UNIVERSITY OF LUSAKA

ANALYSIS OF PROSPECTS AND BOTTLENECKS TO ESTABLISH A SPECIALISED ENVIRONMENTAL COURT OR TRIBUNAL IN ZAMBIA

BY

SHADRECK MBEWE

LLMEL22112333

Study dissertation submitted for the approval of the University of Lusaka Senate in partial fulfilment of the requirement for the award of the Master of Laws Degree in Environmental Law (LLM)

University of Lusaka
March, 2024

DECLARATION OF ORIGINALITY

I, declare that the '*Analysis of Prospects and Bottlenecks to Establish a Specialised Environmental Court or Tribunal in Zambia'* which is hereby submitted for the award of Master of Laws (LLM) degree at the School of Law, University of Lusaka, is my original work and has not been previously submitted and is not concurrently being submitted for the award of a degree at this or any other tertiary institution.

The sources that have been used or quoted have been indicated and duly acknowledged by footnotes giving explicit references. A bibliography is appended. The errors or omissions are solely the author's.

@ 2024 by Shadreck Mbewe
All rights reserved

SUPERVISOR'S RECOMMENDATION

UNIVERSITY OF LUSAKA

SCHOOL OF GRADUATE STUDIES

I, Morgan Katati, recommend that the study dissertation prepared under my supervision by

SHADRECK MBEWE
Computer Number: LLMEL22112333

Entitled

Analysis of Prospects and Bottlenecks to Establish a Specialised Environmental Court or Tribunal in Zambia

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to format as laid down in the University regulations governing Master of Laws Dissertations,

Signature………………………………date ……………04 April……………………2024

ABSTRACT

Environmental degradation and pollution demand quick redress. This is not tenable through the slow adjudication of environmental cases by the ordinary court system due to its caseloads spanning across various causes of action, technical rituals, and lack of adjudicators with enough expertise in the nuanced rules and regulations that comprise environmental law. Due to the present obstacles in the regular legal system, Environmental Courts or Tribunals (ECTs) are emerging as a reasonable logical solution. In light of the foregoing, and based on the fact that Zambia is also increasingly plagued by various environmental problems from developmental activities, it became necessary that a study be carried out to investigate the prospects and bottlenecks for establishing a specialized ECT in Zambia. The study used a desktop-based technique and analysed the ECTs' model solutions in jurisdictions such as Kenya, India and Australia, that have successfully established these judicial institutions as alternative to regular courts in adjudicating environmental cases.

The study revealed that ECTs are public institutions or officials in the government's judicial or executive arm with authority to specialise in adjudicating environmental, natural resource development, land-use development, climate change and interrelated cases. The study found that whereas Zambia is increasingly experiencing its own share of numerous environmental teething problems, it has no specialised ECT. The subsisting system of adjudicating environmental disputes seem incoherent, fragmented, and inefficient. One of the study's major findings is that enforcement of environmental claims through the regular courts is seriously hampered by the absence of a provision for "a right to a clean, safe and healthy environment" in the Constitution of Zambia. Additionally, regular courts have not filled the void by creatively construing constitutional guarantee, such as by reading the right to life as affording each person the right to a healthy, pollution-free environment and to give effective remedies that are enforceable in court.

However, the study concluded that it should not be difficult for Zambia to establish an environmental court or tribunal because under the Constitution of Zambia, the Chief Justice may establish specialist courts to hear specified cases, such as environmental cases. Therefore, the study advocates the creation of an environmental court or tribunal to ensure prompt administration of environmental justice in Zambia.

Key words

Constitution, Environmental Courts or Tribunals, Environmental Justice, Environmental Law, Environmental Rights, Environmental Protection, Zambia Environmental Agency, Zambia.

DEDICATION

To my lovely wife; *Miriam*, and my beautiful daughters; *Reginah, Rose, Lexinah,* and Chaziwe (Sheila), and my two boys *Shadreck Mafafa Ndanji* and *Royd Bob Bukata.*

ACKNOWLEDGEMENTS

Foremost, I wish to acknowledge **THE ALMIGHTY GOD, JEHOVAH,** for *His Loyal Love and Undeserved Kindness* extended to me in this accomplishment.

To my supervisor, Mr. Morgan Katati, I want to say a heartfelt thank you for his immense help in planning and executing the study. His detailed and constructive comments, understanding, encouragement and invaluable support throughout this work have provided a sound basis for the dissertation. His friendship and support will be remembered lifelong.

I would like to thank all whose direct and indirect support has helped me complete my thesis on time. Finally, I am responsible for all the views, understatements and/or overstatements in this dissertation.

TABLE OF STATUTES

Legislation

Zambia

Constitution (Amendment) Act, 2016

Competition and Consumer Protection Act, 2010

Environmental Management Act, 2011

Forest Act, 2015

Fisheries Act, 2011

Mines and Minerals Development Act, 2015

Lands Tribunal Act, 2010

Legal Aid Act, Chapter 34 of the Laws of Zambia

Tax Appeals Tribunal Act, 2015

Urban and Regional Planning Act, 2015

Water Resources Management Act, 2011

Zambia Wildlife Act, 2015

Subsidiary Legislation

Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997

The Small Claims Court (Limit of Jurisdiction) (Liquidated Claims) Rules, 2023

TABLE OF CASES

Zambia

Bank of Zambia v. Access Leasing Limited, Access Financial Services Limited [2008] 1 Z.R. 159

David Ngwenyama v. Attorney General and Mwembeshi Resources Limited, Appeal No. 001/2020.

Doris Chinsambwe and 6 Others v. NFC Africa Mining PLC [2014] HK 374

Geoffrey Elliam Mithi v. Mopani Copper Mines PLC and Attorney General [2014]HB 48.

James Nyasulu and Others v. Konkola Copper Mines PLC and Others 2007/HP/2011.

Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012.

Lafarge Cement Zambia Limited v. Peter Sinkamba Appeal No. 169 of 2009, J16.

Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others 2008/HP/245, J59-60.

Martha Muzithe Kangwa and 29 Others v. Environmental Council of Zambia and 2 Others [2014] ZR 233,257.

Mopani Copper Mines PLC v. Ndumo Miti and 2 Others [2020] (Appeal 154/2016), J86-J87.

Moses Lukwanda and 9 Others v. Zambia Airforce Projects Limited and 7 Others CAZ/08/323/2019,

Robert Chimambo v. The Attorney General and Zambia Environmental Agency, 2022/CCZ/003

Zambia Community based Natural Resource management Forum and Others v. Attorney General and Mwembeshi Resources Limited, 2014/HP/A.006,

Other Jurisdiction

Canada

Trail Smelter Case (United States v. Canada), 3RIAA 1905(Trail Smelter Arb. Trib 1938).

Colombia

Victor Ramon Casttrillon Vega v. Federacion National de Algoderos y Corporation Autonoma Regional del Cesar (COPROCESAR), Case No. 4577 (Supreme Court, Chamber of Civil and Agrarian Cassation, November 19, 1997).

India

L. K. Koolwal v. Rajasthan A.L.R [1988] Raj 2 (Raj. H. C).

Rural Litigation and Entitlement Kendra Vs. Uttar Pradesh A.I.R. [1985] S.C. 652, 656.

Vellore Citizens' Welfare Reform v. Union of India A.I.R. [1996] S.C. 2715.

Nepal
LEADERS, Incorporation v. Godawari Marble Industries (Supreme Court Nepal, October 31 1995).

Nigeria
Chief Gafaru v. Chief Sunday Olowookere [2011] LPELR-SC 200/2003, 38-40.

Kokoro-Owo v. Lagos State Government, 6 N.W.L.R. [1995] 760, 765.

Pakistan
General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhehum v. Director, Industries and Mineral Development, Punjab, Lahore Human Rights Case No. 120 of 1993, [1994] S.C.M.R. 2061

In re Human Rights Case (Environmental Pollution in Balochistan) Human Rights case No. 31-K/92 (Q). P. L. D. 1994 Supreme Court 102 [1992].

Scotland
West v. Secretary of State for Scotland [1992] SC 385.

South Africa
Director: Mineral Development v. Save the Vaal Environment Case No. 133.98 (Supreme Ct. of Appeals of South Africa. Mar. 12.1999).

Tanzania
Joseph D. Kessy v. Dar es Salaam City Council Civil Case No. 299 of 1988 (High Court of Tanzania at Dar es Salaam, Sept. 9, 1991).

United Kingdom
Based on Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223.

Dominic Liswaniso Lungowe and Others v. Vedanta Resources PLC and Konkola Copper Mines PLC [2016] EWHC 975 (TCC).

R v. secretary of State for Home Department, ex parte Anufrijeva [2003] 3 ALL ER 827.

Vedanta Resources PLC and Konkola Copper Mines PLC v. Dominic Liswaniso Lungowe and Others [2019] UKSC 32.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CBE	Citizens for Better Environment
CBNROs	Community-Based Natural Resource Organisations
EC	Environmental Court
ECTs	Environmental Courts or Tribunals
EIA	Environmental Impact Assessment
EMA	Environmental Management Act
ET	Environmental Tribunal
IT	Information Technology
KCM	Konkola Copper Mines
LEC	Land and Environmental Court
MEAs	Multilateral Environmental Agreements
MMDA	Mines and Minerals Development Act
NGO	Non-Governmental Organisation
NGT	National Green Tribunal
PEC	Planning and Environmental Court
ZEMA	Zambia Environmental Management Agency
ZIEM	Zambia Institute of Environmental Management
UN	United Nations
UNEP	United Nations Environmental Programme

TABLE OF CONTENTS

DECLARATION OF ORIGINALITY II

SUPERVISOR'S RECOMMENDATION IV

ABSTRACT V

KEY WORDS VI

DEDICATION VII

ACKNOWLEDGEMENTS VIII

TABLE OF STATUTES IX

TABLE OF CASES X

LIST OF ABBREVIATIONS XII

TABLE OF CONTENTS XIII

CHAPTER ONE 1

INTRODUCTION AND BACKGROUND 1

1.1 BACKGROUND TO THE STUDY 1

1.2 STATEMENT OF THE PROBLEM 4

1.3 OBJECTIVES OF THE STUDY 5

1.3.1 Main Objective....5

1.3.2 Specific Objectives 5

1.4 STUDY QUESTIONS 5

1.4.1 Main Question 5

1.4.2 Specific Questions....5

1.5 SIGNIFICANCE OF THE STUDY 6

1.6 THEORETICAL FRAMEWORK 6

1.6.1 Public Trust Theory in Environmental Matters....6

1.6.2 Theory of justice in Environmental Matters....8

1.6.3 Theory of Public Participation in Environmental Decision-making....8

1.7 LITERATURE REVIEW 9
1.8 METHODOLOGY 16
1.9 SCOPE OF THE STUDY 16
1.10 ETHICAL CONSIDERATIONS 16
1.11 OUTLINE OF CHAPTERS 17
1.12 SUMMARY 17
CHAPTER TWO 18
ENVIRONMENTAL LAW AND THE NATURE OF SPECIALISED ENVIRONMENTAL COURTS AND TRIBUNALS 18
2.1 INTRODUCTION 18
2.2 EVOLUTION OF ENVIRONMENTAL LAW AND ACTORS 18
(i) Traditional Phase – Pre-1972 19
(ii) Modern Phase (1972-1992) 20
(iii) Post Modern Phase – 1992 to date 22
2.3 SPECIALISED ENVIRONMENTAL COURTS OR TRIBUNALS 23
2.4 MODELS FOR AN ENVIRONMENTAL COURT OR TRIBUNAL 24
2.4.1 Specialised Environmental Courts 24
(a) Free-Standing Environmental Court Model 24
(i) The Land and Environment Court of the State of New South Wales in Australia 25
(ii) Environmental Court in New Zealand 26
(iii) Environment and Land Court in Kenya 26
(b) Specialised Green Chambers 27
(c) Green Judges 28
2.4.2 Environmental Tribunals 29
(a) Independent Environmental Tribunals 29
(b) Quasi-independent Tribunals 30
(c) Captive Environmental Tribunals 31
2.5 ECTs BEST PRACTICES IN IMPROVING ENVIRONMENTAL JUSTICE 32

2.5.1 DESIGN STAGE – GOOD PRACTICES ... 32
(i) Independence and Impartiality ... 32
(ii) Flexibility and Not Rigidity ... 34
(iii) Non-Law Decision Makers ... 34
(iv) Adjudicators: Appointment and Career Advancement ... 34
(v) Alternative Dispute Resolution ... 35
(vi) Comprehensive authority ... 35
(vii) Standing or *Locus Standi* Rules ... 36
(viii) Remedies ... 37
(ix) Enforcement Powers ... 37
(x) Evaluation Practices ... 38
(xi) Adequate Resources ... 38
2.5.2 OPERATION STAGE – GOOD PRACTICES ... 38
(i) Public Outreach ... 38
(ii) User-Friendliness ... 39
(iii) Case Management Services ... 39
(iv) Management of Experts Witnesses ... 39
(v) Cost Control. ... 39
2.6 SUMMARY ... 40
CHAPTER THREE ... 41
ENVIRONMENTAL LAW ADJUDICATION IN ZAMBIA ... 41
3.1 INTRODUCTION ... 41
3.2 THE CONSTITUTIONAL PROVISIONS IN THE PRACTICE OF ENVIRONMENTAL LAW ... 41
3.3 THE CONSTITUTION OF ZAMBIA, 2016 AND ENVIRONMENTAL LAW ... 43
3.4 THE RIGHT TO A CLEAN, SAFE AND HEALTHY ENVIRONMENT AND THE RIGHT TO LIFE ... 46
3.5 CONSTITUTIONAL PROCEDURAL RIGHTS IN ENVIRONMENTAL PRACTICE ... 54
3.5.1 Freedom of Association in Environmental Practice. ... 54
3.5.2 Access to information in Environmental Practice ... 55
3.5.3 Public Participation in Decision-making in Environmental Practice ... 56
3.5.4 Access to Justice in Environmental Practice ... 58
3.6 ENVIRONMENTAL MANAGEMENT ACT, 2011 (EMA) ... 60

3.6.1 Right to a Clean, Safe and Healthy Environment under EMA, 2011 61
3.6.2 Standing or *Locus Standi* in Environmental Law Practice 62
3.6.3 Administrative Mechanisms: Reviews and Appeals 63
3.7 MINES AND MINERALS DEVELOPMENT ACT, 2015 66
3.8 SUMMARY 67
CHAPTER FOUR 68
ENVIRONMETAL COURT OR TRIBUNAL IN THE CONTEXT OF ZAMBIA 68
4.1 INTRODUCTION 68
4.2 BACKGROUND TO PUSH FACTORS FOR ESTABLISHING AN ECT IN ZAMBIA 68
4.3 WHY OTHER COUNTRIES ESTABLISH ECTS AND THE PROSPECTS OF ESTABLISHING IT IN ZAMBIA 69
(i) Proficiency in Environmental Decision-Making 70
(ii) Efficiency and Prioritisation in Dealing with Environmental Matters 71
(iii) Government's Visibility and Commitment to Environmental Protection 71
(iv) Litigation Costs and Access to Environmental Justice 72
(v) Uniformity and Predictability in Environmental Decisions 72
(vi) Relaxed *Locus Standi* Requirement in Environmental Matters 72
(vii) Government Accountability for Environmental Decision-Making 73
(viii) Creativity and Judicial Activism in Environmental Proceedings 73
(ix) Alternative Environmental Dispute Resolution and Problem Solving (ADR) 74
(x) Issue and Remedy Integration 74
(xi) Public Confidence 74
4.3.1 Counterarguments Against Establishing an ECT 75
4.4 GENERAL CHARACTERISTICS OF THE ZAMBIAN JUDICIAL SYSTEM IN THE CONTEXT OF THE POSSIBILITY OF CREATING A SPECIALISED ECT. 75
4.5 WHY ZAMBIA NEEDS AN ECT 77
4.5.1 Environmental Cases Get Caught Up in the Slow Judicial Processes 78
4.5.2 The Arrangement for Deciding Environmental Disputes is Fragmented 79
4.5.3 Judges in Zambia are Infrequently Exposed to Environmental Legal Action 81
4.5.4 Access to Environmental Justice is impeded by the high cost of environmental litigation 83
4.5.5 Generalist Courts in Judicial Review Matters do not Consider the Merits of Cases 84

4.6 WHAT KIND OF ECT DOES ZAMBIA NEED? 85
4.6.1 Possible Jurisdiction of an ECT in Zambia 86
(1) Violation of the Requirements for Individual Activities 86
(2) Violation of environmental regulations relating to the use and protection of specific natural resources (water, land, minerals, forests, fauna, air) 87
(4) Environmental court cases involving the use of several resources (land, water, minerals, forests) 88
4.6.2 Form of an ECT in Zambia 88
4.6.3 Essential Design features for an ECT in Zambia 90
4.7 SUMMARY 91
CHAPTER FIVE 93
CONCLUSION AND RECOMMENDTIONS ON ECTS IN THE CONTEXT OF ZAMBIA 93
5.1 SUMMARY OF THE STUDY 93
5.2 KEY FINDINGS AND CONCLUSIONS 93
5.3 STUDY RECOMMENDATIONS 95
5.4 RECOMMENDED FUTURE RESEARCH 96
6.0 BIBLIOGRAPHY 97

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 Background to the Study

The notion that 'environment' is dynamic and very complex subject in relation to its meanings and interpretations need to be interrogated with the attention it deserves.[1] It is science, management and it is law. Globally, environmental laws have dramatically surged in significance ever since the pronouncement of the non-binding principles of environmental law at the Stockholm Conference on Human Environment of 1972.[2] Several nations now realise the crucial connections between the environment, economic expansion, public health, social cohesion, and security[3], and the climate. In fact, many countries have made rigorous efforts to legislate environmental law, create and empower environmental departments, and entrench environmental guarantees and protection in their domestic laws.[4]

The demand for new environmental governance institutions and procedures for resolving environmental disputes and violations has increased as environmental law has spread throughout the world, especially with the rapid proliferation of serious environmental problems, such as the cases of anthropogenic climate change.[5] Generally, the intricacy of environmental legislation and scientific and technical issues it raises,[6] coupled with the rapidly developing climate change lawsuits,[7] have typically been a challenge for traditional judges.[8] Consequently, specialised environmental courts or tribunals (ECTs) have become crucial to the systematic and effective implementation of environmental legislation and the consistent interpretation and enforcement of numerous

---

[1] Chipasha Mulenga, *The Law on Mining and Environmental Protection in Zambia* (Juta and Company (Pty) Limited 2022) 94.
[2] United Nations Environmental Programme, *Environmental Rule of Law: First Global Report* (UNEP, Nairobi, 2019) 1, 2.
[3] Ibid.
[4] Ibid.
[5] George (Rock) Pring and Catherine (Kitty) Pring, "*Specialised Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Climate Change and other Complex Environmental Issues*"(17-19 September, 2010)<http://www.law.edu/document/ect-study/unitar-Yale-Article.pdf> accessed on 10 March 2022.
[6] Ibid.
[7] United Nations Environmental Programme, *Global Climate Litigation Report, 2020 Status Review* (UNEP, Nairobi 2020) 6.
[8] Ibid 203, 204.

environmental principles.[9] This view was emphasized by eminent senior adjudicators from nearly sixty nations, including Zambia, at the Global Judges Symposium in Johannesburg held in South Africa in 2002,[10] that the implementation, development, and enforcement of environmental legislation need an independent judiciary and judicial procedure.[11] The Johannesburg Principles further asserts that the delicate condition in which the environment is, globally demands the Judiciaries to positively, courageously enforce global and domestic regulations on environment.[12]

Several studies have discovered a worldwide "explosion" of these ECTs.[13] George Pring, and Catherine Pring established in 2009 that 350 ECTs were established in forty-one countries.[14] This count increased to 1, 200 in forty-four nations in 2016.[15] In 2018, Don Smith[16] found there were nearly 1, 500 ECTs in existence[17] while as at August 2021 the United Nations Environmental Programme (UNEP) concluded that there were 2, 115 ECTs world-wide, with about 850 of them being established since 2016.[18] Environmental Courts or Tribunals are "judicial or administrative bodies of government with authority to focus on resolving environmental and related disputes."[19] Whereas environmental courts (ECs) refer to entities within the judicial branch of a State, environmental tribunals (ETs) are bodies housed within the administrative arm.[20]

Several fundamental factors have been identified as supporting the significance of specialist Courts in environmental issues. First, environmental edict has attained the normative autonomy which is

---

[9] Domenico Amirante, *"Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India."* (2012) 29 Pace Environmental Law Review 441-469, 441<*https://digitalcommons.pace.edu/pelr/vo/29/iss2/6* >*accessed 11th March, 2022.*

[10] United Nations Environmental Programme, "*Global Judges Symposium, Johannesburg, South Africa, August, 18-20, 2002*, '*The Johannesburg Principles on the Role of Law and Sustainable Development"*< *https://www.unep.org/law/symposium/Principles.htm* > *accessed 5th March, 2022.*

[11] Ibid.

[12] Domenico Amirante (n8) 443.

[13] George (Rock) Pring and Catherine (Kitty) Pring, "*Environmental Courts and Tribunals: A Guide for Policy Makers"* (UNEP 2016) 1.

[14] Ibid.

[15] Ibid.

[16] Don C Smith, "*Environmental Courts and Tribunals: Changing environmental and natural resources law around the globe*" (2018) 36 (2) Journal of Energy & Natural Resources Law 137, 138.

[17] Ibid.

[18] Linda Yanti Sulistiawati, Fara Bouquelle, Jolene Lin, Luc Lavrysen, Mark Ortega, Ricardo Pereira and Sean Tseng, "*Environmental Courts and Tribunals: A Guide for Policy Makers"* (UNEP, Nairobi, 2022) 1.

[19] George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and improving Environmental Courts and Tribunals* (Washington 2009) *3.*

[20] George (Rock) Pring and Catherine (Kitty) Pring (n5) 3.

assured by the amalgamation of rules from soft law that have subsequently been incorporated in national legislation thereby establishing a legal framework for the environment that lays a strong foundation for establishing environmental courts or tribunals.[21] Second, the acceptance of environmental law as a law of principles directs legislative and administrative powers, especially the judicial authority, which interprets environmental law and applies its principles to actual problems.[22] With this in mind, it is therefore not surprising that the contemporary global drift is the establishment of specialised courts or tribunals to adjudicate the ever rising and complex environmental disputes justly, quickly and cheaply[23] and offer easy access to effective environmental justice for inhabitants, non-governmental organizations, and the underprivileged.[24]

A further major stimulus for ECTs is Principle 10 of the Rio Declaration[25] which has brought about a global recognition of the right of access to environmental information held by public authorities, including details on hazardous substances and activities in their communities;[26] access to public participation in environmental decision-making, implying that a country must inform the citizens of relevant projects and the prospect of participating in the decision-making process.[27] Thirdly, being access to justice, implying efficient access to legal and administrative measures, including redress and remedy. The expansion of ECTs is primarily fueled by access to justice, which is now widely regarded as one of these three rights' vital components of the environmental rule of law.[28]

Several governments have rejoined to environmental challenges by enacting multifaceted environmental regulations ranging from constitutional rights to a clean, safe and healthy environment, to substantive environmental statutory regimes that have adopted international environmental principles including, sustainable development, polluter-pays, precautionary,

[21] Domenico Amirante (n8) 444.
[22] Ibid.
[23]George (Rock) Pring and Catherine (Kitty) Pring (n5).
[24] Domenico Amirante (n8), 445.
[25] UN Conference on Environment and Development, Rio de Janiero, *"Rio Declaration on Environment and Development*" (1992) A/CONF.151/26/Rev.1 (Vol.1), Annex 1www.un.org/documents/ga/conf15126-1annex1.htmaccessed 9 March 2022.
[26] Ibid.
[27] Ibid.
[28] Linda Yanti Sulistiawati, et la., (n17) Forward.

prevention, and inter-intra-generational equity.[29] These principles have increased anticipations and pressure on several states to adopt resilient laws and governance institutions to protect the environment, and the health of the extant and future generations.[30]

Zambia's Constitution (Amendment) Act, 2016 has entrenched international environmental norms in a step that suggests "environmental constitutionalism."[31] Notwithstanding this recognition in the Constitution of international environmental law principles,[32] and their incorporation in the environmental legislative and regulatory regimes,[33] the subsisting system of adjudicating environmental disputes seem incoherent, or fragmented, inefficient, and appears irrational. It is against this backdrop that the aim of this study was to analyse the prospects and bottlenecks for establishing a specialized environmental court or tribunal in Zambia.

1.2 Statement of the Problem

In Zambia, environmental dispute resolution system has developed in an ad hoc and unsystematic manner resulting in a fragmented, inefficient regime which appears irrational. For instance, whereas the prosecution for environmental offenses are, in the main, adjudicated in the Subordinate Courts of criminal jurisdiction, civil suits for claims for damages, or other reliefs, emanating from environmental disputes commence by way of appeal from administrative tribunals to the High Court, with appeals to the Court of Appeal, and the Supreme Court. Meanwhile, now that Zambia has adopted environmental principles in the constitution, it implies that only the Constitutional Court is empowered to hear, interpret, implement and enforce challenges touching on these provisions.[34]

Indisputably, however, the concept of a specialised court or tribunal is not novel to the Zambian legal regime because it has for a long time been practiced in areas such as consumer protection,[35]

[29]Robert Carnwath, *"Institutional Innovation for Environmental Justice," (2012) 29(2)[6] Pace Environmental Law Review 555,562<*[*https://digitalcommons.pace.edu/pelr/vo/29/iss2/6*](https://digitalcommons.pace.edu/pelr/vo/29/iss2/6) *>accessed 11 March, 2022.*
[30] Ibid.
[31] James R May and Erin Daly, *"Judicial Handbook on Environmental Constitutionalism"* (UNEP, 2017) 1.
[32] Constitution of Zambia (Amendment) Act 2016, Arts. 8, 12, 253, 255-257.
[33] Environmental Management Act 2011, s 6; Mines and Minerals Development Act 2015, s 4; Zambia Wildlife Act 2015, s 4; Forest Act 2015, s 8; Fisheries Act 2011, s 12; Water Resources Management Act 2011, s 6.
[34] Constitution (Amendment) Act 2016, Art.1(5).
[35] Competition and Consumer Protection Tribunal under The Competition and Consumer Protection Act 2010.

commercial transactions,[36] labour matters,[37] family matters,[38] children maters,[39] tax and custom matters,[40] and land ownership disputes.[41] Surprisingly, though, there has been no specialist environmental court or tribunal in Zambia, nor is there serious debate over its establishment, despite environment law being central to environmental protection and sustainable development aspirations.[42] This gap motivated this study which seeks to address the prospects or challenges to establish a specialised environmental court or tribunal in Zambia.

1.3 Objectives of the Study

1.3.1 Main Objective

The study's main objective was to analyse the prospects and challenges to establish a specialised environmental court or tribunal in Zambia.

1.3.2 Specific Objectives

The study pursued the following specific objectives:

(i) To evaluate the nature of specialised Environmental Courts or Tribunals.

(ii) To examine the drawbacks of the existing environmental law dispute adjudication in Zambia.

(iii) To analyse the prospects and challenges to establish a specialised Environmental Court or Tribunal in Zambia.

1.4 Study Questions

1.4.1 Main Question

The study's main question was: what are the prospects and challenges to establish a specialised environmental court or tribunal in Zambia.

1.4.2 Specific Questions

To sufficiently answer the problem statement in this study the specific questions asked were as follows:

---

[36] Constitution (Amendment) Act 2016, Art. 120 (3) (b).
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Tax Appeals Tribunal under the Tax Appeals Tribunal Act 2015.
[41] The Lands Tribunal, under The Lands Tribunal Act 2010.
[42] Domenico Amirante (n8) 441.

(i) What is the nature of specialised Environmental Courts or Tribunals?

(ii) What are the drawbacks of the existing environmental law dispute adjudication in Zambia?

(iii) What are the prospects and challenges to establish a specialised Environmental Court or Tribunal in Zambia?

1.5 Significance of the Study

The study was justified because the prevailing academic studies and debate in Zambia have focused on general environmental management, protection or conservation. There is currently hardly any scholarly study or debate on specialised environmental courts or tribunals in Zambia. This study aimed at satisfying this gap in the existing academic literature on whether it is now time for Zambia to create a specialist environmental court, or tribunal. The study also addresses the challenges in the exiting environmental adjudication set up in Zambia. In particular, the study focused on analyzing the prospects and bottlenecks to establish a specialised court or tribunal in Zambia.

The study is relevant to policy-makers, environmentalists, legal practitioners, judges, law reform agencies, environmental researchers, as it offers a broader insight on the operations and role of a specialised court or tribunal in fostering sustainable development and environmental justice. It further interrogated the best practices in environmental adjudication regarding the existing models of specialised environmental courts, or tribunals in jurisdictions including Kenya, Australia, and India.

1.6 Theoretical Framework

This study will have a firm footing in three theories: (i) the public trust theory, (ii) the theory of environmental justice, and (iii) the theory of public participation.

1.6.1 Public Trust Theory in Environmental Matters.

The public trust theory has been termed "the oldest expression of environmental law."[43] Its origin is linked to the ancient Roman law restating that "according to the laws of nature, humans share the air, flowing water, sea, and subsequently, seashores."[44] It is a device that compels the government

---

[43] Douglas Quirke, *"The Public Trust Doctrine: A Primer: A White Paper of the University of Oregon School of Law Environmental and Natural Resources Law Center" (* February, 2016) 1.

[44] Joseph L Sax, *"The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention"* (1970) 68 (3) Michigan Law Review 471-566, 473; Rose M Carol, *'Joseph Sax and the Idea of the Public Trust'* (1998) 25 Ecological Law Quarterly 351, 352.

to conserve the natural resources it holds in trust for the people.[45] In the past, courts have used the public trust doctrine to both waterways and publicly owned natural resources usually to limit the state's ability to significantly alter the resources for one party's benefit.[46] According to Joseph Sax's theory of public trust[47] the government has three obligations, namely, (1) the trust property must only be utilized for public purpose; (2) never sell the property, not even for fair market value; and (3) the property has to be kept up certain uses.[48] It asserts that some natural resources are preserved for use by the public and that the government is obligated to protect them for that use.[49] Courts have used the public trust concept to, among other things, void contradictory laws,[50] demand legislative action,[51] mandate the restoration of land to its former condition,[52] and forbid projects in national parks.[53] Citizens have used the public trust theory to question inefficient management of natural resources and to demand that the government take measures to manage resources effectively.[54]

This theory further posits that because natural resources are limited and inherently subject to public claim, they should be kept in an exceptional eminence "in trust" for the present and future generations.[55] When the 1972 Stockholm Declaration states that the world's natural resources, "including the air, water, land, flora, and fauna, and especially representative samples of natural systems, must be preserved for the benefit of current and future generations through careful planning or management, as possible", it provides evidence for the well-known public trust theory.[56]

This study will benefit from the public trust theory as it explores environmental protection concepts and sustainability principle which is a key foundation of modern environmental law.[57]

---

[45] United Nations Environmental Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd edn. UNEP 2007) 32.
[46] Ibid.
[47] Joseph L Sax (n43) 473
[48] Ibid.
[49] Richard Frank, *"The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future"* (2012) 45 University of California, Davis 665-691, 667.
[50] United Nations Environmental Programme (n44) 33.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Richard Frank (n48) 667.
[56] Ibid.
[57] Richard Frank (n48) 667.

1.6.2 Theory of justice in Environmental Matters.

This research is grounded in the philosophy of justice. John Rawls asserts that fair societies and their institutions should be run properly.[58] A theory of justice holds that every individual has an equal right to basic liberties and that they should have the right to opportunities and an equal chance as other individuals of similar ability.[59] He noted that humans need laws in order to cooperate and create communal and individual values in society.[60] According to some definitions, access to justice includes both the ability of courts to scrutinise government actions and oversights and the freedom of individuals to ask courts to do so.[61]

John Rawls attempted to resolve the problem of distributive justice in society. The term "distributive justice" relates to how honour, money, and other communal resources that may be divided among its members are distributed.[62] It has been argued that the power dynamics that supported distributive justice are based on procedural justice.[63] When a decision is made, procedural justice is considered to relate to how it was reached, emphasising the fairness of the decision-making process rather than its outcomes.[64] This study made the case that in order to guarantee that the underrepresented or marginalised groups of society engage fully in environmental decision-making processes, such as environmental impact assessment procedures, courts must interpret environmental justice with audacity.

1.6.3 Theory of Public Participation in Environmental Decision-making.

According to Kathryn Quick and John Bryson, public engagement in governance includes stakeholders' direct or indirect participation in decision-making concerning policies, plans, or programmes that pertain to their interests, concerns, or values.[65] It aims to improve decisions that the public supports through "two-way communication and interaction.[66] Public participation in governmental choices that may have an impact on the environment, either negatively or

---

[58] John Rawls, *'A Theory of Justice'* (Revised edn, Cambridge 1999) 3.
[59] Ibid.
[60] United Nations Environmental Programme (n44) 62.
[61] Ibid.
[62] Kuehn, *"A Taxonomy of Environmental Justice"* 10683.
[63] Pamela Towela Sambo, *A Conceptual Analysis of Environmental Justice Approaches: Procedural Environmental Justice in the EIA Process in South Africa and Zambia (University of Manchester 2012*) 74.
[64] Ibid 75.
[65] Kathryn S Quick and John M Bryson, "Public Participation" in Jacob Torbing and Chris Ansell (eds), *Handbook in Theories of Governance*, (Edward Elgar Press 2016) 1.
[66] James L Creighton, *"The Public Participation Handbook: Making Bretter Dececisions Through Citizen Involvement,"* (Jossy-Bass 2005) 7.

constructively, is a newly developing environmental right.[67] The public involvement paradigm in environmental decision-making processes is not only addressed in the Rio Declaration[68] and the Aarhus Convention[69], but increasingly also in many national constitutions, such as the Zambian constitution.[70]

This study undoubtedly benefited from the notion of public participation since the environmental justice movement is dependent on the need for public engagement in environmental decision-making that affects the general public or communities. In accordance with international standards,[71] the Zambian Constitution,[72] statutes,[73] and the regulations[74] also provide lawful public participation in environmental decision-making.

1.7 Literature Review

Many authors have written on the subject of specialised environmental courts or tribunals. However, there is hardly any literature focusing on the Zambian context.

According to professors George (Rock) Pring and Catherine (Kitty) Pring[75] in their book *"Environmental Courts and Tribunals: A Guide for Policy Makers*" environmental courts and tribunals are rapidly changing the global system for environmental justice.[76] They see this increase as one of the most significant developments in environmental institutions and legislation in the 21st century.[77] They add that attaining the UN's Sustainable Development Goal 16—to ensure access to justice for all and to create effective, responsible, and inclusive institutions at all levels—requires strengthening the environmental rule of law, access to justice, and environmental conflict resolution.[78] They contend that the Sustainable Development Goals and the 2030 Agenda for Sustainable Development

---

[67] United Nations Environmental Programme (n44) 59.
[68] Rio Declaration, Principle 10 relating to public participation in specific projects or activities.
[69] Aarhus Convention Arts. 6, 7 and 8 relating to public participation in programmes, plans, policies.
[70] The Constitution of Zambia (Amendment) Act 2016, Art.257 (d).
[71] Rio, Declaration on Environment and Development; Principle 10 that "environmental issues are best handled with the participation of all concerned citizens at the relevant level." (UN, 1992).
[72] Ibid Art 255 (l); 257 (d).
[73] The Environmental Management Act 2011, s 91.
[74] The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997, SI 28 of 1997, Reg. 10.
[75] George (Rock) Pring and Catherine (Kitty) Pring, (n12) 1.
[76] Ibid.
[77] Ibid.
[78] Ibid, IV.

may both be successfully attained through the use of specialist ECTs. The authors provide a simple reference for anyone thinking of establishing a new ECT or upgrading a current one.[79] They discuss at length the various models of ECTs existing globally and set out best practices, recent trends and have outlined steps to be followed in establishing an ECT.[80]

The Prings work was relevant to this study as it aimed to draw upon the lessons from other jurisdictions on the prospects and challenges to establish an ECT in Zambia.

Don Smith,[81] in his article entitled "*Environmental Courts and Tribunals: Changing environmental and natural resources law around the globe"* [82] acknowledges the findings made by the Prings that there has been a global surge of ECTs established to focus solely on cases involving environmental disputes.[83] He asserts that gaining knowledge about the vital role of ECTs is necessary for lawyers, legal scholars, NGOs, policy makers and environmentalists. He especially urges lawyers representing parties in disputes involving energy, mining, natural resources and environment to take keen interest in these new environmental governance bodies.[84] He argues that failure to familiarize with ECTs, from both procedural and substantive standpoint, legal practitioners may fail to represent their client's interests responsibly.

The present study benefited from Don Smith's article as it added to the scholarly work on ECTs in the context of Zambia and ultimately inform the legal fraternity and others of the special and imperative role of the new form of environmental governance institutions in achieving sustainable development and procedural environmental justice.

In an article entitled "*Environmental Courts and Tribunals: How can Nations Tackle the Growing Demand for Justice on Environmental Issues?"*[85] Erica Woodruff examines the implications of Rio Declaration and Development Principle 10 which mandates that nations must give their citizens

---

[79] Ibid.
[80] Ibid, V.
[81] Don C Smith (n15), 137.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Erica Woodruff, ''*Environmental Courts and Tribunals: How can Nations Tackle the Growing Demand for Justice on Environmental Issues?"* (2012) 39 (3) Denver Journal of International Law and Policy 553.

adequate access to judicial and administrative processes.[86] He contends that given how difficult this task is, nations are left debating how to set up their legal systems so that environmental issues are thoughtfully resolved.[87] Erica acknowledges the 12 elements of a successful ECT as advocated by the Prings which are: the type of forum; the legal jurisdiction; the ECT decisional levels; the geographic area; the case volume; the standing; the costs; the availability of scientific and technical expertise; alternative dispute resolution (ADR); the competency of ECT judges and decision-makers; case management; and enforcement tools and remedies.[88] He exhorts nations to concentrate on these twelve factors when they create their ECTs in order to increase public access to the courts for environmental disputes. He concludes that among the 12 "building blocks," locus standi, costs, and ADR are crucial elements since they directly affect a citizen's first access to ECTs.[89]

Although the context of that work offers a global perspective on ECTs, this study fully benefited from this work as it endeavored to consider the 12 building blocks in the Zambian environmental law adjudication system.

According to Brian Preston's essay, "Characteristics of successful Environmental Courts and Tribunals"[90] twelve qualities are necessary for an ECT to function well in practice. He takes insights from several legal systems, concentrating on the background, goals, and accomplishments of the Land and Environment Court of New South Wales.[91] In addition, he takes into account best practices, both substantive and procedural, based on instances from the worldwide scene regarding the creation of ECTs.[92] The lack of some of the twelve components of a successful ECT, according to Preston, may be the cause of some ECTs' failure. He claims that there is opportunity for ECTs to learn from the successes of other jurisdictions' ECTs and those nations without an ECT yet may also benefit from the best practices mentioned in his essay.[93] He concludes by stating that his article

[86] UN Conference on Environment and Development, Rio de Janiero, (n24).
[87] Erica Woodruff, (n85).
[88] Ibid.
[89] Ibid.
[90] Brian J Preston, *"Characteristics of successful Environmental Courts and Tribunals"* (2014) 26 Journal of Environmental Law 365< http://jel.oxfordjournals.org/ >accessed 21 March, 2022.
[91] Brian J Preston, *"Benefits of Judicial Specialisation in Environmental Law: The Land and Environmental Court of New South Wales as a Case Study"* (2012) 29 (2) [2] Pace Environmental Law Review 397,398< https://digitalcommons.pace.edu/perl/vol29/iss2/2 >accessed 20 March, 2022.
[92] Ibid.
[93] Ibid, 392.

was written to help two groups: (i) those who are planning or establishing ECTs in their country, and (ii) stakeholders and states looking to improve the operations and performance of their specialised environmental courts or tribunals.[94]

This study benefitted from Brian Preston's work by considering the Land and Environment Court of New South Wales in order to properly understand how Zambia might approach its goal to create its own ECT.

In his work titled "The Role of Environmental Tribunals in Pakistan: Challenges and Prospect,"[95] Martin Lau discusses the function and role of environmental tribunals in Pakistan's implementation of environmental protection law. He emphasises how constitutional law and public interest litigation show the application and philosophy of environmental law.[96] He claims that the "right to life under Pakistan Constitution" has been clarified and applied by the Pakistan Supreme Court and other courts, leading to a substantial corpus of environmental jurisprudence.[97] He notes that public interest litigation has received much local and international attention, discussion and publicity as a part of environmental law. He identifies two challenges that specialised environmental courts have encountered in Pakistan being (i) neglect by the government to fully support the entity by establishing and stuffing it, resulting in the tribunals to function sporadically, and (ii) when they do operate, only few judgments are reported in Pakistan law reports. He concludes that because of this imbalance, environmental tribunals' role and function in upholding environmental protection laws have received relatively less attention in the corpus of research on Pakistani environmental law.[98]

The challenges highlighted by Martin Lau were illuminating to this study which also focused on prospects and challenges to establish ECTs in Zambia.

[94] Ibid, 365.
[95] Martin Lau , *"The Role of Environmental Tribunals in Pakistan: Challenges and Prospects" (2021) Koninkiijke Brill NV, Leiden < https://eprints.soas.ac.uk?32989 >accessed 19 March, 2022.*
[96] Ibid 1.
[97] Ibid.
[98] Ibid.

The 2002 Global Judges Symposium in Johannesburg, according to Robert Carnwath's piece titled "Institutional Innovation for Environmental Justice,"[99] provided new inspiration for judges' efforts to preserve the environment.[100] He compares the complex administrative structures in the United Kingdom, where the court's primary functions are judicial review and enforcement, with administrative systems in nations with less established environmental control.[101] He asserts that in these nations, courts have been forced to close the gap by creatively interpreting constitutional guarantees, such as by construing the right to life as granting each person the right to a healthy, pollution-free environment and to effective legal remedies.[102] He contends that the law must promote well-informed and open decision-making, equitable and effective enforcement of environmental regulations, and a fair balance between public goals and private rights.[103]

This study examined whether Zambian courts were filling the legal gap left by the Zambian Constitution, which only guarantees the "right to life"'[104] and not the "right to a clean, safe, and healthy environment,"[105] especially given that the administrative systems and environmental regulations are relatively underdeveloped.

Gitanjali Nain Gill in his study entitled *"The National Green Tribunal: Evolving Adjudicatory Dimensions*"[106] describes the demand for judicial specialization in India to have been driven by both internal and external influences. He argues that the internal demand was fueled by the scientific limits and shortcomings arising from the treatment and progression of environmental cases.[107] He adds that the Supreme Court of India played a significant role in the formation of the ECTs when it determined that an environmental court would benefit from expert counsel offered by environmental

---

[99] Robert Carnwath (n28).
[100] Ibid, 556.
[101] Ibid, 557.
[102] Ibid.
[103] Ibid, 558.
[104] The Constitution of Zambia (Amendment) Act 2016, Art. 12.
[105]Pamela Towela Sambo, "The Environmental Management Act (2011):a basis for the growth of an environmental ethos and good environmental governance in Zambia?" in Patricia Kameri-Mbote, Alexander Paterson, Oliver C Ruppel, Bibobra Bello Orubebe, Emmanuel D Kam Yogo (eds), *Law, Environment, Africa* (1st edn, Germany 2019) 647, 655.
[106]Gitanjali Nain Gill, *"The National Green Tribunal: Evolving Adjudicatory Dimensions"* (2019) 49 (2-3) Environmental Policy and Law 153 https://wwwresearchgate.net/publication/3352/8366 accessed 21 May, 2023.
[107] Ibid.

scientists and technically skilled individuals incorporated in the judicial process.[108] He concludes that the external demand came from the desire to be a 'good international citizen' by the government in order to fulfil its commitments at international level under the various conventions.[109]

India is one of the countries the study considered in trying to appreciate its experience on how both the internal and external demands may motivate Zambia into establishing an ECT.

Donald Kaniaru in an article styled *"Environmental Courts and Tribunals: The case of Kenya"* boasts of the role Kenya has played as a pioneer in establishing ECTs in Africa under its Constitution of 2010 and hopes other countries can draw upon its example.[110] He claims that several tribunals have distinct jurisdictions under the foundation law, and that the Environment and Land Court of Kenya is a higher court of record.[111]

This study drew upon the experiences of Kenya, both positive and negative, in order to achieve its stated objectives.

Pamela Towera Sambo in her article "*The Environmental Management Act (2011):a basis for the growth of an environmental ethos and good environmental governance in Zambia?"*[112] writes on environmental governance in Zambia. She breaks out the history of environmental regulation into three sections: before 1990, post-1990, and after 2011.[113] She contends that environmental awareness is essential for the judiciary, which highlights the issue of specialist environmental courts as an essential component of the idea of "greening the judiciary."[114] She does not however, go further to discuss in detail the nature of ECTs or the possibility of establishing the same in Zambia as this study explored.

---

[108] Ibid.
[109] Ibid.
[110] Donald W Kaniaru, "*Environmental Courts and Tribunals: The case of Kenya"* (2012) 29 (2) (7) Pace Environmental Law Review 566.
[111] Ibid.
[112] Pamela Towera Sambo (n105).
[113] Ibid.
[114] Ibid; see also M Kidd, *"Greening Judiciary"* (2006) 9 (3) Potchefstroom Electronic Law Journal 72.

According to Chipasha Mulenga's book, *"The Law on Mining and Environmental Protection in Zambia,"* the judiciary is regarded as a guarantor of the protective benefits of environmental law in environmental matters, including to ensure the attainment of environmental rights for both the present and future generations..[115] He acknowledges that the manner in which the courts react to environmental related cases brought before them can have a profound transforming impact on society.[116] He has identified a number of discrepancies in the way the general courts in Zambia have handled justiciability questions or concerns, including "standing or locus standi," the definition of "public interest," and the necessity of "demonstrable harm."[117]

This study explored how the existence of specialised courts or tribunals offer significant strategic opportunities that may be unavailable for the concerned general public in traditional judicial court systems.

In *"Foreign Direct Investment in the Zambian Mining Sector: The Need for Environmental Protection and Human Rights,"* Chipasha Mulenga notes that achieving a clean, safe, and healthy environment depends on a functioning legal system that supports public interest litigation.[118] He however, notes that the interpretation of environmental cases preferred by the regular courts in Zambia does not reflect international practices. He begins by stating that judges' interpretations of environmental law are based on either outdated information or a lack of understanding of the environmental area. He insists that an environmental court must be established in Zambia as a specialised section of the High Court, with justices trained in environmental law, as is the situation in Ghana and Kenya.

This study added to the debate why Zambia needs an environmental court or tribunal to ensure speed dispensation of environmental justice in Zambia with the inspiration of successes from other countries such as Kenya, Australia and India.

---

[115] Chipasha Mulenga (n1) 187-188.
[116] Ibid.
[117] Ibid.
[118] Chipasha Mulenga, *Foreign Direct Investment in the Zambian Mining Sector: The Need for Environmental Protection and Human Rights,* (University of Pretoria 2017) 228.

1.8 Methodology

This study was essentially a qualitative desktop-based and library literature-based study. This approach was relevant as it enabled the study to meet the study objectives. Qualitative study is a systematic and interactive scholarly approach used to describe life experiences, cultures, and social processes from the perspective of the persons involved aimed at understanding the human experience about facts and not figures.[119] It draws knowledge on the subject from reliable primary and secondary sources. In addition, it widely recourses to historical and comparative approaches in analyzing the facts relating to specialised environmental courts or tribunals and their rationale.

Primary sources of information consulted included the Constitution of the Republic Zambia and various statutes on environmental management and conservation. However, secondary sources of information will include (a) pertinent books and journal articles; (b) study reports on specialised environmental courts or tribunals; (c) academic and researcher papers on issues pertinent to the study; and (d) NGO's reports, speeches, and daily newspapers covering material pertaining to the matters under debate.

1.9 Scope of the Study

The study's scope was strictly confined to an analysis of environmental-specific courts or tribunals. As Kenya, India, and Australia have lengthy histories of creating dedicated environmental courts or tribunals and share a common law heritage with Zambia, these countries were studied for best practises and current trends in establishing such courts or tribunals. The study was also be limited to qualitative data only and not quantitative data.

1.10 Ethical Considerations

The researcher assured all persons that were contacted for information needed to accomplish this study that such information was for academic purpose only. Further, that unless the informant consented, their identity would not be revealed. Those identified to provide their perspective on the topic were contacted using the most convenient mode of communication in full compliance with the Covid-19 pandemic guidelines.

---

[119] Jennifer R Gray, Susan K Grove and Suzanne Sutherland, *Burns and Grove's The Practice of Nursing Research: Appraisal, Synthesis, and Generation of Evidence*, (8th edn, Elsevier Inc., 2017).

1.11 Outline of Chapters

Five chapters make up this study. Chapter one introduces the study. The overall nature of environmental courts and tribunals is covered in Chapter 2. Chapter three focuses on the prevailing environmental law and adjudication in Zambia with a focus on environmental case-law analysis. Chapter four looks at critical analysis of the ECTs' model solutions as alternative to traditional courts in Zambia. Chapter fives makes conclusion while at the same time offering some recommendations.

1.12 Summary

This chapter discussed the introductory considerations to the dissertation. It highlighted the global surge in the importance of specialised ECTs as compared to traditional court system. It stressed the absence of a specialised forum in Zambia to adjudicate environmental related disputes including the fast growing climate change litigation despite the Constitution and relevant environmental statues having embraced international environmental law principles. Furthermore, the chapter surveyed certain scholarly works on the theories explaining the benefits of environmental law dispute adjudication through specialised fora.

The chapter also showed what several scholars have discovered regarding the significance of specialised ECTs while at the same time pointing out the absence of literature or debate on the subject of prospects of establishing ECTs in Zambia. Finally, this chapter outlined the dissertation's divisions.

CHAPTER TWO

ENVIRONMENTAL LAW AND THE NATURE OF SPECIALISED ENVIRONMENTAL COURTS AND TRIBUNALS

2.1 Introduction

What is presently referred to as 'environmental law' is continuously developing. It is occasionally succeeding and often failing, extraordinarily complex and often misconstrued, developing incrementally, often haphazardly and is still evolving.[120] This makes it essential to start by describing and analysing the development of environmental legislation in order to determine its future development. This chapter's main objective is to give a broad picture of how environmental legislation has changed from the early 20th century to the present. Later, it will outline environmental courts or tribunals in other countries by highlighting achievements made by dedicated environmental courts in Australia, India, and Kenya. This chapter is therefore essential to understanding the chances of setting up an environmental court or tribunal in Zambia.

2.2 Evolution of Environmental Law and Actors

According to this study's definition, environmental law is "that body of law that deals with environmental issues."[121] at the local and global level. In this respect, the origins of environmental law is fairly unambiguous. It relates to the history of the state employing statutory law to address some of the weaknesses of private law controls of environmental problems.[122] It has been noted that private law's main drawbacks, such as nuisance law, were how badly it safeguarded private property rights and how little it did to advance broader environmental protection objectives.[123] The interconnectivity of ecological issues and the understanding that any action taken by an individual or state would have a significant impact on another are the background against which environmental law has emerged.[124] Its evolution has not been a linear process, often moving in various directions as a reaction to specific environmental problems.

---

[120] Stuart Bell and Donald McGillivray, *Environmental Law* (7th edn, Oxford University Press 2008) 39.
[121] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) 28.
[122] Ibid.
[123] Ibid.
[124] Michael Ewing-Chow and Darryl Soh, *'Pain, Gain, or Shame: the Evolution of Environmental Law and the Role of Multinational Corporations'* (2009) 16(1) (7) Indiana Journal of Global Legal Studies 195,196.

It is important to note that the global nature of many environmental issues has played a significant role in the evolution of environmental law. Due to the increased severity of environmental issues, such as industrial accidents and climate change, it is now widely believed that there must be global solutions.[125] Given these facts, therefore, it has been suggested that the development of environmental legislation may be divided into three distinct phases[126]: (i) the traditional phase (pre-1972), (ii) the modern phase (1972-1992), and the post-modern phase (1992-to date). These stages correspond to the early stages of environmental law, when its fundamental structure was still developing.

(i) Traditional Phase – Pre-1972

Early in the 20th century, most countries passed domestic environmental laws to address particular environmental issues, well aware that individual activities required collective control at the state level.[127] At this stage, environmental law was largely a product of ad hoc reactions to particular environmental problems, and manifested little by way of preventive policy with scarce relevant global legal instruments.[128] For instance, environmental law may often be attributed to domestic regulations intended to save fish, migrating birds, seals, and other threatened species.[129] Countries believed that their sovereignty safeguarded the use of natural resources and economic activities inside their boundaries, and that no other state should or could intervene.[130] The notion that "no state is an island" would subsequently weaken the sovereignty premise.[131]

By 1940s, the "*Trail Smelter* " case[132] arose and it was the first key environmental law case with a global dimension on environmental law adjudication focusing on transboundary pollution.[133] The United States of America and Canada were at odds over the Canadian smelting facility's emissions

---

[125] Ibid.
[126] Ibid.
[127] Ibid, 197.
[128] Justine Thornton and Silas Beckwith, *Environmental Law: Sweet & Maxwell's Textbook Series* (2nd edn, Sweet & Maxwell 2004) 9.
[129] Michael Ewing-Chow and Darryl Soh (n124) 198.
[130] Ibid, 201.
[131] John Donne, *Devotions Upon Emergent Occasions* (Reprint edn, Kessinger Publishing 2004) 62.
[132] *Trail Smelter Case (United States v. Canada), 3RIAA 1905(Trail Smelter Arb. Trib 1938).*
[133] Justine Thornton and Silas Beckwith (n128) 29.

of sulphur fumes, which adversely affected Washington state's grassland, trees, and crops.[134] The arbitral tribunal declared that "no state has the right to use or permit the use of its territory in such a way as to harm the territory of another state or the properties or people therein, and that states are responsible for environmental harm caused by activities conducted within their borders."[135] This ruling has had a significant impact on promoting international cooperation and has been hailed as a turning point for environmental law globally. From this point forward, nations started to recognise that domestic industry actions could result in transboundary responsibility for states.[136]

(ii) Modern Phase (1972-1992)

Typically, the United Nations Conference on the Human Environment in Stockholm, Sweden, is credited as being the turning point in environmental legislation.[137] According to Michael Ewing-Chow and Darryl Soh,[138] the Conference was crucial in determining the course environmental law would follow by the end of the 20th century. The Stockholm Conference resulted in the ground-breaking, but non-binding, Stockholm Declaration, which served as the precursor of contemporary international environmental legislation. It consists of seven-point Preamble and its 26 Principles[139] and manifests a strongly human-centric approach.[140] It served as a first step in assessing how human actions, such as overgrazing, deforestation, and the draining of wetlands, negatively affect the biosphere.[141]

The Stockholm Declaration's Principle 1 seems to imply a right to a healthy environment and related intergenerational responsibility.[142] According to Principle 21, nations have the sovereign right to exploit their own resources within the confines of international law, but they also have a responsibility to make sure that these actions do not harm places outside of their national borders.[143] The

---

[134] Ibid, 30.
[135] Trail Smelter Case (n132).
[136] Philipe Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003) 30.
[137]Justine Thornton and Silas Beckwith (n128) 34.
[138] Michael Ewing-Chow and Darryl Soh (n124) 204.
[139] United Nations *'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, A/CONF48/14/Rev 1 (New York 1973) 3-5.
[140] Gunther Handl, *'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992'* (2012) United Nations Audio-visual Library of International Law 1.
[141] Philipe Sands (n136)35.
[142] United Nations (n139).
[143] Ibid.

Stockholm Declaration reaffirmed the idea of state responsibility and acknowledged that every country bears some role in this global cooperation.[144] States also recognised that to tackle the transboundary character and effects of environmental challenges, global collaboration was required. The United Nations Environmental Programme (UNEP), the first global organisation to systematically address environmental issues, was created at the same time.[145] The Stockholm Declaration is essentially "soft law," which is a legal-appearing but non-binding declaration that does not establish rights and responsibilities.[146] However, soft law can be politically significant in setting down intentions and aspirations.[147] A number of its provisions served as the foundation to shape future normative expectations.

Subsequent to the 1972 Stockholm Declaration, global consciousness of environmental problems tremendously increased the international environmental law-making proper.[148] Therefore, by 1992, the world community had grown even more persuaded of the severity of the earth's environmental problems.[149] As a result, 172 nations ratified the Rio Declaration on Environment and Development (Rio Declaration) at the Rio de Janeiro, Brazil-based Earth Summit.[150] The Conference produced, among others, the Rio Declaration which defines the rights and responsibilities of countries. It marked a conceptual revolution, in that it added the natural world to the social and economic dimensions of 'development' to bring to birth the concept of 'sustainable development.'[151] The Rio Declaration affirms the values of the Stockholm Declaration and aspires to further them by establishing a new, just global partnership.[152]

The Rio Declaration's Principle 10, which deals with the creation and administration of efficient environmental judiciaries, is crucial to this study. It demands that nations give residents efficient access to information on judicial and administrative procedures, public engagement, and legal

[144]Michael Ewing-Chow and Darryl Soh (n124) 204.
[145] Ibid.
[146] Asian Development Bank, *'Climate Change, Coming Soon to a Court Near You: Report Series Purpose and Introduction to Climate Change,* (December 2020) 56.
[147] Ibid.
[148] Gunther Handl (n140).
[149] Ibid 205.
[150] UN Conference on Economic Development, Rio de Janiero (n24); Rackemann, *'Environmental Dispute Resolution – Lessons from the State'* (2013) 30 Environmental Planning and Law Journal 329.
[151]Justine Thornton and Silas Beckwith (n128) 36.
[152] Asian Development Bank (n146) 57.

redress and remedies in environmental challenges.[153] According to George Pring and Catherine Pring, this difficult task leaves nations unsure of how to effectively set up their legal systems to handle environmental challenges.[154] Domenico Amirante contends that as a result, national systems of access to justice, judicial organisation, and environmental sensitivity have emerged as key concerns in the execution of both environmental legislation and the principles of sustainable development.[155] As a result, since the Rio Conference, environmental law has advanced, leading many countries to modify their procedural, constitutional, and institutional frameworks. Courts and tribunals are now essential in the era of compliance and enforcement due to the rise in complicated environmental rules and environmental litigation.

(iii) Post Modern Phase – 1992 to date

After the Earth Summit, environmental law has been regarded as entering a consolidation phase[156] as the global community focus on procedural, constitutional and institutional procedures more than conclusion of new treaties on environment. Environmental law enforcement and monitoring, and introduction of methods to achieve practical implementation has become the main focus.[157] In light of this, it is not surprising that developing or recently developed countries are currently leaning towards the establishment of specialised courts and tribunals to deal with an increase in multifaceted environmental rules[158] including an overall increase in environmental and climate change litigation, and to provide simple access to justice for citizens, civil society organisations, and disadvantaged groups.[159]

It is no wonder that the Johannesburg Principles affirmed that an impartial court and judicial system are essential for the formulation, implementation, and enforcement of environmental legislation.[160] To this end, several nations have recognised the vital importance of the Johannesburg Principles

---

[153] UN Conference on Economic Development, Rio de Janiero (n24) Principle 10.
[154] George Pring and Catherine Pring, '*Environmental Courts and Tribunals: How can Nations Tackle the Growing Demand for Justice on Environmental Issues?'*<http://www.law.edu/document/ect-study/unitar-Yale-Article.pdf> accessed on 10 March 2022.
[155] Domenico Amirante (n8) 441.
[156] Domenico Amirante (n8) 445.
[157] Ibid.
[158] Hilario Davide Jr and Sara Vinson, *'Green Courts Initiative in the Philippines'* (2010) (3) 91) Journal of Court Innovation 122 *<https://www.courts.state.ny.us/court.innovation/Winter-2010/index.shtml.>accessed 15 September 2022.*
[159] Domenico Amirante (n8) 445.
[160] United Nations Environmental Programme (n9).

and adopted innovative models of environmental governance, such as dedicated environmental courts or tribunals (ECTs), to resolve environmental disputes.[161]

2.3 Specialised Environmental Courts or Tribunals

The first definition of ECT promoted by Pring and Pring describes these institutions as administrative entities of government with the authority to focus on resolving disputes relating to the environment, natural resource, land use and development, and associated conflicts.[162] The call for improved "access to environmental justice, the environmental rule of law, sustainable development, a green economy, and climate justice"[163] is more urgent than ever. In response to these calls, policymakers, decision-makers, and other interested parties, including legislators, judges, and civil society leaders, are examining their governance institutions closely and establishing new judicial and administrative bodies to enhance access to justice and environmental governance.[164]

According to Brian Preston, the judiciary is still essential for interpreting, explaining, and upholding laws and regulations.[165] To this end, it has been argued that In order to achieve environmentally sustainable growth, a dedicated court with knowledge in environmental issues is best suited to undertake this duty.[166] This is so because specialised environmental courts, through their case law, are authoritative, are eminent, interpretative groups that give environmental concepts a legal persona within a certain legal ethos.[167] As pointed out by Klaus Bosselmann, the importance of environmental principles is more strongly influenced by how courts interpret them than by their legal standing.[168] Indeed, courts are acknowledged to be among the most potent institutions tasked with upholding the environmental rule of law. They are essential to the development of concepts, substantive norms, and legal competence to advance environmental justice, as well as the resolution of actual conflicts.[169]

---

[161] George (Rock) Pring and Catherine (Kitty) Pring (n5).
[162] George (Rock) Pring and Catherine (Kitty) Pring (n18) 3.
[163] Linda Yanti Sulistiawati, Farah Bouquelle, Jolene Lin, Luc Lavrysen, Mark Ortega, Ricardo Pereira and Sean Tseng (n17) 1.
[164] Ibid.
[165] Brian J Preston (n91) 397, 398.
[166] Ibid.
[167] Eloise Scotford (n121) 16.
[168] Klaus Bosselmann, '*The Principles of Sustainability: Transforming Law and Governance'* (Ashgate, 2008) 44.
[169] Ibid.

2.4 Models for an Environmental Court or Tribunal

There is no "one-size-fits-all"[170] ECT. It has been appropriately observed that types of laws, legal structures, cultural norms, and socioeconomic circumstances in each country will influence the most effective form of an ECT.[171] With this in mind, a tectonic shift must be made towards a discussion of environmental court and environmental tribunal models as alternatives to traditional courts.

2.4.1 Specialised Environmental Courts

Specialised environmental courts (ECs) combine two popular ideas; environmentalism and protection of property values.[172] An environmental court has been broadly defined as an adjudicative forum for environmental dispute set up inside the government's judicial branch.[173]

According to their independence in making decisions, the following environmental court models were identified by the UNEP's Guide for Policy Makers-2021: "independent ECs and ETs; green benches, chambers, or other formal and informal groups of judges within a court with general jurisdiction where environmental cases are either formally or informally assigned to specific judges within generalist courts who have training and expertise in environmental law; and ETs located within another government agency such as the environmental agency."[174] A discussion of the models will now follow.

(a) Free-Standing Environmental Court Model

A free-standing environmental court model denotes a standalone court in the country's judicial system. It requires an empowering statute which outlines its establishment and purposes. It is operationally independent and is held to be the most expensive and complex to set up.[175] Prior to establishing this model, a nation would need to conduct a needs assessment.[176] It helps

---

[170] United Nations Environmental Programme, '*Environmental Courts and Tribunals-2021: A Guide for Policy Makers'* (UNEP, Nairobi, 2022) 42.
[171] Ibid.
[172] James Michael Angstadt, *'Green Courts and Global Norms: Specialised Environmental Courts and the Global Governance of Environmental Challenges'* (Colorado State University 2019) 8.
[173] George (Rock) Pring and Catherine (Kitty) Pring (n18).
[174] United Nations Environmental Programme (n170).
[175] George (Rock) Pring and Catherine (Kitty) Pring (n12) 20.
[176] Ibid.

governments to make an informed decision prior to creating this institution.[177] This approach was employed in Kenya before the a decision to establish a standalone EC in the Kenya's judiciary.[178]

It is agreed that a free-standing EC has the exclusive authority to hear and rule on environmental cases, in accordance with the enabling law.[179] This EC model requires qualified personnel, physical infrastructure, and rules of court.[180] It has been argued that free-standing models of ECs exhibit independency of the court, a factor that is vital for obtaining environmental justice. Actually, the greater a court's independence from the political system and administrative pressure, the greater the likelihood that its judgments would be seen as just, equitable, and impartial by the government and the general public.[181]

According to UNEP, countries should aspire to set up free-standing, fully or substantially independent environmental courts, even if it might not always be the optimal strategy for a "start-up" environmental court.[182] Examples of ECs in this category are the Land and Environment Court (LEC) of the State of New South Wales in Australia, the Environmental Court in New Zealand, and the Environment and Land Court in Kenya.

(i) The Land and Environment Court of the State of New South Wales in Australia

It was established by the Land and Environment Court Act of 1979. It is a free-standing environmental court and a superior court of record.[183] It is acknowledged as one of the most innovative and successful due to several procedural innovations tailored to environmental situations and best practices. Furthermore, it has become a model for other countries around the globe to follow when creating their own environmental specialist courts and environmental jurisprudence.[184] It is also an

---

[177] Ibid.

[178] Donald W. Kaniaru, *'Environmental Courts and Tribunals: The Case of Kenya*' (2012) 29 Pace Environmental Law Review566 Available at: https://digitalcommons.pace.edu/pelr/vol29/iss2/7 accessed 7 February 2023.

[179] United Nations Environmental Programme (n44) 44.

[180] George (Rock) Pring and Catherine (Kitty) Pring (n12).

[181] Ibid.

[182] United Nations Environmental Programme (n44) 20.

[183] Brian J Preston, *'Judicial Specialisation Through Environmental Courts: A Case Study of the Land and Environmental Court of New South Wales'* (2012) 29 (2) [10] Pace Environmental Law Review 602-625, 603< https://digitalcommons.pace.edu/perl/vol29/iss2/10 >accessed 20th September, 2022.

[184] Ibid.

example of an environmental court that has very broad authority and sole control for environmental deterioration, land law, land-use planning and development maters, building and mining matters, natural resource matters, as well as environmental criminal jurisdiction.[185]

According to UNEP, the LEC includes 22 science-technical commissioners, 12 law judges, and a registrar with broad administrative and quasi-judicial authority.[186] It handles matters including disagreements over commitments related to climate change, human rights, and the defence of indigenous land rights in planning and traditional tort actions.[187] Although the Australian High Court and the civil and criminal appellate courts examine its rulings, its operations and judgments are generally autonomous.[188]

(ii) Environmental Court in New Zealand

The Environmental Court in New Zealand is one of the first free-standing environmental courts and is still regarded as one of the finest at incorporating best practices such information technology and alternative dispute settlements.[189] Its workforce includes 15 environment commissioners with mediation training, as well as 9 environment judges with legal backgrounds. [190] Due to its three geographically dispersed registries and ability to conduct hearings in the locus *inquo*, or location in question, the court is able to develop a uniform national environmental jurisprudence for all residents.[191] Most notably, the authorizing act enables the environmental court to control its operations as it deems proper, exempting it from regular court norms of evidence and procedure.[192]

(iii) Environment and Land Court in Kenya

This is another self-standing environmental court. In accordance with Article 162(2)(b) of the Kenyan Constitution of 2010 and the Environment and Land Court Act, it is a specialty statutory environmental court..[193] It has the same standing as Kenya's High Court and considers and

[185] United Nations Environmental Programme (n2) 206.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Chapter 32, Laws of Kenya.

determines cases involving the environment, as well as the use, occupation, and ownership of land.[194] Its decisions are appealable to the Court of Appeal. It has jurisdiction over environmental and land disputes, environmental planning and protection, climate change concerns, land-use planning, title, tenure, borders, rates, rents, value, mining, minerals, and other resource disputes, as well as conflicts involving the forced acquisition of property.[195] Collins Odote asserts that in order to incorporate environmental and zoning issues, the Kenyan Environment and Land Court substantially drew inspiration from the New South Wales design.[196]

(b) Specialised Green Chambers

The term "Specialised Green Chambers" refers to the development of a specialist unit, division, branch, chamber, a panel of judges, or a judge who operates inside the country's main court system and is charged with hearing and resolving environmental problems.[197] These environmental courts have great independence in their processes, regulations, and ability to make decisions.[198]

Unlike free-standing environmental courts, the enactment of an enabling legislation is not necessary when establishing a specialised green chamber. Its effect can be by a magistrate or a judge of the court.[199] Countries that use this strategy either have a permanent courtroom set aside for environmental disputes in their usual judicial system or create temporary environmental courtrooms as needed. According to the UNEP 2016 Guide for Policy Makers, among other nations, Uganda and India have environmental courts that fit this description.[200]

It has been noted that the distinguishing feature of this model is its adaptability, allowing any court to set up a green chamber when a case concerning the environment is submitted.[201] The court is still open to the public since anyone who wants to submit an environmental complaint can still do so in any court in the country. Another benefit of this model is that it enables the court to manage its

---

[194] Ibid, 207.
[195] Ibid Section 13 of the Act.
[196] Collins Odote, 'The Role of the Environment and Land Court in governing natural resources in Kenya', in in Patricia Kameri-Mbote, Alexander Paterson, Oliver C Ruppel, Bibobra Bello Orubebe, Emmanuel D Kam Yogo (eds.) *Law, Environment, Africa* (1st edn, Nomos, Germany, 2019) 342.
[197] Linda Yanti Sulistiawati *et la*, (n17) 45.
[198] Ibid.
[199] Ibid 6.
[200] Ibid 24.
[201] Ibid.

caseload while keeping it manageable, especially when the quantity and complexity of environmental cases change.[202]

Australia's Planning and Environment Court is a unique green chamber that operates inside the normal trial court system.[203] The UNEP 2016 ECT Guide notes that the Planning and Environmental Court of Queensland benefits from less administrative costs, less management time, and more efficiency by sharing overhead, budget, courtrooms, employees, and facilities with the regular court.[204] Expert judges are chosen based on their legal knowledge, planning experience, and curiosity.[205]

On the other side, the Vermont Superior Court's Environmental Division is another illustration of a judicially autonomous green chamber. Within the state's general trial court system, it is usually considered as a successful trial court with nationwide jurisdiction.[206] This court employs a variety of expert witness management techniques and supports environmental efforts and sustainable development, among other excellent practices.[207] It is a one-stop-shop for environmental litigation. Even though instituting these specialised green chambers may not entail a distinct budget for setting up, one significant disadvantage would be the court's historic lack of flexibility to adopt novel, creative problem-solving approaches when deciding environmental disputes.[208]

(c) Green Judges

The term "green judge" refers to a single trial judge assigned to environmental cases in a nation's regular court system. Green judges should ideally be given other cases as they come up rather than only environmental ones. More frequently than not, rather than through law, the appointment of specialised green judges is based on a court rule, the Chief Justice's judgement, or the President of the court's decision.[209] This strategy is appropriate for countries whose caseload, financial, and human resources are insufficient to support a court or chamber of judges specifically dedicated to

[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Ibid.

environmental law disputes. It appears that this model may be viewed as a gini pigi (as a one-step-at-a-time) prototype in preparation to building up a specialist green chamber model that might eventually extend to an independent EC model through the enactment of appropriate laws by Parliament.[210] Indonesia serves as an illustration of this concept, where judges have been certified and trained in environmental law since 2011.[211] Even though the nation already has an environmental court, UNEP recommends educating as many general court justices on environmental law as feasible.[212]

2.4.2 Environmental Tribunals

Environmental tribunals (ETs), as opposed to environmental courts, are entities or specialist government agencies with the authority to make judgments that have legal force.[213] Tribunals are thought of as the initial step in avoiding environmental problems and offering appropriate remedy.[214] They may be included in a stand-alone EC model or they may be created under the ministry or government agency selected to oversee environmental issues. According to Linda Yanti Sulistiawati *et la*, three diverse environmental tribunal models exist founded on their decision-making freedom.'[215]

(a) Independent Environmental Tribunals

Enabling law makes it possible to establish independent environmental tribunals, which are often distinct, completely or mostly autonomous tribunals.[216] In general, they are in charge of their own operations, policies, and most crucially, decisions.[217] The National Environment Tribunal in Kenya is one good example that illustrates this category. It was established under Kenya's framework environmental law with jurisdiction over appeals arising from National Environment Management Authority decisions on the issuance, denial, or revocation of environmental impact assessment

[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] George (Rock) Pring and Catherine (Kitty) Pring (n18).
[214] Ibid 32.
[215] Ibid.
[216] Ibid, 54.
[217] Ibid.

licenses[218] for major developments such as roads, industries, housing facilities, hazardous waste, tourist facilities, marine activities, and appeals of forestry decisions.[219]

The realisation that environmental degradation cases were commonplace but that regular courts were taking a long time to decide them led to the establishment of the tribunal in Kenya. During this time, the parties affected and the environment itself suffered, sometimes irreparably.[220] Furthermore, in order to encourage parties involved in environmental conflicts to seek justice, a more adaptable dispute resolution process was required.[221] Additionally, even though common people had legal rights to protect the environment, judicial procedures were frequently expensive. Therefore, the tribunal aimed to ensure that people could access justice effectively.[222] It is not bound by court rules of evidence and has the authority to create its own rules of procedure, which it keeps clear and concise to keep the proceedings amicable and casual for everyone, especially parties participating in person.[223] It can select specialists to assist it, and its fees are lower than those of regular courts to ensure accessible to everyone in need.

In Zambia, the Lands Tribunal,[224] Tax Appeals Tribunal[225] typifies the operationally independent environmental tribunals.

(b) Quasi-independent Tribunals

This category often refers to tribunals that were founded and function under the guidance of another agency, whose judgment they do not review.[226] While they are decisionally independent, such an environmental tribunal is not a stand-alone environmental tribunal *per se*. Another government organisation or agency has operational and administrative authority over it.[227] However, this type of

[218] Linda Yanti Sulistiawati *et la*, (n17) 32.
[219]United Nations Environmental Programme (n170) 32.
[220] United Nations Environmental Programme (n2) 207.
[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] Linda Yanti Sulistiawati *et la*, (n17) 45.
[225] The Tax Appeals Tribunal Act, 2015.
[226] Linda Yanti Sulistiawati *et la*, (n17) 45.
[227] Ibid 56.

environmental tribunal is still substantively independent in the sense that its judgments are autonomous and not subject to review by their supervising governmental bodies.[228]

The Environmental Administrative Tribunal, which was founded under the 1995 Organic Law on the Environment, is a prime example of this group.[229] The Ministry of the Environment and Energy oversees this descentralised organisation.[230] The Tribunal, on the other hand, has sole jurisdiction and operational independence to carry out its duties.[231] Although it does not set its own regulations but rather abides by those outlined in the Organic Law and public administrative law, it has the authority to hear complaints for infractions of all environmental laws across the nation.[232] The Tribunal can adopt interim protective measures in accordance with the precautionary principle, impose fines and administrative punishments for the removal of already done harm,[233] and require environmental restoration actions, among other remedies.[234]

(c) Captive Environmental Tribunals

These environmental tribunals are bodies whose members are chosen by, responsible to, and/or headquartered within the environmental organisation whose judgments they are tasked with reviewing. In actuality, they are governed by an organisation whose administrative, financial, and policy choices are subject to scrutiny by the environmental tribunal.[235] Therefore, captive environmental tribunals are typically thought to be subject to the political, legal, and policy objectives of their parent organisations.[236] In Zambia, captive tribunals may include the Mining Appeals Tribunal,[237] and the Planning Appeals Tribunal.[238]

[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid 57.
[236] Ibid.
[237] Mines and Minerals Development Act 2015; s 98.
[238] Urban and Regional Planning Act 2015; s 62.

2.5 ECTs Best Practices in Improving Environmental Justice

According to Brian Preston, the effectiveness of an environmental court or tribunal depends on its having broad authority to handle all national environmental legislation and being recognised by the government.[239] Since these factors might impede the initial installation of an ECT, it is argued that ECTs function most successfully when their status, power, and jurisdiction[240] are clearly defined in the enabling law. It has also been recognised that ECTs need to hire judges who have experience or training in environmental law and who can contribute to the advancement of environmental jurisprudence.[241] An environmental court or tribunal will be able to build a deep and comprehensive environmental jurisprudence thanks to another external factor: a caseload that is sufficient.[242]

According to Pring and Pring,[243] there are a range of 'best practices' that characterize successful environmental courts or tribunals. The term "successful" has been characterised as practices that provide greater access to justice, improved environmental jurisprudence, strengthened rule of law, and utilisation of procedures that lead to a quicker judgment and decrease in participant expenses.[244] Therefore, it is clear that the evaluation of best practices goes beyond quick, inexpensive, and simple decision-making.[245] Best practices that characterise ECTs can be defined both at design and operation stages of ECT.

2.5.1 Design Stage – Good Practices

The majority of ECT professionals concur that the first authorising law and guidelines establishing the ECT should take into consideration the following best practices.

(i) Independence and Impartiality

Linda Yanti Sulistiawati et al,[246] claim that one benefit of operational ECT is that they are typically politically impartial. Thus, it has been argued that for an ECT to be legitimately recognised as entities that can offer citizens reparation for their grievances, they must manifest independence and

---

[239] Brian J Preston (n90).
[240] United Nations Environmental Programme (n170) 26.
[241] Ibid.
[242] Brian J Preston, (n90) 388.
[243] United Nations Environmental Programme (n170) 44.
[244] Ibid.
[245] Brian J Preston (n90) 384.
[246] Linda Yanti Sulistiawati *et la(n17) 27.*

impartiality.[247] This idea of independence encompasses not just freedom from the other state apparatuses but also from non-State entities like the media and business. These might persuade an ECT, in the lack of independence, to rule on things before it based more on public opinion than their legal and factual merits.[248]

Brian Preston[249] contends that institutional structures and governing laws should demonstrate independence in order to promote the objectivity of ECT judges and other decision-makers. Institutional arrangements that should be taken into account include things like "selection criteria for ECT judicial appointments, the provision of the long-term tenure and security of tenure, safeguards against the removal of judges, the means of fixing and reviewing remuneration and the other conditions of service, and the publication of decisions."[250]

Additionally, it has been proposed that both adjudicative and administrative independence must be incorporated into the design phase of any ECT paradigm.[251] Adjudicative independence is the substratum of any ECT without it environmental justice is hindered especially whit outside influences from the executive and/or legislature arms that might water down environmental orders issued by the ECT.

According to the UNEP 2016 ECT Guide, independent decision-making free from political and other extraneous factors increases public trust, confidence, and desire to present matters to the forum.[252] Institutional independence is also critical to safeguard against exterior impacts, that may be outlying to adjudicative powers. In other words, the emphasis is on the fact that an ECT should operate freely devoid of dependence on outside authorisation or force.

[247] Ibid.
[248] Ibid.
[249] Brian J Preston (n90) 384.
[250] Ibid.
[251] Ibid.
[252] George (Rock) Pring and Catherine (Kitty) Pring (n12).

(ii) Flexibility and Not Rigidity

Giving an ECT the freedom to create its own policies, processes, and remedies is another great practice.[253] The ECT's freedom from limitations imposed by the traditional court system's rules on standing, evidence, management of expert witnesses, cost awards, orders, and penalties, to name just a few, allows it to create a variety of rules specifically designed to advance environmental justice and effectiveness.[254] By giving ECTs more latitude, they can utilise creative problem-solving techniques to settle environmental issues, which may be more effective than regular court rules and processes. Examples of ECTs allowed to create its own rules and processes are the Indian National Green Tribunal (NGT) and the New Zealand Environment Court.[255]

(iii) Non-Law Decision Makers

Another best practice that is widely used by several ECTs in a variety of jurisdictions is the inclusion of both judges with legal training and experts with technical skills, such as scientists, engineers, architects, and economists, as adjudicators.[256] This makes it possible to make sure that the adjudication process appropriately considers the legal and particular factors that are crucial for reaching wise decisions in environmental matters. Costa Rica serves as an illustration, where the three-member Environment Administrative Tribunal is required to be composed of lawyers and environmental professionals.[257]

(iv) Adjudicators: Appointment and Career Advancement

It is a best practice to appoint ECT adjudicators transparently, openly and in a competitive process. Usually, this good practice is not adhered to in many countries on account of extrinsic political agendas mainly through the executive branch of government. However, it has been observed that to be successful, objectivity in the selection of ECT adjudicators must reign premised on credentials, the person’s passion for the job and their character.[258] This practice is said to improve the quality of decisions as well as garnering public confidence in the entity. It is also superlative and proper to consider prior training of the candidates in environmental areas as wells as making continuous

---

[253] Linda Yanti Sulistiawati *et la*(n17) 30.
[254] Ibid.
[255] Ibid.
[256] George (Rock) Pring and Catherine (Kitty) Pring (n12) 30.
[257] Costa Rica, Organic Law on the Environment 1995.
[258] George (Rock) Pring and Catherine (Kitty) Pring (n12) 30.

professional development in environmental issues compulsory. Adjudicators in ECTs often should not receive employment as a sinecure or retirement perk, as is the norm in ordinary courts.[259]

(v) Alternative Dispute Resolution

An additional best practice that epitomises efficacious ECTs is the usage of alternative dispute resolution processes (ADR). These include conciliation, early neutral review, mediation, and arbitration. ADR enables creative remedies that are not anticipated by either the regulations or adjudicators and is less formal, less adversarial, and supports "win-win solutions."[260] It is quicker and less costly, thus broadening access to environmental justice. From a financial, efficiency, and participation point of view, its attractiveness seems to indicate that ADR's involvement in ECTs will only grow over time. To be successful, ECT regulations should guarantee that ADR is accessible to parties and the court, preferably internally or through an outside provider, using staff with training in various kinds of ADR and to constantly upgrade their skill sets. ADR agreements and other settlement agreements should be able to be incorporated by an ECT into a legally binding and enforceable decree.[261]

(vi) Comprehensive authority

It is necessary that an ECT exercises wide a jurisdiction covering geographic, subject matter level, and appellate jurisdiction.

In terms of geographical jurisdiction, it demands that everyone in a nation should have simple, fair physical access to ECT. Hearings for the ECT should take place locally, including at the location of the environmental controversy. While this could require ECTs to exist in several locations, plans might be made for ECT judges and decision makers to travel for site inspections and locus in quo hearings, as they do in New Zealand, Queensland, and the other countries.[262]

In contrast, subject matter jurisdiction demands giving an ECT control over all environmental legislation. It would prevent situations like deciding a wetlands issue within the umbrella of ecological

[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] Ibid.

rules while excluding water regulations. Another effective practice is to combine environmental law and land use and planning law jurisdiction since decisions in one area inevitably impact decisions in the other.[263] Legislating to allow an ECT to decide civil, criminal, and administrative cases all at once is a noble practice since environmental conflicts sometimes involve more than one, if not all three, of these components. [264]

UNEP 2016,[265] reports that some effective environmental courts have broad jurisdiction that includes criminal, civil, and administrative law. For instance, although it lacks criminal authority,[266] Kenya's Environment and Land Court may have the most extensive jurisdiction of any court in the world. Utilising specific legislative power to apply constitutional law and international environmental law principles throughout the adjudication process is another best practice that has been adopted by Kenya, India, and the Philippines.[267] It is acknowledged that applying emerging international principles such as the precautionary principle, intra- and inter-generational equity, polluter pays, and others enables ECTs to protect natural resources both now and in the future, supporting the UN 2030 Agenda for Sustainable Development.[268]

(vii) Standing or *Locus Standi* Rules

The term "standing" or "locus standi" refers to the legal ability to file a lawsuit or contest a ruling in court. It is usually set by statute, court rules and case-law. To be successful, an ECT should make standing as broad and open as possible. It comprises granting standing to anybody to bring up environmental issues, including in public interest litigation, citizen lawsuits, and class actions.[269] The biggest obstacle to obtaining environmental justice is a narrow definition of what constitutes standing.

Citizens generally lack locus standi in several nations unless they have already experienced substantial injury to themselves or their property, reside a predetermined distance from the

[263] Ibid 32.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.

environmental concern, or participated in previous government agency procedures over the issue.[270] According to Zhang and Mayer,[271] broader standing requirements permit more non-governmental or community-based environmental organizations to commence environmental public interest litigation including opposition to the unlawful conduct or omissions of government agencies.[272]

(viii) Remedies

An ECT that lacks adequate remedies and powers cannot successfully contribute to access to environmental justice because a restricted selection of available remedies might hinder an environmental adjudicator's ability to offer meaningful recompense. Although an ECT may have the power to impose penalties and reparations, it lacks the authority to specify more rigorous remedies like specific performance, restitution, or declaratory relief, thus environmental harm might still be perpetrated or left unrepaired.[273] In addition, penalties without a commitment to repair environmental harm are unsatisfactory since there may be circumstances in which civil remedies do entail repairing environmental damage but do not provide compensation for the victims.

(ix) Enforcement Powers

Successful ECTs have sufficient authority to implement their own rulings and remedies. As a result, it should be a top priority to provide the necessary personnel and financial resources for carrying out the judgments and remedies that an ECT has ordered. Continual mandamus[274] is typically used in India, Pakistan, and the Philippines. It refers to an ECT's ability to maintain jurisdiction over the matter after making a ruling, namely by ensuring that the ruling is followed.[275]

The rehabilitation of convicted offenders is another strategy used to prevent recidivism. Examples include requiring offenders to perform mandatory voluntary environmental work or enroll in "environment night school," as done in Brazil.[276] Another method of enforcement is used in Sweden,

---

[270] Ibid.
[271] Zhang Qing and Mayer Benoit, *'Public Interest Environmental Litigation Under China's Environmental Protection Law*' (2017) 1(2) Chinese Journal of Environmental Law, The Chinese University of Hong Kong Faculty of Law Research Paper No. 2017-26, https://ssrn.com/abstract=3090820 accessed 17 February 2023.
[272] Ibid.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.

where anyone can request the help of the Swedish Enforcement Authority to carry out financial judgments and injunctions.[277]

(x) Evaluation Practices

Incorporating an assessment system is another highly recommended best practice for ensuring excellence and achieving long-term improvements in the ECT. To accomplish these goals, assessment processes such as self-evaluation, the publication of yearly reports, or the creation of external oversight boards and user groups to track performance and user satisfaction should be open and transparent.[278]

(xi) Adequate Resources

It may not always be easy to garner sufficient resources to establish, staff and operate an ECT. However, a single ECT with pooled, adequate resources is preferred to the establishment of several ones with insufficient ones. As was previously said, a successful ECT must thus have appropriate resources, including suitable remedies, enforcement authority, and review processes.[279] In addition to having a sufficient funding, ECT needs qualified judges, employees, IT support, and physical infrastructure to handle the volume of complicated problems involved.[280]

2.5.2 Operation Stage – Good Practices

At operation stage, effective ECTs have taken into account (i) public outreach, (ii) user-friendliness, (iii) case management services, (iv) and cost control.

(i) Public Outreach

All stakeholders such as citizens, land and property developers, government officials, legal practitioners, Non-Governmental Organisations and academia should be publicly fully informed about ECTs. It will improve the visibility and credibility of ECTs. It also helps people know how to access justice through these entities.

---

[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] Ibid.

(ii) User-Friendliness.

General courts are often built to be imposing, magnificent, and frightening[281] with judges and legal practitioners robbed in black or red gowns and white-haired wigs. Instead, when ECTs are service-oriented and user-focused, access to justice is increased.[282] These entities strive to avoid traditional court's set up but instead are welcoming and friendly with personnel who aim to provide friendly, supportive customer care.

(iii) Case Management Services

Application of a dynamic case management system is essential for the equitable, timely, and affordable resolution of environmental issues.[283] This contributes to expeditious disposal of environmental cases thereby easing the workload on traditional courts. The Judge and efficient procedures for transferring a case record from filing to adjudication are two further elements of effective case management.

(iv) Management of Experts Witnesses

According to the UNEP 2016 ECT Guide, the "battle of experts" problem arises when there are no expert management mechanisms in place, causing expert witnesses to become biased and solely back their client's argument.[284] Some countries have implemented rules requiring all expert witnesses to speak for the Court rather than the party that hired them in order to provide a fair playing field.[285] Therefore, it is a good ECT practice to establish standards and processes for organising expert testimony and evidence to encourage dependability and efficiency.

(v) Cost Control.

It has been established that in certain jurisdictions, high litigation expenses are a bigger obstacle to environmental justice than having a limited locus standi or providing useful client care.[286] Therefore, managing and lowering costs is a best practise, particularly when the following tactics are used: allowing self-representation without attorneys; combining related complaints into one adjudication

---

[281] Ibid 38.
[282] Ibid.
[283] Ibid 39.
[284] Ibid.
[285] Ibid.
[286] Ibid.

process; establishing reasonable or no court fees for litigants; adopting and actively using alternative dispute resolution; and not making the losing party pay disproportionate costs to the winner except in cases of court or extreme behaviour.[287] The issuance of preliminary injunctions and temporary restraining orders to maintain the status quo without requiring the plaintiff to post a security bond, the use of court-appointed experts, effective case management, and the support of indigent parties, particularly in public interest litigation, are additional effective strategies for cutting costs and time.[288]

2.6 Summary

This chapter stressed the development of environmental legislation from the early 20th century to the present. It also highlighted the demands for new institutions of governance handling environmental disputes. The successes registered by ECTs in other jurisdictions including Australia, India and Kenya and the good practices at design and operational stage were considered. The importance of ECTs in facilitating access to environmental justice and related remedies was emphasised. As a result, ECTs not only help the general public understand how environmental law works, but they also encourage legal inquiry and quick settlement of environmental problems, with an emphasis on offering clear and useful solutions. Additionally, it was mentioned that ECTs have sparked creativity and legal change.

Thus, this chapter is important to the subsequent chapter, which considers the likelihood of creating an environmental court or tribunal in Zambia.

---

[287] Ibid.
[288] Ibid.

CHAPTER THREE

ENVIRONMENTAL LAW ADJUDICATION IN ZAMBIA

3.1 Introduction

Since the enactment of the repealed Natural Resources Conservation Act, Chapter 315 of the Laws of Zambia in the 1970s with the intention of preserving the country's natural environment,[289] environmental regulation has evolved. However, Zambia's traditional courts and tribunals[290] have not taken a proactive or crucial role in resolving environmental issues through enhancing, putting into practice, and upholding environmental legislation.[291] This view is supported by the absence of precedents particularly and broadly examining environmental law issues and the notion of sustainable development as in other jurisdictions such as India, Kenya, and South Africa.

Therefore, this chapter focuses on environmental case-law analysis while discussing the current environmental legislation and adjudication in Zambia. It considered constitutional provisions for protecting the environment generally. It also covered Zambia's current environmental legal framework and adjudication in order to assess Zambia's opportunities to adopt the new types of specialised institutions of governance known as environmental courts or tribunals (ECTs) for the implementation of environmental law. This chapter was therefore crucial to a consideration of the prospects and challenges in establishing an environmental court or tribunal in Zambia.

3.2 The Constitutional Provisions in the Practice of Environmental Law

The establishment or recognition of distinct enforceable rights has a growing impact on environmental protection generally and the specialised role of the courts in executing such

[289] Cuthbert Cassey Makondo, Sydney Sichilima, Matthews Silondwa, Richard Sikazwe, Lombe Maiba, Chawezi Longwe, Yvonne Chliboyi, *'Environmental Management Complaince, Law and Policy Regimes in Developing Countries: A Review of the Zambian Case'* (2015) [3](4) International Journal of Environmental Protection and Policy 79.

[290] In this study, the term "traditional courts and tribunals" has been adopted to mean general courts or tribunals not specialised in environmental law adjudication.

[291] Chipasha Mulenga, ' Judicial Mandate in Safeguarding Environmental Rights from Adverse Effects of Mining Activities in Zambia,' (2019) (22) PER/PELJ-DOI< http://dx.doi.org/org/10.17159/1727-3781/2019/v22i0a5414 > accessed 15 March 2022.

protection.[292] As a result, more and more constitutional and legislative provisions give rights that can be used to safeguard the environment.[293]

Being a fundamental legislation of a country, constitutional provisions provide numerous and strong weapons for environmental protection.[294] However, until far, many African and other countries have greatly underutilised these.[295] With the heightened environmental awareness in recent times, environmental issues are more and more considered as a political priority.[296] Practically, many nations have passed laws and constitutions that explicitly guarantee a "right to a safe, clean, and healthy environment" in addition to stipulating the procedural rights necessary to put this right into effect and enforce it.[297] Additionally, it has been noted that courts all over the world have liberally construed the widely accepted clause of a "right to life" to include a right to a healthy environment in order to enjoy that life.[298] Therefore, it has been observed that giving more people access to the courts so they may exercise their constitutional rights enhances the judicial system, gives civil society more influence, and encourages a culture of environmental accountability.[299]

Courts all across the globe are upholding substantive environmental constitutional provisions as a result of the rise of environmental constitutionalism, which emphasises the constitution as the principal source of legally enforceable environmental duties and rights.[300] Several grounds have been advocated as to why constitutional rights are specifically valued in environmental protection.

Foremost, it has been argued that generally, most environmental legislative and regulatory systems are incomplete as such the constitutional environmental provisions become very significant.[301] This

---

[292] United Nations Environmental Programme, *'Judicial Handbook on Environmental Law'* (UNEP 2005) 27.
[293] Ibid.
[294] United Nations Environmental Programme (n44) vii.
[295] Ibid.
[296] Ibid.
[297] Pamela Towela Sambo, *'Mosses Lukwanda and 9 Others v. Zambia Airforce Projects Limited and 7 Others CAZ/08/323/2019'* (2020)(3)[1]11 SAIPAR Case Review 58.
[298] Pamela Towela Sambo, *'Greening' the Zambian Judiciary with Forest Reserve 27: A Comment on the Court of Appeal Ruling in the case of Mosses Lukwanda and 9 Others v. Zambia Airforcce Projects Limited and 7 Others'* The Mast (Editorial (Lusaka, 12 April 2020) 4.
[299]United Nations Environmental Programme (n44) vii.
[300] Ibid.
[301] Ibid 2.

is true because even in nations with highly developed environmental protection systems, not all environmental issues are always covered by the laws.[302] Countries like Zambia that are currently establishing environmental rules and regulations frequently have this issue. It has been noticed that in both scenarios, environmental regulations might act as a "safety net" for resolving environmental conflicts that the current legal and regulatory frameworks are unable to resolve.[303]

Second, it is typical practice for government agencies or ministries to see environmental issues as secondary to other goals, such as economic growth.[304] Thus, advocates can therefore elevate environmental matters to the status of constitutional challenges implicating other fundamental rights by using the constitution's provisions on environmental preservation.[305] It has also been stated that the entrenchment of environmental goals also gives environmental protection a solid foundation that is less vulnerable to shifting political developments.[306] Because constitutional revisions do not happen often, environmental ideals are therefore more likely to endure.

Finally, it has been said that constitutions are often the source of procedural rights necessary for environmental and other citizen organisations to undertake their advocacy work related to the environment.[307] In other words, it is crucial to enforce constitutional tenets that protect individuals' substantive rights to life and a healthy environment, including freedom of association, access to environmental information, public involvement, and legal standing.[308] Indeed, these procedural rights promote the three pillars of environmental governance—transparency, involvement, and accountability.[309]

3.3 The Constitution of Zambia, 2016 and Environmental Law

The principle of promoting comprehensive environmental management appears to exists at all levels in the Zambian legal regime on environment, beginning with the Constitution. Indeed, with the exception of a non-existent framework law on climate change, several environmental law regulations

[302] Ibid 2.
[303] Ibid.
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Ibid.

and relevant institutional structure have been enacted, especially post 1990, for environmental protection.

The Constitution of Zambia (Amendment) Act, 2016[310] has recognised environmental management and protection principles under Part XIX entitled "Land, Environment and Natural Resources"[311] in what may be termed as "environmental constitutionalism."[312] According to environmental constitutionalism, the basic source of legally enforceable environmental rights and duties is the constitution.[313] A close examination of the Zambian Constitution indicates that it has firmly incorporated international and integrated environmental management ideas including sustainable development,[314] polluter pays,[315] precautionary principle,[316] and intra-intergenerational equity principle.[317] It has also recognised the principle of access to environmental information,[318] and public participation[319] in environmental matters. A conscious consideration of these principles when a court is adjudicating upon an environmental dispute is crucial in enhancing public interest litigation for environmental preservation.

While the constitution assigns citizens[320] the duty to preserve the environment, defend it from harm, and keep it clean and healthy, it does not do the same for the State in ensuring that everyone has "a right to a clean, safe, and healthy environment."[321] Therefore, it is exceedingly difficult for a person who feels wronged in Zambia to enforce their right to a clean and healthy environment and to hold the State responsible because there is not an equal responsibility on the State.[322] On the other hand, however, in other jurisdictions, such as India, courts have expansively interpreted the constitutional

---

[310] The Constitution of Zambia (Amendment) Act No. 2 of 2016.
[311] Arts. 253 – 257.
[312] Louis J Kotze, *'The Conceptual Contours of Environmental Constitutionalism'* (2015) 21 Widener Law Review, 187<https://www.researchgate.net/publication/296319718 >accessed 16th March, 2022.
[313] Erin Daly, Louis Kotze, James R May, *'Introduction to Environmental Constitutionalism'* in New Frontiers in Environmental Constitutionalism (UN Environment 2017) 30.
[314] The Constitution of Zambia (As Amended) 2016, *Preamble*, Art.8(f), Art. 255 (d).
[315] Ibid, Art.255 (b).
[316] Ibid, Art. 255 (c).
[317] Ibid, Art. 255 (f) (k).
[318] Art. 255 9(m).
[319] Art. 257 (d).
[320] Art. 43 (c) (d).
[321] Chipasha Mulenga (n1) 156.
[322] Ibid.

environmental duties explicitly imposed on citizens to also apply to the State.[323] It appears the general Courts in Zambia have not taken such an expansive approach in interpreting environmental law.

As several scholars[324] have bemoaned, the Zambian constitution does not yet include a provision for a "right to a clean, safe, and healthy environment."[325] This is in contrast to the repealed Article 112 of the Constitution, which stated under the Directive Principles of State Policy and Duties of a Citizen that "the State shall strive to provide a clean and healthy environment for all."[326] It has been noted that constitutional provisions provide a variety of powerful measures for defending environmental rights and the environment.[327] Since the Zambian Constitution makes no mention of the "right to a clean, safe, and healthy environment," it is clear that it would be difficult for a citizen or other individual to uphold this right there. It is also observed that while a "right to a clean, safe, and healthy environment" is stated in Section 4 (2) of the Environmental Management Act of 2011, but this provision is subordinate to the Constitution, which regrettably does not include a corresponding right, rendering this right redundant as far as the constitution is concerned.

Every individual has the right to life, which is guaranteed by Articles 11(a) and 12 of the Constitution. The right to life clause in the constitution has an innovative constitutional approach to environmental protection, albeit it has not been tested much in Zambia. The right to life has been suggested as a potential pan-African strategy for empowering individuals to save the environment.[328] In order to properly understand the significance of the right to a safe, clean, and healthy environment, the study will now take into account how courts in other countries have given this right legal meaning similar to that of the right to life.

---

[323] *L. K. Koolwal v. Rajasthan A.L.R [1988] Raj 2 (Raj. H. C).*
[324] Pamela Towela Sambo (n105) 647, 655; Chipasha Mulenga (n293) 5; Proceed Manatsa, *'The Law and Practice of Environmental Impact Assessments (EIA) in Zambia: Strengths and Weaknesses'* (2015) 6 International Journal of politics and Good Governance 1-9, 8; *SADC Environmental Legislation Handbook* (3rd edn. Development Bank of Southern Africa, 2012), 3, 457.
[325] Ibid.
[326] Art. 112
[327] United Nations Environmental Programme (n44) vii.
[328] Ibid 39.

3.4 The Right to a Clean, Safe and Healthy Environment and The Right to life

According to academics, the right to a healthy environment has received widespread recognition over the past few decades, particularly with the rise of environmental awareness and the maturation of human consciousness.[329] It is based on the unquestionable fact that the subsistence of mankind is wholly reliant on a clean, healthy, and pollution-free environment. As a result, it is acknowledged that the right to a healthy environment serves as the "flagship" for all other important human rights.[330] This human right is intertwined with our environment for the reason that an ecosystem which is otherwise will affect all living organisms to the very core of their existence. As such without securing and sustaining a healthy environment for the present-day and future generation, it would be impossible to maintain or enjoy the fundamental human rights that make life worth living.[331]

Despite the paucity of instances involving this component of environmental rights in Zambia, it has been argued that the right to a clean, safe, and healthy environment guarantees the enjoyment of the right to life.[332] It has been noted that the absence of jurisprudence in this field is likely caused by the newness of this environmental right or by a lack of legal action by environmental advocacy organisations particularly pursuing this right in court.[333] It might also be because traditional or mainstream courts lack familiarity with environmental public interest litigation or judicial environmental activism, or because the government failed to create the specialised institutions needed to carry out environmental constitutional rights and obligations.[334]

As shown by the following case law, courts in several countries have broadly construed or implemented the constitutional right to life to encompass a right to a safe, clean, and healthy environment. This right typically applies to well-known environmental methods and concepts, including environmental impact assessments (EIA), the precautionary principle, and the "polluter pays" principle.[335]

---

[329] Sri Yogamalar and Abdul Haseeb Ansari, *' Right to a healthful environment; Flagship of fundamental human rights? An International Perspective'* (2015) Proceedings of International Academic Conferences 3105382 (Abstract).
[330] Ibid.
[331] Pamela Towela Sambo (n300) 4.
[332] Ibid.
[333] United Nations Environmental Programme (n44) 23.
[334] Ibid.
[335] Ibid.

For instance, Indian courts have broadened their interpretation of the fundamental right to life to prohibit all government and citizen acts that can disturb the ecological balance. The court in L. K. Koolwal v. Rajasthan A.L.R [1988] Raj 2 (Raj. H. C.) found that, in the absence of any particular charges of damage, inadequate sanitation might infringe the citizens' constitutional rights to health, sanitation, and environmental preservation by "slowly poisoning" them.[336]

The Indian Supreme Court referred to the right to a "healthy environment" in Rural Litigation and Entitlement Kendra vs. Uttar Pradesh A.I.R. [1985] S.C. 652, 656, notwithstanding the lack of any evidence demonstrating a direct connection to human health. In that case, the petitioner claimed that illegal mining had harmed the ecology and caused environmental harm in the Dehra Dun region. The Supreme Court supported the right to live in a healthy environment without finding any harm to human health and issued a directive to stop mining activities, notwithstanding the mining company's large financial and human resources investments. Despite the mining company's enormous financial and human resources invested, the Supreme Court recognised the right to live in a healthy environment and issued an order to stop mining activities. This was done without finding any harm to human health. This line of reasoning holds that regardless of the impact on human health, protection of this right is required when persistent activity harms or is likely to harm the environment.[337]

In *Vellore Citizens' Welfare Reform v. Union of India A.I.R. [1996] S.C. 2715*, that tanneries had infringed people' rights to life by dumping untreated effluents into agricultural regions and nearby drinking water supplies..[338] The evidence in the case showed that the emissions seriously polluted the local water supplies and rendered thousands of hectares of agricultural land unusable for cultivation or gardening.[339] The court relied on the "precautionary," "polluter-pays," and "sustainable development" principles in granting the requested remedy and viewed them as essential to an interpretation of Article 21's constitutional responsibility to preserve and advance life.[340] The Supreme Court explained the precautionary principle as follows: the state must foresee, prevent,

[336] *L. K. Koolwal v. Rajasthan A.L.R [1988] Raj 2 (Raj. H. C).*
[337] *Rural Litigation and Entitlement Kendra Vs. Uttar Pradesh* A.I.R. [1985] S.C. 652, 656.
[338] Ibid 2716, 2721-22, 2726.
[339] *Vellore Citizens' Welfare Reform v. Union of India A.I.R. [1996] S.C. 2715.*
[340] Ibid.

and combat the causes of environmental degradation; a lack of scientific certainty should not be used as justification for delaying the implementation of pollution prevention measures; According to the Supreme Court, the precautionary principle states that the state must foresee, prevent, and combat the causes of environmental degradation; that a lack of scientific certainty should not be used as justification for delaying the implementation of pollution prevention measures; and that it is the responsibility of the polluter to demonstrate that their actions are not harmful to the environment. It defined the polluter-pays principle to mean that:

> *"polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to soil and to the underground water and liability for harm extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation."*

Courts in Pakistan, Bangladesh, and Nepal have also broadened their interpretations of constitutional right-to-life clauses to include environmental protection by adopting the Indian approach. In General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhehum v. Director, Industries and Mineral Development, Punjab, Lahore,[341] the Pakistani Supreme Court found that the right to life was in danger of being violated because nearby mining operations could contaminate the city's water supplies. It held:

> *"Where the access to water is scare, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. The right to have unpolluted water is the right of every person wherever he lives."*

In the preceding case, the court demonstrated judicial environmental activism when it instructed the mining corporations to relocate their activities and take certain safeguards to prevent contaminating the supply of drinking water.[342] In order to guarantee that the nearby drinking water sources were not contaminated, the court further established a commission with the authority to investigate, monitor, and enforce additional precautions.[343] It is interesting to note that the court ordered the

[341] Human Rights Case No. 120 of 1993, [1994] S.C.M.R. 2061
[342] Ibid.
[343] Ibid.

relevant government bodies to refrain from issuing any new mining licences or renewing any existing ones without the court's permission.[344]

In another intriguing instance, the Pakistani Supreme Court took legal action, *suo muto,* to block corporations from disposing of radioactive waste along the shore.[345] The court found that the dumping violated the right to life guaranteed by the constitution by creating environmental hazards and pollution.[346]

Closer to home, Tanzania is reportedly the first nation on the African continent where courts have liberally construed the right to life clauses in the context of environmental preservation.[347] According to Article 14 of Tanzania's Constitution, everyone has the right to exist and to obtain from society protection for his life in line with the law.

In *Joseph D. Kessy v. Dar es Salaam City Council,*[348] inhabitants of Tabata, a suburb of Dar es Salaam, initiated legal action to prevent the city government from dumping garbage, which caused severe air pollution in the surrounding community. Residents of the neighbourhood, particularly youngsters, expectant mothers, and the elderly, developed respiratory diseases as a result of the unpleasant odours and air pollution.[349]

In awarding the relief, the court ordered the local authorities to stop dumping trash in the affected region and to build a landfill where trash would not put adjacent inhabitants at danger of health issues. The municipal council, however, requested repeated extensions of time to comply by the court decision. In denying the request for a further extension, the court argued that because the garbage dump's air pollution put the health and lives of nearby residents in danger, its operation violated Article 14's provisions[350] on the right to life, which include the right to a safe, clean, and healthy environment.

---

[344] Ibid.
[345] *In re Human Rights Case (Environmental Pollution in Balochistan) Human Rights case No. 31-K/92 (Q). P. L. D. 1994 Supreme Court 102 [1992].*
[346] Ibid.
[347] United Nations Environmental Programme (n44) 41.
[348] *Civil Case No. 299 of 1988 (High Court of Tanzania at Dar es Salaam, Sept. 9, 1991).*
[349] Ibid.
[350] Ibid.

The Nigeria's Constitution provides both for environmental protection[351] and the right to life.[352] However, in Gani Fawehinmi v. Abach*a,*[353] the Court of Appeal relied on the articles of the Charter on Human and People's Rights to reach its conclusion and protect the right to a safe and healthy environment, demonstrating judicial environmental activism and promoting a healthy environment.[354] The right to a favourable environment for development is established as a basic human right in Article 24 of the African Charter.[355] As a result, the court determined in Gani Fawehinmi that a Nigerian citizen might apply the provisions of Article 24 of the African Charter on Human Rights to vindicate his environmental rights even if Section 20 of the Nigerian Constitution is not justiciable since it pertains to state policy.[356] The court also expressly acknowledged that human rights may be violated by environmental damage.[357]

In Peter K. Waweru v. Republic [2006] eKLR, a case from Kenya, the court upheld the right to a clean, safe, and healthy environment by stating, among other things that:

> *"the right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean, safe and healthy environment is primarily to all creatures including man…"*

In *LEADERS, Incorporation v. Godawari Marble Industries,*[358] brought before the Nepal's Supreme Court, the petitioners claimed that Godawari forest and its surrounds had suffered significant environmental deterioration as a result of the marble business. In addition to harming local residents, members of the petitioner's organisation, and mining workers, the industry's operations also damaged the air, land, and water in the area. The court ruled that a marble mining operation that contaminated the land and water sources had infringed the fundamental right to life of neighbouring inhabitants. The court observed that a dirty environment poses a hazard to life. It continued by stating

---

[351] *Art. 20 of the 1999 Constitution of Nigeria.*
[352] Art. 33(1) *"every person has a right to life and no one shall be deprived intentionally of his life."*
[353] *[1996] 9 N.W.L.R (pt. 475) 710.*
[354] Ibid.
[355] Art. 24 *"All people shall have the right to a general satisfactory environment favourable to their development."*
[356] UNEP (n44) 42.
[357] *Kokoro-Owo v. Lagos State Government, 6 N.W.L.R. [1995] 760, 765.*
[358] *LEADERS, Incorporation v. Godawari Marble Industries (Supreme Court Nepal, October 31 1995).*

that, because a clean and healthy environment is a necessary component of human existence, the right to a clean and healthy environment is unquestionably enshrined within the right to life.[359] The government ministries were mandated by the court to adopt the required laws to safeguard the environment, including Godawari's air, water, sound, and land, as well as to conduct other necessary actions.[360]

In a similar vein, Colombian courts have given a broad interpretation of the right to life guaranteed by the country's constitution, stating that environmental preservation is an extension of the right to personal safety. In *Victor Ramon Casttrillon Vega v. Federacion National de Algoderos y Corporation Autonoma Regional del Cesar (COPROCESAR),*[361] the Colombian Supreme Court determined that the discharge of poisonous gases from an open pit by a business violated the constitutional rights to health and life of neighboring residents by endangering their safety.[362] The respondent industry was directed by the court to remove the garbage and safely dispose of it, to cover the costs associated with transporting and disposing of the material securely, and to cover any current and future medical bills for anybody who became ill as a result of the illegal waste.[363]

From these cases, one thing stands out, that is, courts in the jurisdictions considered so far have been vigilant in enforcing violation of environmental regulations that protect the right to life and healthful environment. The constitutional right to life, on the other hand, has not been endorsed by Zambia's mainstream courts to imply the right to a safe, clean, and healthy environment. Additionally, the precautionary principle, polluter pays, sustainable development, and intra-intergenerational equity are just a few examples of environmental law principles that regular courts in Zambia have not vigorously applied. Instead, they have relied on negligence and statutory duty of care to make decisions in environmental cases.

---

[359] Ibid.
[360] Ibid.
[361] *Victor Ramon Casttrillon Vega v. Federacion National de Algoderos y Corporation Autonoma Regional del Cesar (COPROCESAR), Case No. 4577 (Supreme Court, Chamber of Civil and Agrarian Cassation, November 19, 1997).*
[362] Ibid.
[363] Ibid.

For example, the Zambian High Court and the attorneys in the case of *James Nyasulu and Others v. Konkola Copper Mines PLC and Others*[364] lost the chance to use the right to life e[365] to include a right to a safe, clean, and healthy environment. In that case, Konkola Copper Mines PLC was contaminating the only supply of drinking water by dumping the waste from its mine operations into the nearby stream. After drinking the tainted water and developing different ailments, the 2000 plaintiffs filed a lawsuit against the defendants, alleging, among other things, that the first defendant was responsible for dumping the waste from its mining activities. The court concluded that the first defendant bore a responsibility to the neighbourhood it lived in, a duty whose failure would necessitate the payment of damages, based on the common law concept of negligence and a pertinent regulation. The court, a propos, mentioned the 'right to life', when it said:

> *"There was gross recklessness, whether human beings died or not. They deprived the community in Chingola* ***the right to life****, which is a fundamental right in our Constitution. They disregarded environmental legislation…such disregard for human life was received by this court with a sense of outrage."*[366]

On appeal,[367] the Supreme Court upheld the judgment of negligence against Konkola Copper Mines PLC by coming to the conclusion that the company had a legal duty of care to the community that it had violated by dumping contaminants into the water supply. However, as noted by Pamela Towela Sambo,[368] the Environmental Management Act, No. 12 of 2011, a model piece of legislation, had already been passed to replace the Environmental Protection and Pollution Control Act at the time the Supreme Court ruling was handed down. Thus, the Supreme Court had the option to impose environmental remediation on KCM[369] using some of the novel clauses[370] of the then-new Act due to the persistent nature of the effects of the injury suffered by the residents.

[364] 2007/HP/2011.
[365] Article 112 (1) of the Constitution of Zambia (as amended).
[366] *James Nyasulu and Others v. Konkola Copper Mines PLC and Others 2007/HP/2011.*
[367] *Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012.*
[368] Pamela Towela Sambo (n105).
[369] Pamela Towela Sambo (n105) 7.
[370] Sections 4-6 that provide for the right to clean, safe and healthy environment, duty to protect the environment and principles of environmental management; including section 105 on environmental restoration.

In the case of *Doris Chinsambwe and 6 Others v. NFC Africa Mining PLC*,[371] the plaintiffs claimed that the defendant, a mining company operating in the territory they used for farming and gardening, had neglected to contain its tailings, resulting in flooding, stream pollution, and damage to their crops. The plaintiffs cited Section 87 of the Mines and Minerals Development Act (MMDA), which holds mine owners strictly liable for damages they cause as a result of their mining or mineral processing operations. The court was convinced that the defendant company was responsible for negligence, as well as any subsequent loss and damage. According to the court, the plaintiff had a responsibility to take reasonable care to prevent flooding downstream by maintaining the tailings dam's water levels and to prevent chemical pollution of the stream from effluent discharges by the company.[372]

Also, in *Geoffrey Elliam Mithi v. Mopani Copper Mines PLC and Attorney General,*[373] Beatrice Sakala Mithi died after inhaling deadly sulphur fumes that were released by the first defendant while attending a gathering at a nearby church. Her spouse, the plaintiff, alleged negligence on the part of the defendant and a breach of a duty due owed to the deceased. The defendant was held to have been negligent, to have owed the deceased a duty of care, and to have violated that obligation by releasing more sulphur dioxide into the atmosphere than was permitted. On appeal, the Supreme Court reaffirmed that if a legally permissible action is carried out negligently and results in damage, a common law action will arise, and that the appellant had a legal obligation to ensure that gas emissions were safe, not the deceased or the community, and that by failing to do so, it had violated that obligation.[374]

In these cases, unlike in the previously cited *Vellore Citizens' Welfare Reform* case, our conventional courts failed to draw a clear connection between the right to life as guaranteed by the constitution and the right to a safe, clean, and healthy environment and established environmental law concepts. The courts have taken the tort responsibility approach to ordering compensation for environmental victims. Restoring the environment after environmental damage has only sometimes been ordered.

---

[371] *Doris Chinsambwe and 6 Others v. NFC Africa Mining PLC* [2014] HK 374
[372] Ibid.
[373] *Geoffrey Elliam Mithi v. Mopani Copper Mines PLC and Attorney General [2014]HB 48.*
[374] *Mopani Copper Mines PLC v. Ndumo Miti and 2 Others [2020] (Appeal 154/2016), J86-J87.*

The courts have the authority to enforce environmental laws. Therefore, these established organisations have a huge responsibility to uphold residents' rights to a safe, clean, and healthy environment. It also demonstrates the necessity for courts to be flexible in their efforts to safeguard residents from the negative impacts of pollution and environmental degradation, especially in the absence of a clear legal provision safeguarding the right to a safe, clean, and healthy environment. As Kidd stated, courts are obliged to accurately analyse, interpret, and apply the pertinent environmental law, as well as give environmental factors adequate discussions, without necessarily ruling in favour of environmental issues in all cases.[375] However, it has been argued that for courts to make informed environmental judgments, it is crucial for solicitors to be well-versed in the rising scientific component and intricacies of environmental law and ecological sustainability.[376]

3.5 Constitutional Procedural Rights in Environmental Practice

Procedural rights in environmental law have been suggested to be crucial for the application and enforcement of substantive environmental rights.[377] These procedural rights provide civil society with ways to participate in governmental decision-making, hold the government accountable for its deeds, learn about actions that may affect them, and form coalitions to protect the environment.[378] The four procedural rights categories covered in this study are (i) the right to free association; (ii) the right to access information; (iii) the right for the general public to participate in decision-making; and (iv) the right to access justice, including the explicit acknowledgment of public interest litigation and the locus standi doctrine.

3.5.1 Freedom of Association in Environmental Practice.

The right to associate freely in order to further one's interests is guaranteed under Article 21 (1) of the Zambian Constitution.[379] It has been noted that freedom of association is crucial for promoting environmental causes.[380] This is true because the creation of Community-Based Natural Resources Organisations (CBNROs), NGOs, and other non-profit organisations allows people to band together to more successfully fight for environmental conservation, especially when it involves contentious

[375] M Kidd, *'Greening the Judiciary'* (2006) 19(3) Potchefstroom Electronic Law Journal 1-15.
[376] Pamela Towela Sambo (n105) 655.
[377] United Nations Environmental Programme (n44) 51.
[378] Ibid.
[379] Ibid.
[380] Ibid.

policies. NGOs are more in touch with the local populations that are typically impacted by environmental contamination caused by development activities like mining or agriculture. They have made a significant contribution to environmental conservation and the use of law to uphold human rights.[381]

Citizens for Better Environment (CBE) and the Zambia Institute for Environmental Management (ZIEMA) are Zambia's two most active nongovernmental organisations (NGOs) in the subject of environmental preservation. They are well-known for conducting public interest litigation. Although these NGOs are motivated to file lawsuits to ensure that environmental regulations are followed, it has been noted that the traditional courts' strict interpretation of the locus standi requirements has severely limited their ability to contribute meaningfully to the defence of human rights and the enforcement of environmental laws.[382] Furthermore, it is said that many NGOs are reluctant to speak out strongly against contentious environmental development choices out of concern that doing so may result in their deregistration.[383]

3.5.2 Access to information in Environmental Practice

For the general public to effectively participate in decision-making and monitor governmental and private sector actions that have an environmental impact, access to environmental information is a must.[384] Early and accurate data are required to make educated decisions since environmental damage sometimes occurs years after a project is finished and can be challenging, if not impossible, to reverse.[385] It is one of the three “access rights” set out under Principle 10 of Rio Declaration[386] as key pillars of sound environmental governance.[387] These "access rights" have shown to be crucial in encouraging open, inclusive, and responsible environmental governance.[388] Citizens are empowered by knowledge and are encouraged to engage in decision- and policy-making processes in an educated way as a result. The public needs access to pertinent environmental information to

---

381 Mulenga Chipasha (293) 173.
382 Ibid 174.
383 Ibid.
384 United Nations Environmental Programme (n44) 27.
385 Ibid.
386 UN Conference on Environment and Development, Rio de Janiero (n24)
387 Ibid.
388 Chipasha Mulenga (n1) 108.

properly promote environmental conservation.[389] The general public and civil society should be aware of environmental dangers, their origins, and the underlying causes of such problems.[390]

Access to information or the right to know is relatively novel, and still a burning issue in Zambia. In any case, neither officially nor indirectly through citation of either the African Charter on Human and Peoples' Rights or the Universal Declaration of Human Rights does the Zambian Constitution provide citizens the right to access environmental information kept by the government.[391] In contrast, access to environmental information is not explicitly stated as a right in Article 255(m) of the Constitution, but rather as one of the principles of managing and developing natural resources.[392] On the other hand, section 91 of the EMA gives the public the right to know when public authorities plan to make choices that will have an impact on the environment.[393]

Apparently, one of the factors that has hampered the effective participation of NGOs in public interest litigation is the challenge faced to obtain evidence on allegations of environmental pollution. It is not easy to obtain documentary evidence from the government departments, officers or authorities due to fears about losing their employment, as a result, many remain mute.[394]

3.5.3 Public Participation in Decision-making in Environmental Practice

One of the three "access rights" listed under Rio Declaration's Principle 10 as a cornerstone of good environmental governance is public engagement.[395] By pushing governments to adopt policies and implement legislation that take community needs into consideration, public engagement is becoming regarded as an essential component of tackling environmental issues and attaining sustainable development.[396] This is important because communities heavily rely on natural resources for their survival or else their lives would be annihilated.[397] Therefore, the court noted in *Martha Muzithe*

[389] Section 6 (g), EMA, 2011.
[390] United Nations Environmental Programme (n44) 53.
[391] Article 9 of the African Charter on Human and Peoples' Rights provides "Every individual shall have the right to receive information." Article 19 of the UDHR has a similar provision on right to receive information.
[392] Art. 255 (m) of the Constitution of Zambia.
[393] Section 91(1), EMA, 2011.
[394] Mulenga Chipasha (n118) 204.
[395] UN Conference on Environment and Development, Rio de Janiero (n24).
[396] Ibid.
[397] Chipasha Mulenga (n118) 110, 160.

Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others[398] that it is now acknowledged on a global scale that mandatory provisions to ensure public participation in matters affecting the environment create a corresponding right of participation for the public.[399]

A newly developing environmental right is the right of the general people to participate in government decisions that may have an impact on the environment.[400] There is no stated right to public involvement in government decisions in the Zambian Constitution, other than the goal of the government to promote public engagement[401] in the utilisation of natural resources and management of the environment. Additionally, the Constitution only recently acknowledged meaningful public engagement in the creation of pertinent policies, plans, and programmes as one of the guiding principles of environmental and natural resource management and development.[402] Under section 91 (2) of EMA, the right to participate is limited to formulation of strategic environmental assessments and the development of environmental laws and regulations.[403] The right to public participation can take many different forms, such as the right to know about pending government decisions, such as legislative, administrative, and policy decisions[404]; the right to attend public hearings[405]; the ability to submit written or oral comments and supporting documentation[406]; the requirement that government take into account citizen comments[407]; and the ability to submit petitions, complaints, or grievances to administrative authorities.[408]

A South African case of *Director: Mineral Development v. Save the Vaal Environment*[409] is instructive on the judicial recognition of public participation. In that case, the Supreme Court of Appeals of South Africa ruled that "the government must be willing to listen to the views of people concerned about

[398] *Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others [2008]HP/245, J35.*
[399] Ibid.
[400] United Nations Environmental Programme (n44) 59.
[401] Art. 257 (d).
[402] Art. 255 (l).
[403] Section 91(2) EMA 2011.
[404] See Section 91 of EMA 2011.
[405] See, the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997, Reg 10 and 17.
[406] Ibid.
[407] Ibid.
[408] United Nations Environmental Programme (n44) 59.
[409] *Director: Mineral Development v. Save the Vaal Environment Case No. 133.98 (Supreme Ct. of Appeals of South Africa. Mar. 12.1999).*

potential environmental impacts before a permit is given for mining."[410] Environmental issues that may be brought up include the extinction of flora and animals, pollution, the devaluation of real estate, and the loss of employment and small companies. Governments are required to make sure that progress does not jeopardise meeting the demands of future generations.[411]

In Zambia, though, public participation in environmental decisions has been a thorny issue and traditional courts have not been vigilant[412] in enforcing breach of the requirement of public participation at scoping stage of an EIA process. For instance, in *Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others*[413] the plaintiffs claimed that the defendant was carrying out mining activities in an agricultural area without consultation prior to commencing the activities on the impacts the cement production would have on water and pollution and that the list of those consulted as attached to the Environmental Impact Statement were fictitious. However, the court rejected the plaintiffs' claim on the grounds that they regrettably were unable to present any evidence of injury.[414] In the appeal, the Supreme Court concurred with the lower court that the Plaintiffs had not presented any evidence of actual injury that would result from the project moving forward.[415] The court failed to recognise the importance of public engagement as a method for establishing the legitimacy of the decision-making process, a method for resolving disputes, and a tool for evaluating the potential advantages and hazards that a project may have for the surrounding area.[416]

3.5.4 Access to Justice in Environmental Practice

Like other basic rights, environmental rights guaranteed by the constitution are only significant if they are also enforced. Consequently, for constitutional environmental rights to have any real meaning,

---

[410] Ibid.
[411] Ibid.
[412] Mulenga Chipasha (n118) 207.
[413] *Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others 2008/HP/245, J59-60.*
[414] Ibid.
[415] *Martha Muzithe Kangwa and 29 Others v. Environmental Council of Zambia and 2 Others [2014] ZR 233,257.*
[416] Makweti Sishekanu, Morgan Katati, *'Subjectivity in the Logic of Zambia's Environmental Impact Assessments (EIA) Process: The Bedrock of Controversial EIA Approvals'* (2021) 17 (1) Law, Environment and Development Journal, 40-54,51.

people and nongovernmental organisations must be able to enforce such rights.[417] Normally, constitutional provisions should take effect to enable individuals to seek recourse from the courts when the state fails, ignores, or refuses to uphold constitutional environmental rights.[418] Therefore, the common law legal system recognises access to justice as a basic right.[419] Additionally, this right is viewed as a fundamental element of international environmental law.[420]

The third of the three "access rights" outlined in Principle 10 of the Rio Declaration as one of the cornerstones of effective environmental governance is access to environmental justice.[421] The "access rights" are built on access to justice because it makes it easier for the people to uphold their rights to participate, be educated, and hold regulators and polluters accountable for environmental harm.[422] It includes both the ability of courts to examine government actions and inactions and the right of individuals to petition courts to conduct such an analysis.[423]

In Zambia, Article 28 of the Constitution limits a person's constitutional right to obtain justice to the High Court, where they can seek remedy if any of the Bill of Rights'[424] provisions are being violated or are likely to be violated in respect to them. On the other hand, Article 2 of the Constitution establishes a duty and a right for everyone to protect the Constitution. Although this clause does not necessarily guarantee access to justice, it may imply it because a citizen is not expected to defend the Constitution in the absence of legal recourse. On the other hand, Article 128 (3) of the Constitution appears to give a person access to justice because it enables a person to petition the Constitutional Court if they claim that a law, statutory instrument, action, measure, or decision was taken in violation of the Constitution.[425]

However, The question is whether a claim based on articles 2, 11 and 12 of the Constitution to enforce a "right to life" to imply a "right to a safe, clean and healthy environment" can be initiated and

---

[417] United Nations Environmental Programme (n44) 62.
[418] Ibid.
[419] *R v. secretary of State for Home Department, ex parte Anufrijeva [2003] 3 ALL ER 827.*
[420] Richard Burnett-Hall and Brian Jones (eds), Burnett-Hall on Environmental Law (2nd edn., London, Sweet& Maxwell 2009) 270.
[421] UN Conference on Environment and Development, Rio de Janiero (n24).
[422] Ibid.
[423] Ibid.
[424] Articles 11 to 26 inclusive.
[425] Article 128 (3).

heard by both the High Court and the Constitutional Court given that only the High Court has jurisdiction to hear allegations of violations of the rights in the Bill of Rights, and the Constitutional Court has jurisdiction[426] to hear a matter relating to the Constitution. Ii is interesting to note that in the case of *Robert Chimambo v. The Attorney General and Zambia Environmental Agency*,[427] a petition was filed asserting that approvals for mining activities in the lower Zambezi National Park violated the Constitution's provisions under Part XIX relating to land, environment, and natural resources. This claim was based, among other things, on Articles 2 and 128 of the Constitution. Unfortunately, this case did not progress to hearing as it was discontinued after suffering some technicalities common in traditional courts based on, *inter alia,* jurisdiction of the court to hear the petition. It is asserted that this case also highlights how Zambia's system for resolving environmental disputes has evolved haphazardly and unsystematically, leading to a disjointed, ineffective regime that seems irrational. Nevertheless, this was another chance lost for the court to show judicial environmental activism so that jurisprudence can be developed to determine whether the government's or its agents' failure to comply with Part XIX's environmental provisions is justiciable to advance environmental justice. In any case, the conventional courts have not yet established a body of case law interpreting the 'right to life' enshrined in Articles 11 and 12 to include a guarantee of a secure, sanitary, and healthy environment in which to live that life.

3.6 Environmental Management Act, 2011 (EMA)

The Environmental Management Act (EMA) is Zambia's ultimate framework legislation for environmental management and preservation, even though it is subject to the Constitution. If any other statute conflicts with it, the EMA must take precedence.[428] It repealed the 1990-enacted Environmental Protection and Pollution Control Act (EPPA) Chapter 204 of the Laws of Zambia.

The Environmental Management Act No. 12 of 2011 continued the existence[429] of the Environmental Council of Zambia and re-named it the Zambia Environmental Management Agency (ZEMA) as an independent environmental authority, and the Supreme Court acknowledged this status in *Mopani*

[426] Article 1(5) and 128.
[427] *Robert Chimambo v. The Attorney General and Zambia Environmental Agency* 2022/CCZ/003.
[428] Environmental Management Act 2011, s 3.
[429] Section 7 of the Environmental Management Act, 2011.

Copper Mines PLC v. Ndumo Miti and 2 Others.[430] By adopting progressive legislative guidelines[431] in tandem with global and integrated environmental management concepts,[432] EMA has radically altered the fundamentals of environmental management in Zambia.

3.6.1 Right to a Clean, Safe and Healthy Environment under EMA, 2011

Every individual living in Zambia is guaranteed a right to a clean, safe, and healthy environment[433] under Section 4(1) of the EMA, including the ability to access diverse environmental aspects for recreational, educational, health, spiritual, cultural, and economic purposes.[434] However, the aforesaid section 4 is subordinate to the Constitution which apparently does not provide for a mirror provision in the Bill of Rights to a clean, safe, and healthy environment. [435]

Since the Constitution's provisions do not grant an equivalent right in the Bill of Rights, as was already established,[436] the section 4 (1) right is essentially superfluous. It is argued that submitting the right to a clean, safe, and healthy environment to the Constitution, which is empty of this right, suggests that it may be difficult to enforce this right through conventional courts. This is made worse by the need of Article 1 (1) of the Constitution, which states that any written legislation that conflicts with its provisions is invalid to the degree of the conflict.[437] It is, in effect, a challenge to the traditional courts to take on the duty of upholding constitutional environmental rights by broadly interpreting the Articles 11 and 12 "right to life" to compel the observance of the right to a clean, safe, and healthy environment. Otherwise, the obvious lack of a right to a clean, safe, and healthy environment reduces attempts to constitutionalize environmental standards to a symbolic effort and prevents them from being elevated to the same status as other basic rights.

---

[430] *Mopani Copper Mines PLC v. Ndumo Miti and 2 Others [2020] (Appeal 154/2016), J76.*

[431] EMA, Preamble.

[432] Pamela Towela Sambo (n105) 650.

[433] See also *Mopani Copper Mines PLC v. Ndumo Miti and 2 Others [2020] (Appeal 154/2016), J76.*

[434] EMA, 2011, sec. 4(2).

[435] 4 (1) Subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment. (2) The right to a clean, safe and healthy environment shall include the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes. (3) A person may, where the right referred to in subsection (1) is threatened or is likely to be threatened as a result of an act or omission of any other person, bring an action against the person whose act or omission is likely to cause harm to human health or the environment.

[436] Section 3.2. supra.

[437] Art. 1(1) of the Constitution (Amendment) Act, 2016.

3.6.2 Standing or *Locus Standi* in Environmental Law Practice

The requirement of standing is at the center of a claim such that in its absence, a claimant will not have his day in court to prove or try his case.[438] Traditionally, in order to establish standing, a party must show that they have the necessary ability to file a lawsuit, that their interests are protected by law, and that their rights have been violated.[439]

In relation to environmental law disputes, courts have not been consistent in deciding the issue of *locus standi.* In fact, locus has been a problematic issue and claims have been declined because the claimant failed to demonstrate a sufficient interest in the issue mainly "because they have not suffered any particular or special or demonstrable harm from the specific action or omission complained of."[440] This problem has occurred even in the face of statutory provisions[441] granting standing to a party. For instance, in the case of *Lafarge Cement Zambia Limited v. Peter Sinkamba*,[442] the Supreme Court overturned a finding by the High Court that the respondent had locus standi to commence the matter and dismissed the matter after concluding that the respondent had no locus standi to commence the action, despite the fact that the respondent had provided evidence of the detrimental effects the mining activities complained of had on the subject area.[443] This case exhibits a limited or restrictive interpretation of standing used by traditional courts in cases involving the preservation of the environment, the application of environmental legislation, and the importance of such matters.[444]

On the other hand, in order to enforce the right to a clean, safe, and healthy environment or to recover damages for an act or omission that violates the requirements of EMA, a person may file a lawsuit under Section 4(3)[445] of the EMA when read in conjunction with Section 110(1) of the Act. It is asserted that these clauses open the way for public interest lawsuits to uphold environmental laws and safeguard the environment. Public interest litigation can be used to advance environmental

---

[438] Chipasha Mulenga (n118) 191.
[439] *Chief Gafaru v. Chief Sunday Olowookere [2011] LPELR-SC 200/2003, 38-40.*
[440] Action for justice (n4) 17.
[441] See section 87, MMDA, 2015; section 4(3), 110(1) EMA, 2011.
[442] *Lafarge Cement Zambia Limited v. Peter Sinkamba Appeal No. 169 of 2009, J16.*
[443] Ibid.
[444] Chipsaha Mulenga (n293) 193.
[445] Section 4(3) provides 'A person may, where the right to [right to clean, safe and healthy environment] is threatened or is likely to be threatened as a result of an act or omission of any other person, bring an action against the person whose at or omission is likely to cause harm to human health or the environment.'

justice. The term "public interest litigation" refers to a legal action brought in a court of law to uphold a broad or public interest in which the general public or a group of the community has a financial interest or another interest that affects their legal rights or obligations.[446] For instance, in a the case of *Moses Lukwanda and 9 Others v. Zambia Airforce Projects Limited and 7 Others*[447] the Court of Appeal recognised this broad thread of locus standi and made the following determination:

> *"Section 4(1) of the Act makes it abundantly clear that an aggrieved person may commence an action in relation to any perceived disobedience to the provisions of the Act."*

The court's decision in this case stands in stark contrast to the Lafarge Cement case mentioned earlier, where the court declined to acknowledge the respondent's interest in the matter despite referencing a provision similar to section 4(1) that categorically granted "any person, group of person," locus standi.[448]

3.6.3 Administrative Mechanisms: Reviews and Appeals

Reviews and appeals are provided for as administrative processes in a three step process under Part X of the EMA. First, it gives someone the opportunity to request to the ZEMA board for review within 30 days if they are unhappy with a ZEMA decision or directive, particularly one involving the acceptance of environmental impact assessment papers from project proponents.[449] Secondly, in the event the ZEMA board dismisses the application for review, a dissatisfied party may appeal to the Minister.[450] Any party that disagrees with the Minister's decision has the right to appeal to the Zambian High Court.[451]

Of interest to the study is the provisions of sections 115 and 116 which have caused un-ending controversies relating to Environmental Impact Assessments/Statements approvals by ZEMA in recent time. First, there have been discussions over the Minister's authority or discretion, as provided for in section 115(1)(c), to remit the review application or appeal to the ZEMA board with a request

---

[446] United Nations Environmental Programme (n44) 45.
[447] *Moses Lukwanda and 9 Others v. Zambia Airforce Projects Limited and 7 Others* CAZ/08/323/2019,
[448] Section123(7) [now section 87(7) of the Mines and Minerals Development Act, 2015.
[449] Sections 112 (1), 113(1).
[450] Section 115 (1).
[451] Section 116 (2).

for consideration or further examination of certain relevant circumstances. When the ZEMA board had previously rejected the application or appeal, as is typically the case, the Minister's "request" has a tendency to undermine the independent review process, which is based on a wide spectrum of technical knowledge as well as stakeholder participation.[452]

Second, despite the legislation's requirement that an investigation be carried out into the case's merits when the ZEMA board rejects an appeal, the same law also permits the Minister to ignore the investigation's findings and recommendations,[453] even if they were based on expert testimony.[454]

In *Zambia Community-based Natural Resource Management Forum and Others v. Attorney General and Mwembeshi Resources Limited,*[455] the court upheld the Minister of Lands' discretion by ruling that the Minister of Lands is not required to follow the conclusions and advice of the person conducting the inquiry when making decisions regarding an appeal or review.[456] It is argued that the Minister's[457] decision to not be bound by expert or scientific conclusions or recommendations appears to open the door for political involvement in the system of EIA regulatory enforcement.[458] Additionally, it has been suggested that the Minister's discretion to disregard scientific investigations, results, and/or recommendations impairs scientific certainty, planning, and decision-making in the application of the precautionary and preventative principles of environmental legislation.[459]

Thirdly, while the Minister is required to consider the Act's purpose, the principles governing environmental management, and "relevant environmental policies, guidelines, and standards published by ZEMA"[460] in making the review application or appeal decisions, the Minister is not required to abide by any expert opinion that may be provided in the inquiry or recommendation. It is suggested that this is a severe flaw since environmental concerns involve science[461] and it would be

---

[452] Kelly Leigh, *'Evaluation Report: Kangaluwi Open-pit Copper Mine in the Lower Zambezi National Park'* (2014) Lower Zambezi Association, 65.
[453] Section 115 (2) (c).
[454] Makweti Sishekanu, and Morgan Katati (n412) 46.
[455] *Zambia Community based Natural Resource management Forum and Others v. Attorney General and Mwembeshi Resources Limited* 2014/HP/A.006,
[456] Ibid, 15.
[457] EMA, 2011, Sec. 115, 116 (1).
[458] Kelly Leigh (n453) 2-4.
[459] Makweti Sishekanu, and Morgan Katati (n412) 46.
[460] Section 115 (2) (a) (b).
[461] Chipasha Mulenga (n1) 27.

cumbersome to expect the Minister to handle such issues as environmental management principles in accordance with Section 6 of the Act. It is in view of the clear weakness of the provisions of section 115 aforesaid that some scholars have advocated for the repeal of section 115 and replacement by the establishment of a specialised tribunal, as is the case in Tanzania.[462] It has thus been argued that establishing a specialised body to handle reviews and appeals from the ZEMA board would take environmental matters away from the realm of political convenience.[463]

The third stage of the review or appeal process requires the party that feels aggrieved by the Minister's decision to file an appeal with the High Court of Zambia within 30 days. Interesting, while providing for the right of appeal, section 116 (2) is silent on the mode of commencement of the appeal in the High Court. In the case of *Zambia Community based Natural Resource management Forum,*[464] the issue of how to appeal the Minister's decision to the High Court arose, and the Court made it clear that the appeal must be made by Originating Notice of Motion and not Notice of Appeal.[465] It is also asserted that while High Court has multiple specialised divisions, there is currently no such specialised division to adjudicate upon environmental matters including appeals against the Ministerial decisions under the EMA, 2011.[466] In essence, environmental cases have not been given the priority given to economic or investment cases. Environmental cases are filed, allocated and adjudicated upon like any other general maters filed in the Principal Registry of the High Court. However, it is encouraging and consoling that Article 133 (3) gives the Chief Justice the authority to establish by statutory instrument specialty courts of the High to hear certain cases.[467] It is argued that with this provision in mind, Zambia should not therefore struggle to establish an environmental court or tribunal.

Part XI of the EMA sets out environmental offence. Criminal cases are currently heard by the magistrate's court, with appeals going to the High Court, Court of Appeal, and Supreme Court. Civil claims, for instances involving toxic torts and EIA approvals, are heard in the High Court and appeals

[462] Chipasha Mulenga (n118) 208.
[463] Ibid.
[464] *Zambia Community based Natural Resource management Forum (n457), 10-13.*
[465] Ibid.
[466] Article 133 (2) provides that there are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.
[467] Article 133 (3).

are heard in the Court of Appeal, and Supreme Court. As mentioned earlier,[468] only one case was commenced in the Constitutional Court, though, it terminated before it could be heard on the merits.

3.7 Mines and Minerals Development Act, 2015

The Mines and Mineral Development Act of 2015 (MMDA) is the primary piece of law referencing environmental management in the mining sector. It stipulates that one of the guiding principles to be followed in mining activities is the preservation of the environment, human health, and safety.[469] According to the Act, it is mandatory to take into account the need to preserve and safeguard the air, water, soil, vegetation, animals, fish, fisheries, and scenic features while issuing or denying any mining right or mineral processing licence.[470] It extends accountability for any injury or damage to any disruption or damage to any agricultural or production system, any decrease in local community yields, any pollution of the air, water, or soil, or any harm to biological variety, as well as any impairment to the economy of any region or community.[471]

According to the MMDA, mining licence holders are subject to strict accountability for any environmental harm caused by their operations, and individuals may file lawsuits for resulting damages..[472] Interestingly, section 87 (7) of the Act categorically regulates the question of *locus standi* such that no aggrieved person or private or state organisation should face challenges to establish standing in the matter.

Nevertheless, as previously mentioned,[473] in *Lafarge Cement Zambia Limited v. Peter Sinkamba*,[474] the court glossed over the clauses of now-section 87 (7) and came to the conclusion that the respondent lacked locus standi to bring the lawsuit.[475] This case demonstrates how general courts have occasionally adopted a restricted locus standi approach in public interest litigation, which is detrimental to environmental preservation and the effective implementation of environmental law.[476]

---

[468] Section 3.4.4 above.
[469] Preamble, Sec. 4 (c) MMDA, 2015.
[470] Ibid sec. 80. 81.
[471] Ibid, sec. 87 (5) (c) (d) (e) and (f).
[472] ibid, sec.87(1)
[473] Under part 3.5.2 above.
[474] *Lafarge Cement Zambia Limited v. Peter Sinkamba Appeal No. 169 of 2009, J16.*
[475] Ibid.
[476] Chipsaha Mulenga (n118) 193.

3.8 Summary

This chapter explored environmental case law while focusing on the current environmental legislation and adjudication in Zambia. It has been proven that even if the legal system seems to have progressive legislation, the highest law of the nation does not explicitly include readily enforceable environmental rights like the right to a safe, clean, and healthy environment. As a result, in Zambia, the right to a safe, clean, and healthy environment must be inextricably linked to the right to life. Sadly, traditional courts have not supported this right in the enforcement of environmental rights.

The chapter also discussed the approach taken by courts in other jurisdictions in the enforcement of environmental rights. While courts in other countries have shifted away from restrictive methods adopted in respect to the criteria for *locus standi* or demonstrated damage, courts in Zambia have not been consistent in their approach to these requirements.

Although the High Court of Zambia has a number of divisions that are specialty courts, there is no specific environmental court or tribunal. However, the Chief Justice is allowed by the Zambian Constitution to create specialty courts of the High Court to hear certain cases by means of a statutory instrument. Therefore, setting up an environmental court or tribunal in Zambia should not be too difficult.

In order to address the question of why Zambia requires an environmental court or tribunal, the following chapter will concentrate on a critical analysis of the ECTs' model solutions as an alternative to traditional courts in Zambia. This will be done by applying the legal framework and current approaches to environmental adjudication that were previously discussed.

CHAPTER FOUR

ENVIRONMETAL COURT OR TRIBUNAL IN THE CONTEXT OF ZAMBIA

4.1 Introduction

Law, together with robust institutions, is crucial for communities to respond to environmental challenges of our time.[477] In light of this, this chapter examined the argument for setting up an environmental court or tribunal in Zambia. It examined the ECTs' model solutions as an alternative to Zambia's traditional courts. To achieve this objective, this chapter applied the legal framework and current approaches to environmental adjudication discussed earlier in chapter two and three to answer the question why Zambia needs an environmental court or tribunal.

4.2 Background to Push Factors for Establishing an ECT in Zambia

As was already mentioned in chapter two of this dissertation, a number of actions are being taken both internationally and domestically to prevent and lessen the negative effects of environmental issues such as climate change, environmental pollution, degradation, and others. Foremost of these efforts came through the Stockholm Declaration[478] in 1972 followed by the Rio Declaration[479] twenty years later. Numerous Multilateral Environmental Agreements (MEAs), treaties, and conventions have been signed and adopted by various countries in response to global efforts to safeguard the environment.[480] Thus, it has been noted that the Stockholm Declaration, Rio Declaration, and MEAs serve as the cornerstones of current environmental legislation.[481] These principles have globally been adopted by many countries who are ratifying and domesticating them as part of their domestic environmental laws. Further, countries are adopting various mechanisms to enforce these environmental principles. One such mechanisms is specialised Environmental Courts or Tribunals (ECTs).[482]

---

[477] George (Rock) Pring and Catherine (Kitty) Pring (n12) xvii.
[478] United Nations *'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, A/CONF48/14/Rev 1 (New York 1973) 3-5.
[479] Rio Declaration on Environment and Development (n24).
[480] Michael Uche Ukponu, *'Environmental Law and Access to Justice in Nigeria – A Case for a Specialised National Environmental and Planning Tribunal (NEPT)'* (2019) (1)1 NAU LAW REVIEW 20-53, 20.
[481] Ibid.
[482] George (Rock) Pring and Catherine (Kitty) Pring (n18) v, ix.

As stated in chapter two, an ECT is a public institution or specialist venue for resolving environmental disputes, such as those involving the exploitation and use of natural resources.[483] In many jurisdictions, reference is made to Principle 10 of the Rio Declaration as the main inspiration for ECTs.[484] The principle requires that adequate access be granted to judicial and administrative actions, including redress and remedy, in environmental concerns.[485] As a result, several nations have realised that creating a dedicated ECT is a viable option for fulfilling their commitments to Principle 10. This is demonstrated by a worldwide "explosion" of these environmental courts and tribunals (ECTs)[486] as a means of facilitating greater access to justice in environmental matters. As mentioned in chapter one, the foremost authorities in this field, George Pring and Catherine Pring, conducted a thorough research of ECT in 2009 and found that there were more than 350 ECTs operating in 41 different nations.[487] This count rose to 1, 200 in forty-four nations in 2016.[488] In 2018, Don Smith[489] found there were nearly 1, 500 ECTs in existence,[490] while the United Nations Environmental Programme (UNEP) reported that there were 2,115 ECTs worldwide as of August 2021.[491] In many nations, ECTs are proven to be a workable mechanism for ensuring citizens' access to efficient and effective administration of environmental justice and environmental rule of law.[492]

4.3 Why Other Countries Establish ECTs and the Prospects of Establishing it in Zambia

A consideration of why other countries have been motivated to establish ECTs is relevant in the context of Zambia. This is so because there is a dearth of discussions in the scientific community about the establishment of a specialised ECT in Zambia. It has totally been overlooked by the political elite. However, it is important to remember that there was extensive intellectual discussion prior to the majority of governments implementing ECTs.

---

[483] George (Rock) Pring and Catherine (Kitty) Pring, *'Environmental Courts and Tribunals' in Michael Faure (ed) Elgar Encyclopedia of Environmental Law: Volume II (Edward Elgar Publishing, 2016) 452, 453* <https://www.elgaronline.com/view/nlm-book/9781786436986/9781786436986.xml?v=toc >accessed 20th May, 2023.

[484] Ibid.

[485] Rio Declaration on Environment and Development (n24).

[486] George (Rock) Pring and Catherine (Kitty) Pring (n12) 1.

[487] ibid

[488] ibid

[489] Don Smith (n15).

[490] Ibid.

[491] Linda Yanti Sulistiawati et la., (n17) 1.

[492] George (Rock) Pring and Catherine (Kitty) Pring (n487).

Although there have been many proposed causes for the "explosion" in the use of ECTs across the world, the Prings have outlined the following justifications for why ECTs are important and well-liked.[493]

(i) Proficiency in Environmental Decision-Making

The main justification for creating an ECT is the requirement for decision-makers who are specialists in national and international environmental law[494] and principles. It has been noted that judges who specialise in ordinary court cases sometimes lack the necessary background in complicated legislation, scientific content, and the concepts underlying environmental law.[495] They might not feel comfortable presenting the highly technical expert testimony and facts that are often needed to weigh the potential economic advantage against the anticipated environmental impact.[496] For instance, in *Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others*[497] the traditional court completely disregarded the expert testimony of a specialist in poultry health and production when deciding to approve the project because it would create 300 jobs and that any environmental violations would be corrected.[498]

Judges participating in specialised ECTs often need to have knowledge of environmental law and associated fields of competency, and they have the chance to gain experience via ongoing training. Additionally, some ECTs allow inclusion of attorneys with planning, technical, or pertinent scientific background to rule over matters in their areas of specialty.[499] It provides an opportunity for multidisciplinary decision making in the environmental matters.

Australia's Planning and Environmental Court (PEC) and the Land and Environmental Court illustrate such ECTs with judges of vast experience in environmental law and principles. In addition, the National Green Tribunal of India is composed of a bench of adjudicators who have received training

---

[493] George (Rock) Pring and Catherine (Kitty) Pring (n12) 13-14.
[494] George (Rock) Pring and Catherine (Kitty) Pring (n18).
[495] Ibid.
[496] Ibid.
[497] *Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others [2008]HP/245, J35.*
[498] Ibid J16-20, J60-61.
[499] George (Rock) Pring and Catherine (Kitty) Pring (n18).

in environmental law and science, including experts in environmental science.[500] Compared to their general court counterparts, these ECTs are better able to comprehend, manage, and use expert evidence to reach environmentally-informed and thorough decisions in environmental cases because of these competences, which have allowed these ECTs to establish a sound environmental jurisprudence.[501]

(ii) Efficiency and Prioritisation in Dealing with Environmental Matters

It is common knowledge that many general trial and appellate courts have a severe backlog of cases that prevents the parties from having their cases heard on the merits for an extended period of time.[502] In the absence of a hearing or an injunction remedy, delay can harm the environment or community parties by allowing the development to move forward and cause environmental damage.[503] The adage "time is money" is used to justify the prompt conclusion of environmental processes since a delay may be very expensive for both public and private parties who may have invested enormous sums in planning and development.[504] In the end, shifting environmental cases from generalist courts to an ECT can allow for a faster and more effective resolution of the immediate environmental impact.[505]

(iii) Government's Visibility and Commitment to Environmental Protection

Governments throughout the globe are under pressure from both inside and outside their borders to pay attention to the need for environmental preservation and enhance access to environmental justice.[506] Internal pressure comes from groups like civil society, commercial interests, and others that want to save the environment and human health for present and future generations.[507] Externally, the pressure is triggered by government's commitments to be a 'good international citizen' by promoting their international duties under environmental conventions and declarations.[508] Thus,

---

[500] Scot C. Whitney, 'The Case for Creating a Special Environmental Court System' (1973) 14 Wm. & Mary Law Review 473-522, 473 https://scholarship.law.wm.edu/wmlr/vol14/iss3/2 accessed 21 May 2023.
[501] Ibid.
[502] George (Rock) Pring and Catherine (Kitty) Pring (n18).
[503] Ibid.
[504] Ibid.
[505] Ibid.
[506] Ibid.
[507] Ibid.
[508] Gitanjali Nain Gill (n106).

establishing an ECT is said to be one way a government can visibly show identifiable commitment to and progress towards environmental justice and preservation.[509]

(iv) Litigation Costs and Access to Environmental Justice

A significant barrier to accessing justice is the cost of litigation. Costs in environmental issues can be extremely high for all parties involved, including the legal system.[510] Costs may include attorney fees, expert witness costs, trial and witness time, transcription of protracted testimony, travel expenditures, filing fees, and perhaps an order for a failed party to cover the successful side's costs.[511] Conversely, forums that are quicker and more effective tend to be less expensive for everyone interested in the case. In this sense, specialised ECTs may be given specialised authority to establish policies and practices that drastically reduce expenses for the parties, in a way that is not possible or practical for ordinary courts.[512]

(v) Uniformity and Predictability in Environmental Decisions

Another justification for the creation of ECTs is the need for consistent, predictable and uniform precedent in environmental decisions.[513] Judges with specialised training and knowledge of the law and relevant case law are more likely to make decisions that are consistent and uniform. The consistency offers the parties and their lawyers greater predictability which can also benefit all those interested in environmental decision-making including government, industry, and concerned NGOs. Additionally, uniformity in environmental judgments helps reduce "forum shopping," in which parties select courts they believe would rule in their favour.[514]

(vi) Relaxed *Locus Standi* Requirement in Environmental Matters

As mentioned in chapter 3, the largest barrier to obtaining environmental justice, even in Zambia, has been locus standi—the credentials needed to unlock and pass through the door of justice. Specialised ECTs may be given the authority to define locus standi requirements broadly to initiate an environmental action in ways that are neither legally nor politically feasible for regular courts. This

---

[509] George (Rock) Pring and Catherine (Kitty) Pring (n18) 14.
[510] Ibid 15.
[511] Ibid.
[512] Ibid.
[513] Ibid.
[514] Ibid.

would pave the way for public interest litigation, class actions, and individual actions in accordance with the concept of doing substantial justice over technicalities and the universal discourse relating to environmental rights as human rights.[515] Relaxing the standing rules ensures that public participation and access to environmental justice, which are outlined in the Principle 10 of the Rio Declaration, are not forfeited on the altar of technicalities.[516]

(vii) Government Accountability for Environmental Decision-Making

One inspiration for establishing an ECT has been to give robust monitoring, and accountability over the executive arm of government, especially for departments or ministries of environment that mght not be active in enforcing environmental regulations.[517] When government organisations are aware that their illegal actions or inactions may be successfully challenged before an informed judiciary and that they can be held accountable for both the process and the results, they are more inclined to operate legally, transparently, and responsibly. In other words, it is the credible threat of legal action which is critical to ensure environmental decision-making by a government entity is of a high quality.[518] This study concluded that this credible threat is essentially lacking in Zambia.

(viii) Creativity and Judicial Activism in Environmental Proceedings

Several ETCs have adopted more flexible rules of procedure and evidential requirements to make environmental legal proceedings less formal and friendly compared to a regular court. Many of these advancements have been made specifically to reduce or eliminate obstacles to environmental justice, such as expenses or standing requirements, and eventually to increase public involvement.[519] Given the authority to strike a balance between environmental and economic rights in order to achieve sustainable development, numerous judges have transformed from traditional problem-solvers into active environmental champions.[520]

---

[515] Ibid.
[516] Ibid.
[517] Ibid.
[518] Friends of the Earth Scotland, *'An Environmental Court or Tribunal for Scotland: Friends for the Earth Scotland Policy Briefing'* (April, 2015).
[519] George (Rock) Pring and Catherine (Kitty) Pring (n18) 15.
[520] Ibid 16.

(ix) Alternative Environmental Dispute Resolution and Problem Solving (ADR)

The majority of the ECTs studied by George (Rock) Pring and Catherine (Kitty) Pring[521] use mediation, third-party unbiased review, arbitration, and restorative justice as a primary form of alternative dispute resolution (ADR) to settle environmental disputes.[522] Many use court-annexed alternative dispute resolution (ADR) that is funded and delivered by the ECT rather than the parties to the proceedings.[523] ADR is used because it may minimise expenses, court workload and backlog, time to judgment, and, most importantly, achieve solutions that fundamentally creatively resolve an environmental situation beyond the use of existing legal remedies.[524] ADR is used to reduce costs to the parties and the ECT while increasing public engagement and access to justice.[525]

(x) Issue and Remedy Integration

ECTs, as opposed to traditional courts, can take a more integrated approach to tackling many environmental rules at once. For the resolution of environmental conflicts, it can serve as a "one-stop judicial shop."[526] An ECT may be given the authority to concurrently analyse all licences, notifications, and permissions that a development may require, such as environmental impact studies, water and waste authorisations, and planning authorizations. Without an ECT, these judgments may be made by several decision-makers, which could result in contradictory results.[527]Another integration combines the civil, administrative, and criminal domains in an ECT, allowing judges to select the best resolution for a conflict in a way that regular courts cannot..[528]

(xi) Public Confidence

The idea of preserving public trust in the environmental dispute resolution process is closely tied to the themes of accountability, dedication, and competence. An ECT that is visible, widely available, and more easily monitored typically commands the confidence and faith of the general population.

---

[521] Ibid 61.
[522] Ibid.
[523] Ibid.
[524] Ibid.
[525] Ibid.
[526] Ibid.
[527] Ibid.
[528] Ibid.

Therefore, transparency is a distinguishing and desired characteristic of well-recognised ECT models.[529]

4.3.1 Counterarguments Against Establishing an ECT

Although there are some reasons for refusing to establish an ECT such as fragmentation of the court system, huge costs of creating and operating ECTs, low caseload and undue influence by interested parties, it has generally been argued that these arguments are of minor significance compared to the positives.[530] In this regard, it has been suggested that the fears that there would not be enough cases to warrant the expense of an ECT do not, typically, seem to be supported by the evidence.[531] Additionally, it has been noted that most environmental issues are never brought before the courts due to the obstacles to accessing environmental justice in civil litigation, such as those covered in this study.[532]

It has been recognised that the previous sources of inspiration for ECT creation in other nations are also applicable to Zambia's internal dialogue. But there are additional Zambia-specific arguments in favour of setting up an ECT in Zambia.

4.4 General Characteristics of the Zambian Judicial System in the Context of the Possibility of Creating a specialised ECT.

The Supreme Court, the Constitutional Court, the Court of Appeal, and the High Court are currently the superior courts that make up Zambia's judicial system. Lower courts include the Subordinate Courts, small Claims Courts, Local Courts, and other courts as may be prescribed.[533] The Supreme Court and the Constitutional Court rank *peri passu* or rank equally to the effect that a decision of the Constitutional Court is not appealable to the Supreme Court[534] or vice versa.

[529] Ibid.
[530] Environmental Rights Centre for Scotland, *'Why Scotland needs an environmental court or tribunal'* (October, 2021) 12.
[531] Ibid 23.
[532] Ibid 24.
[533] Article 120(1).
[534] Article 128 (4) of the Constitution of Zambia (Amendment) Act, 2016.

The following table outlines each court's legal foundation, including its statutory authority.[535]

NAME OF COURT	LEGAL MANDATE
Supreme Court	• It was created pursuant to Article 124 of the Constitution, and • it is endowed with appellate power to hear appeals from the Court of Appeal as well as other statutes.[536]
Constitutional Court	• It was established in accordance with Article 127 of the Constitution; • It is endowed with original and final jurisdiction over all constitutional matters, with the exception of the Bill of Rights, which is subject to original jurisdiction by the High Court; • It also has jurisdiction over cases referred to it by any court in Zambia when a constitutional issue comes up during that court's proceedings.[537]
Court of Appeal	• It was created in accordance with Article 130 of the Constitution, and all quasi-judicial organisations, with the exception of the tribunal for local government elections, are subject to its authority. With the exception of subjects under the Constitutional Court's exclusive jurisdiction, the Court has the power to hear appeals from other courts.[538]
High Court	• It was established in accordance with Article 133 of the Constitution; • It has divisions that include the Industrial Relations Court, Commercial Court, Family Court, and Children's Court; • It has unlimited and original jurisdiction in civil and criminal matters; it has appellate and supervisory jurisdiction, as prescribed; and • It has jurisdiction to review decisions, as prescribed; it has a Principal Registry in Lusaka and District Registries in Kitwe, Livingstone, Ndola, Kabwe, Chipata, Mongu, Solwezi, Kasama and Mansa.

[535] Republic of Zambia, 'Judiciary of Zambia: Annual Report 2021' 3-4 available at https://judiciaryzambia.com/category/resources/annual-reports accessed 23 May 2023.
[536] Article 125 (2).
[537] Article 128 (2).
[538] Article 131 (1).

Subordinate Courts	• They are courts of record,[539] founded in accordance with Article 120 of the Constitution, and their operations are controlled by Chapter 28 of the Zambian laws, the Subordinate Courts Act. They have the authority to consider cases involving environmental violations.
Small Claims Court	• Similar to the subordinate courts, the Small Claims Court was established by Article 120 of the Constitution. It is a court of record,[540] and its procedures and processes are governed by Chapter 47 of the Zambian Code, as amended by Act No. 14 of 2008. It has the authority to hear claims where the value of the property, debt, or damages does not exceed ZMW75,000.00.[541]
Local Court	• Although they were created in accordance with Chapter 29 of the Laws of Zambia's Local Courts Act, Section 4 (1), they were also founded under Article 120 of the Constitution.

As noted in chapter 3, there is currently no specialised court or tribunal dealing with environmental cases in the Zambia's judicial system. However, it is heartening to learn that the Chief Justice of Zambia has the authority to create, by statutory instrument, specialised courts of the High Court to decide particular issues,[542] with the jurisdiction, powers, and sitting of these courts and other specialised courts being prescribed.[543]

4.5 Why Zambia Needs an ECT

Improving access to environmental justice is one reason Zambia needs an ECT. The current system for resolving environmental disputes in Zambia is unsatisfactory for the following reasons: (1) environmental cases are bogged down in lengthy legal procedures; (2) the system is fragmented; (3) judges in Zambia are rarely exposed to environmental legal action; (4) the cost of environmental litigation; and (5) the courts in judicial review matters do not take the merits of cases into account.

---

[539] Article 120(2).
[540] Article 120(2).
[541] Statutory Instrument No. 20 of 2023 – The Small Claims Court (Limit of Jurisdiction) (Liquidated Claims) Rules, 2023.
[542] Article 133(3).
[543] Article 120 (3) (b).

It is noted that a carefully crafted ECT should make it possible to resolve environmental disputes more affordably, should alter how courts evaluate the merits of cases, and having a "one-stop-environmental shop" would rationalise the current system and enable judges to gain a better understanding of environmental issues. The study now examines the five reasons mentioned above in more depth, as well as how ECTs can effect environmental transformation.

4.5.1 Environmental Cases Get Caught Up in the Slow Judicial Processes

Adjudication of environmental case in Zambia has experienced ineffectiveness on account of consistent backlog of cases. Environmental cases become caught up in the backlog and slow legal system, which is unfair to the impacted populace who continuously endure environmental harm. These environmental harms grow irreversible over time and become irreparable to be atoned for by any remedy.

For instance, the Chief Justice established a Taskforce on Backlog in 2018 to address the backlog of cases and outstanding judgments in the High Court of Zambia.[544] The Taskforce discovered a backlog of 2, 054 cases that were entered onto the general list between 1986 and 2015.[545] Environmental matters, such as appeals against administrative decisions made by public entities, are submitted in the High Court, specifically the General List. According to the 2019 Judiciary Annual Report, 6,579 cases were carried over to the year 2020, while 5,556 new cases were added to the General List and 8,854 cases from 2018 were brought forward across all divisions of the High Court.[546] In contrast, the 2021 Judiciary Annual Report shows that 4,407 cases were filed at the General List, while there were 7,769 civil cases still outstanding at the end of 2021.[547]

Flowing from these statistics is evidence that the delay in disposing off cases will still be plaguing the General List of the judicial system within which the environmental cases are caught up to the detriment of the affected communities, environment and the development projects. As a matter of fact, the case of *David Ngwenyama v. Attorney General and Mwembeshi Resources Limited,*[548]which

---

[544] Republic of Zambia, 'Judiciary of Zambia: Annual Report 2018' 5 available at https://judiciaryzambia.com/category/resources/annual-reports accessed 23 May 2023.
[545] Ibid.
[546] Ibid.
[547] Republic of Zambia (n539).
[548] *David Ngwenyama v. Attorney General and Mwembeshi Resources Limited Appeal No. 001/2020.*

is one of the lawsuits involving the proposed establishment of a large-scale mining operation in the Lower Zambezi National Park, was filed in the High Court in early 2014.[549] It was only disposed of 8 years later by the Court of Appeal on 25th February, 2021. In a similar vein, the case of *James Nyasulu and Others v. Konkola Copper Mines PLC and Others*[550]was brought before the High Court of Zambia in 2007, although, it was not disposed of until 2011 and an appeal by the Supreme Court in 2015.[551]

As highlighted before from the experience of other nations,[552]moving environmental matters from ordinary courts to a dedicated ECT can obviously offer an opportunity for judges to quickly dispose of these cases more swiftly and remedy the immediate harm to the environment.[553] Unlike conventional courts where cases are typically decided in the order they are submitted, ECTs have the ability to fast-track urgent cases to address the immediate harm to the community and the environment.[554] According to the Prings, a typical court judge can be motivated to put off complicated, challenging matters—which environmental disputes sometimes are—in favour of considering simpler, smaller cases in order to demonstrate high turnover.[555] To this end, it is essential to execute judicial reforms in this area, such as creating a dedicated environmental court or tribunal, in order to effectively provide environmental justice and promote greater compliance of environmental and planning laws in Zambia.

4.5.2 The Arrangement for Deciding Environmental Disputes is Fragmented

It is noted that there are many forums where environmental litigation and litigation-type appeals are now considered in Zambia. For instance, offences[556] relating to willful failure to conduct an EIA, to prepare and submit a project brief, or offences relating to hazardous waste materials, violations of environmental standards, or biological diversity are filed and heard before the Subordinate Courts of Zambia with appeals to the High Court and Court of Appeal.

---

[549] *Zambia Community based Natural Resource management Forum and Others v. Attorney General and Mwembeshi Resources Limited, 2014/HP/A.006.*
[550] *James Nyasulu and Others v. Konkola Copper Mines PLC and Others 2007/HP/2011.*
[551] *Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012*
[552] See 4.2. (ii) above.
[553] George (Rock) Pring and Catherine (Kitty) Pring (n18) 14.
[554] Ibid 15.
[555] Ibid.
[556] Part XI, Sections 117-123 of the EMA, 2011.

However, section 116 of the 2011 EMA stipulates that a challenge to the Minister's decision may be made to the High Court..[557] Although the EMA of 2011 does not define a court, Section 4(3) appears to imply that public interest lawsuit can be initiated in the High Court's General List. It is interesting to note that the Zambian Constitutional Court did receive a lawsuit involving the environment. This is related to the previously noted case of *David Ngwenyama v. Attorney General and Mwembeshi Resources Limited,*[558]one of the lawsuits regarding the proposed establishment of a large-scale mining operation in the Lower Zambezi National Park. Although it did not proceed to trial, the case challenged among other things, the validity of an environmental impact statement. It is also observed that, in fact, the case involving the mining project in the Lower Zambezi National Park demonstrates the fact that Zambia has an incoherent system for determine environmental cases. This is so because this case, arising from the same facts, first came before the High Court as an appeal against the Minister’s decision but it suffered several technicalities and could not be heard on merits. Thus, a new action was later commenced in the Constitutional Court on the same facts and subject matter.

Dominic Liswaniso Lungowe and Others v. Vedanta Resources PLC and Konkola Copper Mines PLC[559] is another example that highlights Zambia's disjointed system for processing environmental claims. The facts in this case were on all fours with those in *James Nyasulu and Others v. Konkola Copper Mines PLC and Others*[560] which was taken out of the Principal Registry of the High Court of Zambia. However, due to Vedanta Resources PLC's level of ownership over Konkola Copper Mines PLC, the Lungowe action was brought in the United Kingdom to seek the same reliefs as in the *James Nyasulu* case. The Supreme Court of England came to the conclusion that because Vedanta had expressed its willingness to submit to Zambian courts, there was a forum in Zambia where the claimants could pursue legal action against both defendants because the acts complained of were primarily committed there, the mine was run under Zambian licence and law, the majority of the evidence was located there, and the claimants would have a difficult time travelling to England to testify.[561]

---

[557] Section 116 EMA, 2011.
[558] *David Ngwenyama v. Attorney General and Mwembeshi Resources Limited Appeal No. 001/2020.*
[559] *Dominic Liswaniso Lungowe and Others v. Vedanta Resources PLC and Konkola Copper Mines PLC [2016] EWHC 975 (TCC).*
[560] *James Nyasulu and Others v. Konkola Copper Mines PLC and Others 2007/HP/2011.*
[561] *Vedanta Resources PLC and Konkola Copper Mines PLC v. Dominic Liswaniso Lungowe and Others [2019] UKSC 32.*

It is asserted that combining a fragmented regime into a specialised ECT jurisdiction can produce many efficiency gains and would establish broader societal benefits. An ECT can circumvent the challenges of having multiple litigations based on the same environmental dispute as was the situation in the earlier mentioned cases of *James Nyasulu* and *Dominic Lungowe* that involved the same toxic discharged by Konkola Copper Mines PLC. Additionally, it might be more convenient for the parties when many legal problems are handled in the same courtroom. A single integrated jurisdiction can, in fact, lower administrative expenses compared to having many fora. Irreconcilable judgments will also be avoided.

Brian Preston asserts that logical resolution of environmental problems can enhance the standard of judgment.[562] He also contends that having a single "one-stop-shop" type ECT handling environmental problems can encourage improved awareness of environmental law, policy, and concerns among the government, business, members of the public, and civil society.[563] As a result, environmental legislation is more quickly invoked and enforced, fostering good governance, a necessary component of achieving environmentally sustainable development.[564] It is observed that the public interest is not served by Zambia's present fragmented system for resolving environmental disputes.

4.5.3 Judges in Zambia are Infrequently Exposed to Environmental Legal Action

The complexity of environmental legislation and its reliance on scientific concepts necessitate professional decision-making in these cases.[565] According to Ceri Warnock,[566] these peculiar aspects of environmental law include the dynamic nature of ecosystems, the inherent scientific uncertainty present in such disputes, the polycentric or interdependent features of environmental challenges, and the various categories of effects including physical, fiscal, or socio-cultural that go beyond conventional bi-party conflicts.[567] As previously said, environmental adjudication requires courts that have a thorough understanding of the complex network of domestic, regional, and

---

[562] Brian J Preston (n91).
[563] Ibid.
[564] Ibid.
[565] Ceri Warnock, 'Environmental Courts and Tribunals: Powers Integrity and the Search for Legitimacy (Hart Publishing, 2022) 46.
[566] Ibid.
[567] Ibid.

transnational rules and ideologies outlined in both soft and hard laws that make up environmental law and the accompanying policies.[568] Therefore, to properly tackle the kind of environmental problems, in addition to their legal complexity, some level of scientific or technical expertise is necessary. Additionally, it's crucial to be conversant with the typical highly technical expert evidence that appears in environmental lawsuits. For this reason, regular court judges might not be the best choice to decide the majority of environmental matters.[569]

As was mentioned before,[570] there is no environmental judicial specialty in Zambia because numerous environmental matters are adjudicated in several fora. As a result, judges are less frequently exposed to environmental litigation, which may prevent them from developing the necessary competence to resolve such issues quickly and effectively. It is asserted that the creation of an ECT in Zambia will permit the growth of requisite knowledge among its appointed adjudicators.. This might be improved by the ECT offering its judges specialised continuous professional development. In order to provide guidance and promote multidisciplinary decision-making, the ECT may additionally designate technical specialists to sit with the adjudicators.

The late Chief Justice Mrs. Irene C. Mambilima of Zambia highlighted the need for a cadre of environmental law specialists to be on the bench when she said the following: "there is an urgent need to build capacity for adjudicators in order for them to be well vested in environmental laws and be equipped to interpret them correctly."[571] She directly advised the judges that "environmental adjudication requires you to keep abreast of sophisticated environmental crimes and be aware that perpetrators will stop at nothing. Civil actions, on the other hand, will oftentimes demand of you to strike the delicate balance between the economic benefit and public interest."[572] It is asserted that more specialised adjudicators under the ECT can handle more efficiently the environmental cases and arrive at decisions quickly. Further, a specialised Zambian ECT can result in cost-saving to the litigants and the public expenditure in general.

---

[568] Ceri Warnock (n570).
[569] George (Rock) Pring and Catherine (Kitty) Pring (n12) ix.
[570] See 4.4.2. above.
[571] Republic of Zambia, '*Judiciary of Zambia: Training of Trainers Workshop in Environmental Law (Chisamba, 4 December, 2019)*' available at https://judiciaryzambia.com/category/resources/annual-reports accessed 23 May 2023.
[572] Ibid.

4.5.4 Access to Environmental Justice is impeded by the high cost of environmental litigation.

The goal of environmental law, according to Lord Hope's opinion in Walton v. Scottish Ministers,[573] is to ensure that everyone has a legitimate interest in maintaining the condition of the environment.[574] While there is some truth to this remark, it is sometimes difficult or financially risky for the majority of the poor and disadvantaged members of the public and NGOs to start legal proceedings to safeguard the environment.[575] Access to environmental justice has always faced this common problem. The fact that legal aid is restricted to persons and there is no legal aid accessible in environmental lawsuits due to the restriction on who can get civil legal aid simply makes this situation worse.[576] This criteria disqualifies community organisation, whether incorporated or not, including environmental civil society organisations. Therefore, it is not just the risk of unfair financial burden that deters community members from filing a lawsuit over the environment, but also the whole cost of the environmental litigation, which includes the cost of legal counsel.

An ECT that is designed to ensure the affordability of environmental litigation can provide a comprehensive answer to solve the difficulties associated with the expenses of environmental litigation. Making access to justice possible by lowering the cost of environmental litigation is one of the main justifications for creating an ECT.[577] It has been suggested that the ECT should substitute an alternative system for allocating litigation expenses at the end of the case in place of the "loser pays rule" in order to make environmental litigation more inexpensive.[578]

When it comes to handling fees in environmental lawsuits, Zambia's traditional courts have not always been consistent. In *Lafarge Cement Zambia Limited v. Peter Sinkamba*,[579] for instance, the Supreme Court mandated that the defendant pay court costs despite having brought the environmental lawsuit in the public interest. A similar thing happened in the case of *Martha Muzithe*

---

[573] *Walton v. Scottish Ministers [2012] UKSC44.*
[574] Ibid 152.
[575] Mary Church, *'Tipping the Scales: Complying with Arhus Convention on Access to Environmental Justice'* (Friends of the Earth Scotland, 2011).
[576] Legal Aid Act, Chapter 34 of the Laws of Zambia Part IV.
[577] Environmental Rights Centre for Scotland (n534).
[578] Ibid 12.
[579] *Lafarge Cement Zambia Limited v. Peter Sinkamba Appeal No. 169 of 2009, J16.*

Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others,[580] when the court dismissed the case with costs going to the defendants despite the fact that there was a real environmental disagreement at the heart of it that was centered on a forged environmental impact statement. On the other hand, the Supreme Court ordered that each party bear their own costs in the case of *Konkola Copper Mines PLC v. James Nyasulu and Others.*[581]

As noted earlier,[582] a specialist ECT may be given explicit authority to create policies and practices that significantly reduce the costs of litigation for parties, in ways that generalist court systems are either unable to do or are not practical.

4.5.5 Generalist Courts in Judicial Review Matters do not Consider the Merits of Cases

When the content of the law has been broken, a person may dispute a decision, act, or omission through a procedure known as merits review, which is also referred to as substantive legality.[583] The term "procedural review," on the other hand, refers to a method where a person can contest a decision, act, or omission if legal processes have been broken.[584]

It is usual to use a judicial review procedure to contest environmental decisions. However, a thorough merits examination is not one of the reasons for judicial review. In contrast to merits review, Lord Hope[585] emphasised that the purpose of judicial review is to ensure that the decision-maker does not overstep his authority, misuse his discretion, or fail to carry out the task that has been assigned to or entrusted to him. The court lacks the authority to examine the conduct or decision's legality or to substitute its own judgment for that of the person or organisation that was given control or authority over the subject.[586] In *Bank of Zambia v. Access Leasing Limited, Access Financial Services Limited*[587] the Supreme Court of Zambia upheld this position and stated that judicial review is not concerned with the merits of the decision giving rise to the application for judicial review, but rather

[580] *Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others [2008]HP/245, J35.*
[581] *Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012.*
[582] See 4.2. (iv) above.
[583] Environmental Rights Centre for Scotland (n534) 12.
[584] Ibid.
[585] *West v. Secretary of State for Scotland [1992] SC 385.*
[586] Ibid 413.
[587] *Bank Of Zambia v. Access Leasing Limited, Access Financial Services Limited [2008] 1 Z.R. 159*

with the decision-making process itself. On a judicial review application, the court will not serve as an appeals court for the body in question, nor will it interfere in any way with the exercise of any authority or discretion that has been delegated to that body unless it has been done so outside of its purview.[588]

It has been argued that the only aspect of a decision's merits examination that the court may address is whether it violated the *"Wednesbury unreasonable"*[589] standard, which takes into account irrationality, absurdity, or perversity.[590] The bar is really high. In the context of environmental disputes, however, it has been contended that the *Wednesbury* test fails to effectively protect the environment.[591] One theory put up is that the majority of decision-makers might not have the knowledge necessary to make choices involving complex environmental science, and hence their conclusions cannot be properly contested.[592] It is argued that the same is true of statutory appeals procedures used to challenge specific court rulings since courts typically do not permit thorough merits assessment.

On the other hand, a specialised ECT may be granted legislative authority to undertake merits reviews of actions taken by individuals and public entities that contravene national environmental legislation.[593] This is possible because the ECT can use both legal and expert members who have the necessary scientific and technological knowledge to assess such matters.[594]

4.6 What Kind of ECT Does Zambia Need?

According to Sir Harry Woolf, the fundamental tenet of the environmental court may be the requirement to safeguard not just individual rights but also the environment for the benefit of the populace as a whole.[595] Therefore, it is often preferable to create an ECT's jurisdiction on an objective basis, meaning that they would have jurisdiction over civil and administrative disputes regarding the

---

[588] Ibid.
[589] Based on *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223.*
[590] Lorna Drummond, Frances McCartney and Anna Pole, *'A Practical Guide to Public Law Litigation in Scotland*' (W Green, 2020) 63-65.
[591] Crispin Agnew, *'Does Wednesbury Protect the Environment'* [2018] 104 UKELA elwa 26.
[592] Ibid.
[593] Environmental Rights Centre for Scotland (534) 14.
[594] Ibid.
[595] Sir Harry Woolf, *'Are the Judiciary Environmentally Myopic?'* (1992) (4) Environmental Law 1, 4.

utilisation of natural resources or environmental preservation. Contrary to subjective criteria, as used, for instance, when military tribunals assess matters involving certain participant types, such as military soldiers.[596]

4.6.1 Possible Jurisdiction of an ECT in Zambia

It is instructive to consider the Indian experience regarding jurisdiction where two factors influence the environmental nature of a case. The first consideration has to do with the effects of ecological repercussions on the general public, such as the extent of environmental harm or property damage or if population health is harmed as a result of a clear breach of statutory environmental responsibility.[597] The second consideration relates to the existence of ecological effects connected to the specific activity or the source of pollution.[598]

In the context of Zambia, it is asserted that an ECT should have jurisdiction over four types of environmental cases as discussed below based on scientific and practical ideas prevalent in Zambia.

(1) Violation of the Requirements for Individual Activities

Zambia's environmental regulatory framework includes a wide range of significant regulations to safeguard the environment and reduce pollution[599] from sources such as industry, agriculture, transportation, and energy, to name a few. The breach of these requirements may take the form of the emission of hazardous substances above the established limits and standards (as in the case of *Mopani Copper Mines PLC v. Ndumo Miti and 2 Others s*[600]), the disposal and consumption of waste without the necessary authorization, the construction of energy facilities in violation of the applicable environmental regulations and restrictions, and other similar actions. Non-compliance with these environmental standards is a breach of people's constitutional rights to a safe, healthy, and clean environment, or, right to life, as the case maybe. As a result, an ECT should have the authority to hear cases involving claims for compensation for harm to property, health, or life caused by

---

[596] Aleksey Pavlovich Anisimov and Anatoly Yakovlevich Ryzhenkov, *'Environmetal Courts in Russia: To be or Mot to be?'* (2013) The International Lawyer 441-458, 454.
[597] Gitanjali Nain Gill, *'A Green Tribunal for India'* (2010) 3 Journal Environmental Law 461-474, 461, 469 https://www.jstor.org/stable/44248749 accessed 21 May, 2023.
[598] Ibid.
[599] See Sections 31 – 83 under Part IV of EMA, 2011; section 12 of MMDA 2015; Section 48 of Water Resource Management Act 2011.
[600] *Mopani Copper Mines PLC v. Ndumo Miti and 2 Others [2020] (Appeal 154/2016), J76.*

environmental rules breaches. It has been noted that the primary risk to a community's life and health comes from the use of poisonous chemicals that are harmful to their wellbeing.[601] In order to accomplish this, an ECT must address the well-known challenge of proving a causal-link between a claimant's allegation of environmental harm and those impacts on their health. This was demonstrated in the case of *Konkola Copper Mines PLC v. James Nyasulu and Others*[602] where the Supreme Court stated that "…we would not award damages for personal injuries in the absence of credible evidence…there was…no credible medical evidence showing that the 1, 989 Respondents suffered any injury as a result of the pollution."[603]

(2) Violation of environmental regulations relating to the use and protection of specific natural resources (water, land, minerals, forests, fauna, air)

The core of these requirements is that an ECT must decide on unique protective measures for certain natural things that are not important to other natural objects. For instance, the rules for preventing forest fires are unimportant for the goal of safeguarding water.[604] Similarly, the conservation of forests is also unaffected by environmental restrictions on hunting and fishing. However, a specialist ECT should also take into account any infractions of these guidelines.

(3) Violation of the legal framework governing particularly protected places (such as national parks, nature reserves, or environmentally vulnerable regions, such as Forest No. 27)

The third category of an ECT jurisdiction's qualifying requirements is the region under special protection where the offending activities occurred, in contrast to the first two groups, which are classified according to the standards of environmentally harmful activities.[605]

[601] Aleksey Pavlovich Anisimov and Anatoly Yakovlevich Ryzhenkov (n600) 455.
[602] *Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012.*
[603] Ibid J21.
[604] Aleksey Pavlovich Anisimov and Anatoly Yakovlevich Ryzhenkov (n607) 455.
[605] Ibid 456.

(4) Environmental court cases involving the use of several resources (land, water, minerals, forests)

This category includes specialised regulations that address the usage of natural resources in ways that are directly related to the preservation of the environment.[606] These may include the Lands Act,[607] Water Resources Management Act,[608] Forest Act,[609] Zambia Wildlife Act,[610] MMDA,[611] Urban and Regional Planning Act.[612] These should be taken into account by an ECT for specific use of natural resources.[613]

4.6.2 Form of an ECT in Zambia

According to the discussion in chapters 2 and 3, there are several approaches to develop an ECT, each of which has advantages of its own. This research makes no recommendations about the structure of the environmental court or tribunal, whether it should be a court or tribunal, whether to convert an existing institution into an ECT, or whether to create a brand-new ECT forum from scratch. The study will give only various options and a broad view of the law-enforcement regime of ECTs, should it ever be set up in Zambia.

First of all, it is proposed that the possibility of expanding the Lands Tribunal's environmental jurisdiction be taken into consideration in order to deal with environmental lawsuits in the previously mentioned areas. In line with this proposal, the Lands Tribunal should become a *'Land and Environmental Tribunal.'* The merits of this suggestion is that the Lands Tribunal has recognised legal status and authority. Furthermore, adopting an established institution would not require a lot of extra funding.

The second option is to create a Land and Environmental Court as a division of the High Court of Zambia.[614] It should be a court of first instance, hearing all environmental related appeals from

---

[606] Ibid.
[607] Chapter 184 of the Laws of Zambia.
[608] Act No. 21 of 2011.
[609] Act No. 04 of 2015.
[610] Act No. 14 of 2015.
[611] Act No. 11 of 2015.
[612] Act No. 03 of 2015.
[613] Aleksey Pavlovich Anisimov and Anatoly Yakovlevich Ryzhenkov (n607) 456.
[614] Mulenga Chipasha (n118) 274.

administrative bodies with its appeals lodged in the Court of Appeal. As was previously mentioned, the Zambian Constitution enables the establishment of courts in accordance with established procedures,[615] and the Chief Justice is empowered by the Constitution to create specialist courts of the High Court to hear certain cases.[616] This progressive provision may be resorted to in actualising the second proposal, should an ECT be established in Zambia. Further, this is the most feasible option considering the financial and other resource implications to establish a stand-alone Environmental Court or Tribunal.

The third proposal relates to the establishment of a new institution as an ECT rather than adopting or modifying an existing institution. It has been stated that this is a radical strategy that offers a better choice to establish things more clearly from the start, purposefully independent of the current quo.[617] Additionally, it has been noted that developing a new ECT would require overcoming resistance to change, which is essential for an ECT to be successful.[618] Ideally, a completely new ECT would provide the opportunity to build the ECT and its processes based on basic principles in a way that modifying an existing institution would not be able to.[619] The Kenyan system, in which the Land and Environmental Court is created by the Constitution, may be examined and used as inspiration by Zambia. Environmental rights are elevated to the same level as other fundamental rights by including the Land and Environmental Court in the Constitution, which increases the government's commitment to environmental management and preservation.

It therefore appears that under the current situation in Zambia, the most suitable form of an ECT would be for a trial and appeal cases from administrative decisions to be heard at the level of a specialised ECT. Any appeals against its decision to be heard by the appellate jurisdiction to ensure unity of practice.

---

[615] Article 120 (1) (d) of the Constitution of Zambia (Amendment) Act, 2016.
[616] Article 133 (3) of the Constitution of Zambia (Amendment) Act, 2016.
[617] Environmental Rights Centre for Scotland (n534) 25.
[618] Ibid.
[619] Ibid.

4.6.3 Essential Design features for an ECT in Zambia

The elements that were taken into consideration while developing an ECT must be addressed in the ECT's design, as was already mentioned under section 4.4 of this chapter. In any event, an ECT should have such key features as:

(i) A clearly defined institutional goal to promote access to environmental justice, democracy, the rule of law, and the human right to a safe, clean, and healthy environment.

(ii) It should determine environmental cases in a just, fair and cheap or affordable way.

(iii) It should provide access to environmental justice in order to satiate the three "access or procedural rights" outlined in Principle 10 of the Rio Declaration.

(iv) It should operate independently from the executive branch of government in terms of member selection, term limits, and financial support. It ought to have enough resources.

(v) It should have the authority to appoint members with the necessary technical and scientific training, including solicitors.

(vi) It should have the power to establish its own operating guidelines and norms.

(vii) An ECT should also include a wide variety of environmental jurisdictions that span civil and administrative conflicts, including the many different environmental and planning statutes.

(viii) It should have authority to conduct merits review of cases. The inclusion of a criminal jurisdiction should also get enough attention..[620]

(ix) It should have jurisdiction to handle referral environmental questions arising during proceedings in other courts.

---

[620] Note that this study concentrated on civil and administrative law. As such a consideration of the inclusion of criminal jurisdiction is beyond its contemplation and requires further study.

(x) It should be run transparently by making its operations, including its rules, methods, and rulings, public, as is the case with the Land and Environmental Court of New South Wales.[621]

(xi) It should be simple to use and intended for those without legal training.

These are a few of the fundamental characteristics that an ECT in Zambia should have to guarantee efficient adjudication of national and international environmental law and principles.

4.7 Summary

The argument for setting up an environmental court or tribunal in Zambia was covered in this chapter. It analysed the ECTs' model solutions as alternative to traditional courts in Zambia. It has been proven that, despite the Rio Declaration's non-binding nature, Principle 10 has served as a major inspiration for ECTs in a number of states. The chapter also made clear that Zambia should be motivated to reconsider how environmental issues are handled and solve the long-standing problem of lack of access to environmental justice by considering the elements that have made other nations favour the formation of ECTs.

The chapter also showed that the current system in place in Zambia for resolving environmental disputes is problematic for the following reasons: environmental cases get caught up in lengthy legal procedures; the system for doing so is fragmented; Zambian judges are rarely exposed to environmental legal action; the cost of environmental litigation; and the courts in judicial review cases do not take the merits of cases into consideration. A carefully crafted ECT could make it possible for environmental cases to be resolved more cheaply, could change how courts evaluate case merits, and having environmental disputes decided in one place would legitimise the status quo and give judges plenty of room to hone their skills. The chapter came to a close with a discussion of some key characteristics that an ECT in Zambia, should one be constituted, to facilitate efficient adjudication of national and international environmental law and principles.

---

[621] https://www.lec.nsw.gov.au/.

The chapter that follows will provide a summary of the whole study, highlight the major findings, address the study's central topic, and then make some recommendations to the Zambian government in order to spark further conversation about the creation of an ECT in Zambia.

CHAPTER FIVE

CONCLUSION AND RECOMMENDTIONS ON ECTs IN THE CONTEXT OF ZAMBIA

5.1 Summary of the Study

ECTs have been recognised and adopted by judiciaries all over the world as essential new forms of governance to resolve environmental conflicts fairly, swiftly, and affordably. Given the aforementioned, this study examined the challenges and opportunities for creating a dedicated environmental court or tribunal in Zambia. This study has shown that the present rise in ECTs is changing how environmental law is decided and how people can obtain environmental justice. This sharp rise in ECTs is a result of the escalating severity of environmental issues, such as anthropogenic climate change, the complexity of environmental laws, the public's growing awareness of these issues, and the inadequate handling of environmental cases by regular courts and administrative tribunals. The increased demand on governments to enable public engagement, access to justice, and access to environmental information in order to safeguard the environment for current and future generations is another factor contributing to the rapid rise of ECTs.

5.2 Key Findings and Conclusions

Key results and specific conclusions from the study were made in each chapter, and they are as follows:

The second chapter focused on how environmental law evolved from the early 20th century to the present, resulting in the need for new institutions of governance to handle environmental conflicts. The study established that the successes recorded by ECTs in other jurisdictions including Australia, India and Kenya and the good practices at design and operational stage are worthy to emulate when attempting to create an ECT in Zambia. It has been determined that ECTs are important for ensuring that people have access to environmental justice and related remedies, for bolstering the judiciary, and for ensuring that there is legal accountability in environmental issues. As a result, ECTs not only help the general public understand how environmental law works, but they also encourage legal inquiry and quick settlement of environmental issues with an emphasis on offering logical and useful solutions. It is also stated that ECTs have fostered innovation and changes in environmental law.

Chapter 3 critically discussed the prevailing environmental law and adjudication in Zambia with environmental case-law analysis. The study discovered that although Zambia's legal system appears to contain progressive environmental regulations, the country's constitution does not clearly provide for rights to the environment that are straightforward to enforce, such as the right to a safe, clean, and healthy environment. Additionally, the study found that in Zambia, the only right that must be interpreted as encompassing the right to a safe, clean, and healthy environment is the right to life. Unfortunately, this entitlement has not been upheld by conventional courts in the enforcement of environmental rights. To establish culpability against those who violate environmental laws, the courts have mainly relied on the tort of negligence and the statutory duty of care.

The chapter also discussed the approach taken by courts in other jurisdictions to uphold environmental rights. While courts in other countries have moved away from restrictive methods adopted in respect to the criteria for locus standi or demonstrated harm, it was discovered that Zambian courts have not consistently applied the requirements for locus standi or demonstrable harm. As a result, it is determined that while the High Court of Zambia has a number of divisions that are specifically focused on specialist courts, there is no such court or tribunal that is focused on environmental law. However, the Chief Justice is allowed by the Zambian Constitution to create specialty courts of the High Court to hear certain cases by means of a statutory instrument. Therefore, Zambia should not have any difficulty setting up an environmental court or tribunal.

In **Chapter 4**, the argument was made for Zambia to establish an environmental court or tribunal. It examined the ECTs' model responses as an alternative to conventional courts to decide environmental disputes in Zambia. The analysis discovered that, despite the Rio Declaration's Principle 10 not having any legal force, it served as a major impetus for the formation of ECTs in a number of countries. The study also discovered that the same elements that made other nations choose the development of ECTs may be used to persuade Zambia to reconsider its approach to environmental issues and resolve the long-standing problem of lack of access to environmental justice.

The chapter also found that the system currently in place in Zambia for resolving environmental disputes is problematic for the following reasons: environmental cases get bogged down in lengthy legal procedures; the system for doing so is fragmented; judges in Zambia are rarely exposed to environmental litigation; the cost of environmental litigation is prohibitive; and the courts in judicial review matters do not carry out merits review.

The conclusion is that a carefully crafted ECT could make it possible to settle environmental cases more cheaply, could change how courts evaluate case merits, and having environmental matters decided in one forum would legitimise the status quo and give judges plenty of opportunity to sharpen their skills in this field.

5.3 Study Recommendations

Taking into account the aforementioned findings, the study recommends as follows:

- **Entrench a constitutional guarantee of the right to a safe, clean, and healthy environment.**
  The right to a clean, safe, and healthy environment be enshrined as a basic human right in Zambia's Constitution. The Constitution must clearly define procedural rights, such as standing and access to environmental information, which are essential to the realisation of substantive environmental rights. Courts throughout the globe seem more ready to preserve the environment after a constitutional right to a clean, safe, and healthy environment is established, seemingly without needing an explicit relationship to demonstrated harm.

- Establish a **Land and Environmental Court** by:

  - Modify the Lands Tribunal into a Land and Environmental Court of first instance to be headed by a judge. The merits of this proposal is that the Lands Tribunal already has legal status and authority. Its jurisdiction must be expanded to include environmental litigation; or

  - Create a division of the High Court with the focus on Land and Environmental Law. The Chief Justice of Zambia may establish specialist courts of the High Court to

hear certain cases under Article 133 (3) of the Zambian Constitution. Therefore, Zambia should not have any difficulties in creating a Land and Environmental Court as a specialty division of the High Court. In Zambia, the absence of a serious threat of legal action makes it difficult to guarantee that government entities make environmental decisions that are of a high caliber; or

    - Create a new Land and Environmental Court with constitutional protections, like in Kenya. This would elevate environmental matters and concerns to the level of other constitutional rights. It would also provide the opportunity to design the court and its procedures from the first principles in a way that modification of an existing body may not.

- Establish an **Environmental Tribunal** under the Environmental Management Act to handle appeals and reviews from the ZEMA Board in place of the Minister. This will ensure that environmental matters are taken away from the realm of political convenience.

- **Judicial training on environmental law** must not be overlooked. These initiatives can alter judges' perceptions of environmental cases since the public will be more inclined to trust and engage in environmental justice when there are more qualified adjudicators in place.

5.4 Recommended Future Research

- Further research on modifying the Lands Tribunal into a Land and Environmental Court of first instance to be headed by a judge should cover a stakeholder perspective.
- Additional or further research on environmental rights should analyse the conditions under which citizens in Zambia utilise the existing environmental legal provisions to redress environmental grievances.

6.0 Bibliography

Primary Sources

CASES

Zambia

Bank of Zambia v. Access Leasing Limited, Access Financial Services Limited [2008] 1 Z.R. 159

David Ngwenyama v. Attorney General and Mwembeshi Resources Limited, Appeal No. 001/2020

Doris Chinsambwe and 6 Others v. NFC Africa Mining PLC [2014] HK 374

Geoffrey Elliam Mithi v. Mopani Copper Mines PLC and Attorney General [2014]HB 48

James Nyasulu and Others v. Konkola Copper Mines PLC and Others 2007/HP/2011

Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012

Lafarge Cement Zambia Limited v. Peter Sinkamba Appeal No. 169 of 2009

Martha Muzithe Kangwa and 27 Others v. Environmental Council of Zambia and 2 Others 2008/HP/245

Martha Muzithe Kangwa and 29 Others v. Environmental Council of Zambia and 2 Others [2014] ZR 233

Mopani Copper Mines PLC v. Ndumo Miti and 2 Others [2020] (Appeal 154/2016)

Moses Lukwanda and 9 Others v. Zambia Airforce Projects Limited and 7 Others CAZ/08/323/2019

Robert Chimambo v. The Attorney General and Zambia Environmental Agency, 2022/CCZ/003

Zambia Community based Natural Resource management Forum and Others v. Attorney General and Mwembeshi Resources Limited, 2014/HP/A.006

Other Jurisdiction

Canada

Trail Smelter Case (United States v. Canada), 3RIAA 1905(Trail Smelter Arb. Trib 1938)

Colombia
Victor Ramon Casttrillon Vega v. Federacion National de Algoderos y Corporation Autonoma Regional del Cesar (COPROCESAR), Case No. 4577 (Supreme Court, Chamber of Civil and Agrarian Cassation, November 19, 1997)

India
L. K. Koolwal v. Rajasthan A.L.R [1988] Raj 2 (Raj. H. C)

Rural Litigation and Entitlement Kendra Vs. Uttar Pradesh A.I.R. [1985] S.C. 652

Vellore Citizens' Welfare Reform v. Union of India A.I.R. [1996] S.C. 2715

Nepal
LEADERS, Incorporation v. Godawari Marble Industries (Supreme Court Nepal, October 31 1995)

Nigeria
Chief Gafaru v. Chief Sunday Olowookere [2011] LPELR-SC 200/2003

Kokoro-Owo v. Lagos State Government, 6 N.W.L.R. [1995] 760

Pakistan
General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhehum v. Director, Industries and Mineral Development, Punjab, Lahore Human Rights Case No. 120 of 1993, [1994] S.C.M.R. 2061

In re Human Rights Case (Environmental Pollution in Balochistan) Human Rights case No. 31-K/92 (Q). P. L. D. 1994 Supreme Court 102 [1992]

Scotland
West v. Secretary of State for Scotland [1992] SC 385

South Africa
Director: Mineral Development v. Save the Vaal Environment Case No. 133.98 (Supreme Ct. of Appeals of South Africa. Mar. 12.1999)

Tanzania
Joseph D. Kessy v. Dar es Salaam City Council Civil Case No. 299 of 1988 (High Court of Tanzania at Dar es Salaam, Sept. 9, 1991)

United Kingdom
Based on Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223

Dominic Liswaniso Lungowe and Others v. Vedanta Resources PLC and Konkola Copper Mines PLC [2016] EWHC 975 (TCC)

R v. secretary of State for Home Department, ex parte Anufrijeva [2003] 3 ALL ER 827.

Vedanta Resources PLC and Konkola Copper Mines PLC v. Dominic Liswaniso Lungowe and Others [2019] UKSC 32

STATUTES

Constitution (Amendment) Act, 2016, Art.1(5)

Competition and Consumer Protection Tribunal under The Competition and Consumer Protection Act, 2010

Tax Appeals Tribunal under the Tax Appeals Tribunal Act, 2015

The Lands Tribunal, under The Lands Tribunal Act, 2010

Environmental Management Act, 2011

Mines and Minerals Development Act, 2015

Zambia Wildlife Act, 2015

Forest Act, 2015

Fisheries Act, 2011

Water Resources Management Act, 2011

Urban and Regional Planning Act, 2015

Legal Aid Act, Chapter 34 of the Laws of Zambia

Subsidiary Legislation

The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997, SI 28 of 1997

Other Jurisdictions

Costa Rica, Organic Law on the Environment 1995

Art. 20 of the 1999 Constitution of Nigeria

Secondary Sources

BOOKS AND CHAPTERS IN BOOKS

Bell S and McGillivray D, *Environmental Law* (7th edn, Oxford University Press 2008)

Bosselmann K, '*The Principles of Sustainability: Transforming Law and Governance'* (Ashgate, 2008)

Daly E, *et la*, *'Introduction to Environmental Constitutionalism'* in New Frontiers in Environmental Constitutionalism (2017)

Donne J, *Devotions Upon Emergent Occasions* (Reprint edn, Kessinger Publishing 2004)

Drummond *et la*, *'A Practical Guide to Public Law Litigation in Scotland*' (W Green, 2020)

Gray R. J, *et la, 'Burns and Grove's The Practice of Nursing Study: Appraisal, Synthesis, and Generation of Evidence'*, (8th edn, Elsevier, Inc., 2017)

May J R, and Daly E, *'Judicial Handbook on Environmental Constitutionalism'* (UNEP, 2017)

Pring (Rock) G and Pring (Kitty) C, *Greening Justice: Creating and improving Environmental Courts and Tribunals* (Washington 2009)

Pring (Rock) G and Pring (Kitty) C, '*Environmental Courts and Tribunals: A Guide for Policy Makers'* (UNEP 2016)

Pring (Rock) G and Pring (Kitty) C, *'Environmental Courts and Tribunals' in Michael Faure (ed) Elgar Encyclopedia of Environmental Law: Volume II (Edward Elgar Publishing, 2016) 452, 453* <https://www.elgaronline.com/view/nlm-book/9781786436986/9781786436986.xml?v=toc >accessed 20th May, 2023

Quick K S, and Bryson J M, 'Public Participation' in Jacob Torbing, Chris Ansell (eds.) *Handbook in Theories of Governance*, Edward Elgar Press

Rawls J, *'A Theory of Justice'* Revised Edition (Belknap Press of Harvard University Press, Cambridge, 1999)

Sambo P T, *'The Environmental Management Act (2011):a basis for the growth of an environmental ethos and good environmental governance in Zambia?'* In Patricia Kameri-Mbote, Alexander Paterson, Oliver C Ruppel, Bibobra Bello Orubebe, Emmanuel D Kam Yogo (eds.) Law, Environment, Africa (1st edn, Nomos, Germany, 2019)

SADC Environmental Legislation Handbook (3rd edn. Development Bank of Southern Africa, 2012)

Sands P, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003)

Scotford E, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing, 2017)

Sulistiawat, *et la*, '*Environmental Courts and Tribunals: A Guide for Policy Makers'* (UNEP, Nairobi, 2022)

Thornton J and Beckwith S, *Environmental Law: Sweet & Maxwell's Textbook Series* (2nd edn, Sweet & Maxwell 2004)

United Nations Environmental Programme, '*Environmental Courts and Tribunals-2021: A Guide for Policy Makers'* (UNEP, Nairobi, 2022)

United Nations Environmental Programme, *Global Climate Litigation Report, 2020 Status Review* (UNEP, Nairobi, 2020)

United Nations Environmental Programme, *Environmental Rule of Law: First Global Report* (UNEP, Nairobi 2019)

United Nations Environmental Programme, '*Environmental Courts & Tribunals; A Guide for Policymakers'* (UNEP, Nairobi 2016)

United Nations Environmental Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd edn. UNEP 2007)

United Nations Environmental Programme, *'Judicial Handbook on Environmental Law'* (UNEP, 2005)

Warnock C, 'Environmental Courts and Tribunals: Powers Integrity and the Search for Legitimacy (Hart Publishing, 2022)

JOURNALS

Amirante D, *'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India.*' (2012) 29 Pace Environmental Law Review 441-469, 441<https://digitalcommons.pace.edu/pelr/vo/29/iss2/6 >*accessed 11th March, 2022*

Carol M R, *'Joseph Sax and the Idea of the Public Trust'* (1998) 25 Ecological Law Quarterly

Davide H, Jr and Vinson S, 'Green Courts Initiative in the Philippines' (2010) (3) 91) Journal of Court Innovation 122 <https://www.courts.state.ny.us/court.innovation/Winter-2010/index.shtml.>*accessed 15th September 2022*

Ewing-Chow M, and Soh D *'Pain, Gain, or Shame: the Evolution of Environmental Law and the Role of Multinational Corporations'* (2009) 16(1) (7) Indiana Journal of Global Legal Studies

Frank R, *'The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future'* (2012) 45

University of California, Davis

Gill G N, 'The National Green Tribunal: Evolving Adjudicatory Dimensions(2019) 49 (2-3) Environmental Policy and Law153-162, 153 DOI 10.2333/EPL-190151 https://wwwstudygate.net/publication/3352/8366 accessed 21 May, 2023

Gill G N, *'A Green Tribunal for India'* (2010) 3 Journal Environmental Law 461-474, 461, 469 https://www.jstor.org/stable/44248749 accessed 21 May, 2023

Qing Z and Benoit M, *'Public Interest Environmental Litigation Under China's Environmental Protection Law*' (2017) 1(2) Chinese Journal of Environmental Law, The Chinese University of Hong Kong Faculty of Law Study Paper No. 2017-26, https://ssrn.com/abstract=3090820 accessed 17 February 2023

Handl G, *'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992'* (2012) United Nations Audio-visual Library of International Law

Kaniaru D W, '*'Environmental Courts and Tribunals: The case of Kenya'* (2012) 29 (2) (7) Pace Environmental Law Review566 Available at: https://digitalcommons.pace.edu/pelr/vol29/iss2/7 accessed 7 February 2023

Kidd M, *'Greening Judiciary'* (2006) 9 (3) Potchefstroom Electronic Law Journal

Kotze L J, *'The Conceptual Contours of Environmental Constitutionalism'* (2015) 21 Widener Law Review, 187<https://www.studygate.net/publication/296319718 >accessed 16th March, 2022

Lau M, '*The Role of Environmental Tribunals in Pakistan: Challenges and Prospects'(2021) Koninkiijke Brill NV, Leiden < https://eprints.soas.ac.uk?32989 >accessed 19th March, 2022*

Makondo C C, et la, , *'Environmental Management Compliance, Law and Policy Regimes in Developing Countries: A Review of the Zambian Case'* (2015) [3](4) International Journal of Environmental Protection and Policy

Manatsa P, *'The Law and Practice of Environmental Impact Assessments (EIA) in Zambia: Strengths and Weaknesses'* (2015) 6 International Journal of politics and Good Governance

Mulenga C, ' Judicial Mandate in Safeguarding Environmental Rights from Adverse Effects of Mining Activities in Zambia,' (2019) (22) PER/PELJ-DOI< http://dx.doi.org/org/10.17159/1727-3781/2019/v22i0a5414 > accessed 15th March, 2022

Pavlovich *et la, 'Environmetal Courts in Russia: To be or Mot to be?'* (2013) The International Lawyer

Preston B J, *'Judicial Specialisation Through Environmental Courts: A Case Study of the Land and Environmental Court of New South Wales'* (2012) 29 (2) [10] Pace Environmental Law Review 602-625, 603< https://digitalcommons.pace.edu/perl/vol29/iss2/10 >accessed 20th September, 2022

Preston B J, *'Benefits of Judicial Specialisation in Environmental Law: The Land and Environmental Court of New South Wales as a Case Study'* (2012) 29 (2) [2] Pace Environmental Law Review 396-419,397,398< https://digitalcommons.pace.edu/perl/vol29/iss2/2 >accessed 20th March, 2022

Preston B J, *'Characteristics of successful Environmental Courts and Tribunals'* (2014) 26 Journal of Environmental Law 365-393< http://jel.oxfordjournals.org/ >accessed 21st March, 2022

Rackemann, *'Environmental Dispute Resolution – Lessons from the State'* (2013) 30 Environmental Planning and Law Journal

Sambo P T, 'Mosses Lukwanda and 9 Others v. Zambia Airforce Projects Limited and 7 Others CAZ/08/323/2019' (2020)(3)[1]11 SAIPAR Case Review

Sambo P T, '*Konkola Copper Mines PLC v. James Nyasulu and Others Appeal No. 1 of 2012*' (2019)(2)[2]4 SAIPAR Case Review. Available at: https://scholarship.law.cornell.edu/scr/vol2/iss2/4 .

Sax J L, *'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention'* (1970) 68 (3) Michigan Law Review

Sishekanu M, and Katati M, *'Subjectivity in the Logic of Zambia's Environmental Impact Assessments (EIA) Process: The Bedrock of Controversial EIA Approvals'* (2021) 17 (1) Law, Environment and Development Journal

Smith D, *'Environmental Courts and Tribunals: Changing environmental and natural resources law around the globe*'(2018) 36 (2) Journal of Energy & Natural Resources Law 137, 138. Robert Carnwath, '*Institutional Innovation for Environmental Justice,'(2012) 29(2)[6] Pace Environmental Law Review 555,562<https://digitalcommons.pace.edu/pelr/vo/29/iss2/6 >accessed 11th March, 2022*

Ukponu M U, *'Environmental Law and Access to Justice in Nigeria – A Case for a Specialised National Environmental and Planning Tribunal (NEPT)'* (2019) (1)1 NAU LAW REVIEW

Woodruff E, ''*Environmental Courts and Tribunals: How can Nations Tackle the Growing Demand for Justice on Environmental Issues?* (2012) 39 (3) Denver Journal of International Law and Policy

Zhang *et la*, *'Public Interest Environmental Litigation Under China's Environmental Protection Law'* (2017) 1(2) Chinese Journal of Environmental Law, The Chinese University of Hong Kong Faculty of Law Study Paper No. 2017-26, https://ssrn.com/abstract=3090820 accessed 17 February 2023

Whitney C S, 'The Case for Creating a Special Environmental Court System' (1973) 14 Wm. & Mary Law Review 473-522, 473 https://scholarship.law.wm.edu/wmlr/vol14/iss3/2 accessed 21 May 2023. George (Rock) Pring and Catherine (Kitty) Pring, *'Greening justice: Creating and improving*

Environmental Courts and Tribunals' (Washington, 2009) 14 <https://www.accessinitiative.org/resource/greening-justice >accessed 20th September, 2022

Woolf H S, *'Are the Judiciary Environmentally Myopic?'* (1992) (4) Environmental Law

REPORTS AND OTHER SOURCES

Angstadt M J, *'Green Courts and Global Norms: Specialised Environmental Courts and the Global Governance of Environmental Challenges'* (PhD Dissertation, Colorado State University, 2019)

Asian Development Bank, *'Climate Change, Coming Soon to a Court Near You: Report Series Purpose and Introduction to Climate Change, December, 2020'*

Burnett-Hall R and Jones B (eds), Burnett-Hall on Environmental Law (2nd edn., London, Sweet& Maxwell 2009)

Chipasha M, *' Foreign Direct Investment in the Zambian Mining Sector: The Need for Environmental Protection and Human Rights,'* (Doctor of Laws Thesis, University of Pretoria 2017)

Church M, *'Tipping the Scales: Complying with Arhus Convention on Access to Environmental Justice'* (Friends of the Earth Scotland, 2011)

Crispin Agnew, *'Does Wednesbury Protect the Environment'* [2018] 104 UKELA elwa

Environmental Rights Centre for Scotland, *'Why Scotland needs an environmental court or tribunal'* (October, 2021).

Frank R, *'The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future'* (2012) 45 University of California, Davis

Friends of the Earth Scotland, *'An Environmental Court or Tribunal for Scotland: Friends for the Earth Scotland Policy Briefing'* (April, 2015)

Kuehn, *'A Taxonomy of Environmental Justice'*, 10683

Leigh R, *'Evaluation Report: Kangaluwi Open-pit Copper Mine in the Lower Zambezi National Park'* (2014) Lower Zambezi Association

Odote C, *'The Role of the Environment and Land Court in governing natural resources in Kenya'*, in in Patricia Kameri-Mbote, Alexander Paterson, Oliver C Ruppel, Bibobra Bello Orubebe, Emmanuel D Kam Yogo (eds.) *Law, Environment, Africa* (1st edn, Nomos, Germany, 2019)

Pring (Rock) G and Pring (Kitty) C, '*Specialised Environmental Courts and Tribunals:*

The Explosion of New Institutions to Adjudicate Climate Change and other Complex Environmental Issues'(17-19 September, 2010)<http://www.law.edu/document/ect-study/unitar-Yale-Article.pdf> accessed on 10th March, 2022

Pring G and Pring C, '*Environmental Courts and Tribunals: How can Nations Tackle the Growing Demand for Justice on Environmental Issues?'*<http://www.law.edu/document/ect-study/unitar-Yale-Article.pdf> accessed on (10th March, 2022)

Quirke D, *'The Public Trust Doctrine: A Primer', A White Paper of the University of Oregon School of Law Environmental and Natural Resources Law Center*, February, 2016

Republic of Zambia, 'Judiciary of Zambia: Annual Report 2021' 3-4 available at https://judiciaryzambia.com/category/resources/annual-reports accessed 23 May 2023

Republic of Zambia, 'Judiciary of Zambia: Annual Report 2018' 5 available at https://judiciaryzambia.com/category/resources/annual-reports accessed 23 May 2023

Republic of Zambia, *'Judiciary of Zambia: Training of Trainers Workshop in Environmental Law (Chisamba, 4 December, 2019)*' available at https://judiciaryzambia.com/category/resources/annual-reports accessed 23 May 2023

Rio, Declaration on Environment and Development; Principle 10 that "environmental issues are best handled with the participation of all concerned citizens at the relevant level." (UN, 1992)

Rio Declaration on Environment and Development, GA Res 151/26, UN GAOR, UN Doc A/CONF.151/26 (Vol 1) (12 August 1992) annex 1 principle 10 ('Rio Declaration) http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

Sambo P T, *'A Conceptual Analysis of Environmental Justice Approaches: Procedural Environmental Justice in the EIA Process in South Africa and Zambia (PhD Thesis, University of Manchester 2012*)

Sambo P T, ''Greening' the Zambian Judiciary with Forest Reserve 27: A Comment on the Court of Appeal Ruling in the case of Mosses Lukwanda and 9 Others v. Zambia Airfoece Projects Limited and 7 Others' *The Mast (Editorial)* (Lusaka, 12 April 2020)

Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment (1992) UN Doc. A/CONF.48/14. At 2 and CON.1

United Nations Environmental Programme, '*Global Judges Symposium, Johannesburg, South Africa, August, 18-20, 2002*, '*The Johannesburg Principles on the Role of Law and Sustainable Development'< https://www.unep.org/law/symposium/Principles.htm > accessed 5th March, 2022*

UN Conference on Environment and Development, Rio de Janiero, *'Rio Declaration on Environment and Development*' (1992) A/CONF.151/26/Rev.1 (Vol.1), Annex 1www.un.org/documents/ga/conf15126-1annex1.htmaccessed 9 March 2022

United Nations *'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, A/CONF48/14/Rev 1 (New York 1973)

United Nations *'Report of the United Nations Conference on Environment and Development, Rio de Janeiro 3-14 June 1992.* A/CONF 151/26/Rev 1 (1) (New York 1973) Principle 10

United Nations Environmental Programme, '*Global Judges Symposium, Johannesburg, South Africa, August, 18-20, 2002*, '*The Johannesburg Principles on the Role of Law and Sustainable Development'*< *https://www.unep.org/law/symposium/Principles.htm* > *accessed 5th March, 2022*

United Nations Environmental Programme, '*Environmental Courts & Tribunals; A Guide for Policymakers'* (Nairobi, 2016) xvii https://wedocs.unep.org/bittream/handle/20.500.11822/1000/environmental-courts-tribunals.pdf

United Nations *'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, A/CONF48/14/Rev 1 (New York 1973)

Yogamalar S and Ansari A H, *' Right to a healthful environment; Flagship of fundamental human rights? An International Perspective'* (2015) Proceedings of International Academic Conferences 3105382, International Institute of Social and Economic Sciences