduced provisions for an aggrieved party to seek review, first with the ZEMA Board, then the Minister and ultimately to the High Court.³⁴ In contrast, the EPPCA reposed the power to review in the Minister. The current provisions of EMA recognise ZEMA as a legally constituted environmental regulator that takes technical environmental concerns into consideration; in contrast to the Minister, who may be more likely to base an environmental decision on political expediency.

Part XI provides for environmental offences relating to a broad array of issues including environmental impact assessment, environmental standards, biological diversity, hazardous waste materials, chemicals, radioactive substances and protected areas. Part XII contains general provisions on confidentiality, civil damages and the imposition of penalties.

In summary, the provisions of EMA have introduced innovations in environmental regulation in Zambia, which can properly be termed as the development of an environmental ethos. In order to have a better understanding of the implementation of EMA, it is important to give some background to the provisions of Zambia’s supreme law, the Constitution.

32 Section 109(4) of EMA.

33 Section 109(6) of EMA.

34 Sambo (2012: 203-204).

2.4 Constitution of Zambia

The Constitution of Zambia (Amendment) Act (2016)³⁵ (the Constitution) is the supreme law in Zambia. The provisions of EMA are accordingly subservient thereto. The Constitution has important provisions for environmental regulation, despite not containing a right to a clean, safe and healthy environment.³⁶

The Constitution provides that “a citizen shall protect and conserve the environment and utilise natural resources in a sustainable manner and maintain a clean and healthy environment”.³⁷ This duty to protect and conserve the environment is bestowed upon each and every citizen. Without meaningful support, however, the role that a citizen can play in the momentous task of environmental management cannot be achieved. Article 255 of the Constitution provides for the general management and development of the environment and natural resources and prescribes adherence to a number of environmental principles, also provided for in EMA, which include the following: polluter pays principle; equitable sharing of environmental benefits and natural resources; the need to ensure that natural resources have an environmental, economic, social and cultural value and the reflection of this in their use; precautionary principle; the conservation and protection of ecologically sensitive areas, habitats, species and other environment shall be done in a sustainable manner; respect for the integrity of natural processes and ecological communities; effective participation of people in the development of relevant policies, plans and programmes; and access to environmental information to enable people preserve, protect and conserve the environment. Furthermore, Article 256 provides that:

... a person has a duty to co-operate with state organs, state institutions and other persons to:

- (a) Maintain a clean, safe and healthy environment;
- (b) Ensure ecologically sustainable development and use of natural resources;
- (c) Respect, protect and safeguard the environment; and
- (d) Prevent or discontinue an act which is harmful to the environment.

This provision needs to be read together with Article 43(1) which mandates citizens to protect and conserve the environment. Article 256 requires a person to cooperate in maintaining a clean, safe and healthy environment and generally respect, protect and safeguard the environment. Implicit in this obligation is that a person must have the awareness that this is required of them and also the means to carry out the obligation. It is arguable that this is a very fluid legal provision that needs to be elucidated if it is

35 Act 2 of 2016.

36 The Bill of Rights currently in force in Zambia is that contained in the Constitution of Zambia, Act 18 of 1996. This is as a result of the failure to pass the 2016 National Referendum to adopt a new Bill of Rights.

37 Article 43(1)(c) and (d) of the Constitution.

to serve a meaningful and practical purpose. Article 257 of the Constitution further provides that:

- ...the State shall, in the utilisation of natural resources and management of the environment –
- (a) protect genetic resources and biological diversity;
 - (b) implement mechanisms that minimise waste;
 - (c) promote appropriate environment management systems and tools;
 - (d) encourage public participation;
 - (e) protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and genetic resources of local communities;
 - (f) ensure that the environmental standards enforced in Zambia are of essential benefit to citizens; and
 - (g) establish and implement mechanisms that address climate change.

This provision focuses on the role of the state in using natural resources and managing the environment. This means that the state has a duty to facilitate overall sustainable use of natural resources by protecting genetic resources and biological diversity and also carrying out all the obligations listed in this provision. These state duties encompass the full breadth of environmental regulation and governance. This chapter is unable to provide evidence that the state has fulfilled these obligations following the enactment of the Constitution.

In general, this section of the chapter has shown that the Constitution has clear and progressive provisions regarding environmental management. The question that begs an answer, however, is whether these provisions are adhered to. In a country with relatively poor levels of environmental awareness, the state can hardly be held accountable.

3 Enter an ‘environmental ethos’ beyond pollution control

As highlighted above, EMA is the current framework environmental legislation in Zambia. Read together with the relevant constitutional provisions, the Act reveals that there are key environmental themes that are likely to have a positive impact on environmental regulation and the development of an environmental ethos in Zambia. The question to be resolved, however, is whether these relatively good provisions are contributing, if at all, to the creation of an environmental ethos that has practical benefits.

According to the Oxford English Dictionary, the word ethos is defined as “the characteristic spirit of a culture, era or community as manifested in its attitudes and aspirations”.³⁸ The Collins Dictionary defines an ethos as “the set of ideas and attitudes that is associated with a particular group of people or a particular type of activity”.³⁹

38 See <www.en.oxforddictionaries.com> (accessed 2-5-2018).

39 See <www.collinsdictionary.com> (accessed 2-5-2018).

Therefore, this chapter advances the definition of ‘environmental ethos’ as the set of ideas and attitudes towards the environment that are informed by relevant education, awareness and enforcement of legislative provisions. Environmental education in general addresses education about the environment, which involves building awareness, understanding and skills necessary for developing a world population that is aware of, and concerned about, the environment and its associated problems; and which has the knowledge, skills, attitude, motivation and commitment to work individually and collectively towards forging solutions to current problems and the prevention of new ones.⁴⁰ It is the hypothesis of this chapter that the development of an environmental ethos is dependent on the availability of opportunities for enhanced environmental education. This education needs to be approached from a multidisciplinary perspective to ensure that all aspects of the environment are adequately covered. In this vein, the cooperation of environmental lawyers with other environmental specialists seems essential.

3.1 Environmental law practice and *locus standi*

Locus standi is the right one has to bring an action before a court of competent jurisdiction. To do so a person generally must be affected by the matter and there must be a case that can be resolved by legal action. Environmental cases can push the bounds of *locus standi* because people may often not hold individual, immediate or exclusive interests in the thing harmed. Environmental concerns are often collective or shared in nature, implicit in the definition of the environment – that it is everything around us.

Section 4(3) of EMA regulates *locus standi* in environmental matters. This concept is referred to as the *action popularis*, which means an action to obtain a remedy by a person or a group in the name of the general public, without the necessity of representation authorisation from the victims of the harm.⁴¹ The *locus standi* provision in EMA is universal in the sense that any person can bring the action, whether or not they are directly affected. This is a departure from the past practice where the right to bring an action was based on actual harm or injury being occasioned to the person bringing the action. This new position is recognition that environmental matters are matters of general public interest, and further that the general public should have a right to seek redress for environmental law wrongs. The nature and scope of the remedies that can be sought are alive to both the general harmful effects of pollution on the environment and the possible harm caused to the individual.

Section 109 of EMA empowers a member of the public to request in writing the Director-General to investigate an alleged contravention of the legislative provisions.

40 See generally: Woock (1972); and Maina-Okori et al. (2017).

41 Aceves (2003: 360).

Where the Director-General decides not to investigate the said matter, the person who made the request may lay a charge and prosecute. This shows that members of the public are not hindered from accessing the courts by the legal technicality of *locus standi*. In a similar manner, Section 110(1) of EMA provides that:

A person may sue for damages in respect of an act or omission that constitutes a contravention of the Act or that is likely to have an adverse effect whether or not that person or any other person has suffered or likely to suffer any loss or harm from the act or omission.

This provision makes it clear that the issue to consider for one who intends to sue for damages for acts or omissions contravening EMA, is the likelihood of suffering harm and not whether the harm has actually been suffered, thereby enhancing a person's *locus standi*.

Since the enactment of EMA, the rights and duties of citizens in environmental matters have been clearly laid out. However, with literacy and awareness levels being low, these otherwise progressive provisions remain unutilised.⁴²

Despite the recognition of the right to a clean, safe and healthy environment in EMA, and the creation of various offences in several laws governing environmental management and conservation, water management and mining and mineral processing activities, there is still a dearth of judicial decisions on these matters. One reason for this is that the public has not taken steps to test the waters in enforcing the right to a clean and healthy environment using the progressive provisions in both EMA and the Constitution.

In the case of *James Nyasulu & 2000 Others v. Konkola Copper Mines (KCM) Plc., Environmental Council of Zambia & Chingola Municipal Council*⁴³ (Nyasulu case), instituted in the Lusaka High Court in 2007 but only decided in 2011, the court ordered the first defendant to pay a total of K10 billion as general and punitive damages to the 2000 plaintiffs who had suffered personal and environmental injury as a result of the first defendant discharging effluent from its mining operations into Kafue River, the main source of water for the plaintiffs' livelihood.

The *Nyasulu* case could well be referred to as a success in enforcing environmental rights. It must be noted that this case was argued on the basis of the provisions of the now repealed EPPCA. This is one case in which the courts missed an opportunity for judicial activism. Despite the court establishing that the actions of the first defendant caused harm to fish, frogs, crocodiles, hippos, aquatic plants and people who used the water for drinking purposes, the defendant was not punished for the harm caused to the environment. The court could have taken this opportunity to address the wider environmental harm caused by the pollution instead of focusing solely on the personal loss suffered by the plaintiffs.

42 See generally: Sambo (2012).

43 *James Nyasulu and Others v. Konkola Copper Mines Plc and Others* (2007/HP/1286) (unreported).

In the *Nyasulu* case, the Environmental Council of Zambia (the then equivalent of ZEMA and the second defendant in the case), was exempted from liability by the court on the grounds that it operated under difficult circumstances since it was a government agency not insulated from political control. According to the provisions of the now repealed EPPCA, the agency was indeed a government agency tasked with ensuring that the provisions of the legislation were adhered to.

The plaintiffs in this case argued that the Environmental Council of Zambia had neglected its duty by failing to prosecute the first defendant, enforce the licence conditions and to protect the community. Accordingly, the court's decision can be said to have been misguided in that it failed to give effect to clear legislative provisions for unknown reasons. Arising from the *Nyasulu* case, it is arguable that there is a continued need for public environmental education and awareness with regard to environmental rights and the duties and obligations of both state and private individuals in relation to environmental management.

Whilst great strides have been made toward widening the scope of access to environmental justice in Zambia, a lot still remains to be done. Mere legal pronouncements without deliberate efforts to enhance their enforcement serve no practical purpose. More concerted efforts are needed to raise public awareness and access to environmental information. Further, measures such as establishing special courts or tribunals to deal with environmental matters and aimed at lowering the costs of instituting and undertaking environmental litigation need to be implemented to encourage public participation in environmental litigation and ensure true access to justice.

3.2 Environmental good governance

Good governance in all sectors of a country is a process and not an occasion. Environmental good governance refers to the processes of decision-making involved in controlling and managing the environment and natural resources,⁴⁴ and has been the subject of numerous scholarly writings. The concept is now firmly established both in international and domestic law.⁴⁵ Environmental good governance also includes the manner in which decisions are made.

According to Article 8 of the Constitution, there are national values and principles that must be followed in Zambia. Specifically, Article 8(c), (e) and (f) call for democracy and constitutionalism, good governance, integrity and sustainable development. These principles are important in every sector of the economy and governance. Article 9 buttresses the provisions of Article 8 by emphasising that the national values and principles shall apply to the interpretation of the Constitution, enactment and

44 Esty (1999).

45 Feris (2010); and Bernstein (2004).

interpretation of the law, and the development and implementation of state policy. The necessity of these national values and principles in environmental governance cannot be overemphasised.

Environmental governance encompasses “adherence to values such as transparency, accountability, public participation in decision-making and freedom of association”.⁴⁶ Environmental governance should also involve a social element. The aspiration towards establishing a society based on social justice is important.

In the context of South Africa, some of the key pointers as to what constitutes good environmental governance are that: governance should be responsible and accountable; regulations should be enforced; mechanisms and structures that facilitate participation should be clearly laid out; environmental issues should be ‘mainstreamed’ through all sectors of the economy; and access to information should be prevalent.⁴⁷ In addition, international measures of environmental governance can also be useful in measuring various aspects of national environmental governance relative to other countries.⁴⁸

Using the South African key pointers of good environmental governance as a basis for a rudimentary comparison with Zambia reveals that almost all these pointers are provided for in EMA and the Constitution as has been shown in the discussion relating to the specific legislative provisions above.⁴⁹

3.3 Greening the Zambian judiciary

The history of global environmental law has repeatedly demonstrated the importance of the judiciary in ensuring that “ordinary citizens can, through the legal process, make their governments protect the environment when that may be the last thing their governments want to do”.⁵⁰ The judiciary is the bedrock of the rule of law and good governance in any society. In order to ensure that these values permeate the environmental sector, it is essential that the judiciary as a neutral arbiter is equipped with environmental consciousness. This raises the argument for specialised environmental courts. An environmental court is defined as “any government judicial or administrative body specialising in resolving disputes about environment, natural resources, land use, or related issues”.⁵¹ The creation of such specialised courts is a necessary part of the

46 Feris (2010: 76).

47 Fakier et al. (2005); and Hassan (2001: 11).

48 Fakier et al. (2005).

49 See parts 2.3 and 2.4 above.

50 Houck (2010: 9).

51 Pring & Pring (2016: 54).

concept of ‘greening the judiciary’. From the South African perspective, Kidd has argued that:⁵²

...it would appear that the judges’ performance is rather ‘chequered’ in environmental cases, which suggests that the judiciary needs to become more attuned to environmental law. I call this process, for purposes of this note, ‘greening the judiciary’. What I mean by this is not that judges must decide all environmental cases in a way that favours the environment, but that they must correctly consider, interpret and apply the relevant environmental law, and give environmental considerations appropriate deliberation. This note aims to identify, in admittedly somewhat general terms, the current state of environmental decision-making by judges and to suggest what needs to happen for such decisions to be improved.

The issues brought out in this argument are pertinent to Zambia. The performance of judges in environmental cases does indeed suggest that there is need for continuous training. The author agrees that the critical consideration is not whether judges decide all environmental matters in favour of the environment, but rather that some balance must be struck between developmental needs that necessitate projects and the preservation of the environment. It is important that the judges are aware through routine training that there is a need to look beyond rendering traditional or default judgments that only focus on promoting the socio-economic aspect of development.

It has been argued that a number of courts around the world have used “environmental provisions in national constitutions to break new legal ground in an effort to respond to contemporary environmental problems, such as climate change”.⁵³ For instance, in India the courts have created a system of public interest litigation with very broad *locus standi* for interested members of the public to bring environmental cases.⁵⁴ The question that might be asked is what the advantages of having environmental courts are. One advantage is that the efficiency with which environmental cases are handled may improve. Further, specialist environmental judges can over time develop greater expertise.

Flowing from a critical analysis of South African environmental law cases, Kidd concludes that:⁵⁵

... these judicial shortcomings are, in all likelihood, not solely the fault of the judges however. It is probable that the reason why these provisions were not considered is that counsel did not bring them to the courts’ attention. In light of this, I would argue strongly that the greening of the judiciary is not achievable, certainly not in any comprehensive sense, unless legal practitioners also are more closely exposed to the burgeoning body of environmental law, which is beginning to permeate many more ‘traditional’ areas of law.

52 Kidd (2006: 3).

53 Percival (2017: 1).

54 *M.C. Mehta v. Union of India (Taj Trapezium)* 1998 (2) SCALE 7 (SP) [268]. M.C. Mehta has been the top public interest environmental lawyer. He petitioned the Supreme Court to take action to protect the Taj Mahal from the ravages of air pollution. Relying on Article 21 of the Indian Constitution that creates a “right to life”, which the court has interpreted to imply a right to a healthy environment, the court ordered that polluters who were harming the Taj Mahal had to cease doing so or relocate.

55 Kidd (2006: 8).

This conclusion highlights that judges cannot be held to shoulder the blame alone on judicial shortcomings in environmental matters. The author agrees with this observation especially that cases presented before courts must be well prepared by legal practitioners. A judiciary well-informed of the rapidly expanding boundaries of environmental law and law in the field of sustainable development, and sensitive to their role and responsibilities in promoting the rule of law in regard to environmentally friendly development, would play a critical role in the vindication of the public interest in a healthy and secure environment through the interpretation, enhancement and enforcement of environmental law. Kidd further argues that in order for judges to arrive at sound environmental decisions, they must be “guided by arguments raised by counsel and it is therefore critical that environmental lawyers embrace the scientific dimensions of environmental decision-making as well...”.⁵⁶ With the emergence of new global environmental challenges, it is necessary to ensure that the almost limitless boundaries of science and technology are employed in enunciating effective environmental law and policy in Africa.

4 Conclusion

It has been shown that the enactment of EMA in 2011 gifted Zambia a robust and forward-looking environmental regime, with the exception that there is no constitutional environmental right to a clean, safe and healthy environment. The constitutional protection of environmental rights has been proved world over to be an important mechanism for securing individual environmental rights and promoting environmental and ecological sustainability. This lack of constitutional force in the quest to uphold environmental integrity is one drawback towards developing a meaningful environmental ethos in Zambia. With an enforceable constitutional environmental right in Zambia, the key themes towards good environmental governance are likely to be more easily achieved. Environmental education encompassing awareness, access to information, meaningful public participation, enhanced access to (environmental) justice are all important concepts that are given adequate prominence in the legislation. As noted throughout this chapter, however, these innovative legal provisions are yet to be exploited for the environmental good. These innovative legislative provisions need to be exploited to the fullest if real change is to be seen in the management of the country’s environment and natural resources.

In 2012, a recommendation with regard to the practice of environmental law in Zambia highlighted the following:⁵⁷

56 Ibid: 11.

57 Sambo (2012: 217).

The courts in Zambia need to have a good understanding of environmental law principles in order to arrive at informed decisions which are necessary in the sound environmental management and dispensation of environmental justice. In addition, legal practitioners in Zambia need to be equipped with the necessary interest, knowledge and skills to conduct environmental litigation which is important in resolving environmental injustices.

Six years down the line, the position remains the same, notwithstanding forward-looking legislation. It can be argued that adequate environmental law provisions combined with a 'green' judiciary are likely to make a significant contribution towards the development of an environmental ethos and good environmental governance in Zambia. These two factors, however, are by no means significant in themselves. With the aid of other research methodologies, it would merit further research to understand how some jurisdictions are making progress towards entrenching environmental considerations in governance models.

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