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Constraints Faced in Enforcing the Montreal Protocol Control Measures on Ozone Depleting Substances

By Mutuso Dhiwayo

The purpose of this article is to review the constraints / challenges that Zimbabwe faces in enforcing the Montreal Protocol control measures on ozone depleting substances. Firstly, it gives a brief overview of the protocol. Secondly, it outlines Zimbabwe's legal, regulatory and institutional framework for implementing and enforcing the protocol. Thirdly, it outlines and discusses the challenges of enforcing the control measures.

The Montreal Protocol is an international agreement whose objective is firstly the reduction and secondly, the eventual phase out of Chloro-fluoro Carbons (CFCs) and other Ozone Depleting Substances (ODS). The Montreal Protocol builds on the foundation laid by the Vienna Convention for the Protection of the Ozone Layer which was concluded in Vienna, Austria on March 22 in 1985. It provided a framework for the adoption of the Montreal Protocol. The Montreal Protocol was concluded on the 16th of September 1987 in Montreal, Canada and entered into force on 1 January 1989. It has a membership of 175 countries.

The protocol sets out timeframes for the phase out of ODS. These timeframes are dependent on whether a country is an A5 or non-A5 party. The non- A5 parties (developed countries) were required to phase out CFCs, Halons, Carbon Tetrachloride by 2000 and Methyl Chloroform and Bromide by 2005. On the other hand A5 parties (developing countries) are required to phase out CFCs, Halons, Carbon Tetrachloride by 2010 and Methyl Chloroform and Bromide by 2015. Articles 2 and 2A to 21 sets out the framework for the development of control measures by parties to the protocol to reduce and phase out ODS and the use of ozone dependent equipment. These control measures are required to be measured to determine if they are achieving the desired results or not. The measuring requirement is provided for in terms of section 6 of the protocol which states that "Beginning in 1990, and at least every four years thereafter, the Parties shall assess the control measures provided for in Article 2 and Article 2A to 21 on the basis of available scientific, environmental, technical and economic information.

The Montreal Protocol, just like many other international agreements, requires the development of the appropriate legal, institutional and administrative arrangements at the national level so that it can be effectively implemented and enforced. Zimbabwe has a legal, policy, regulatory and institutional framework for implementing the control measures required under the protocol. These include the Environmental Management (Control of Ozone Depleting Substances and Ozone Dependent Equipment) Regulations (statutory instrument 134 of 2004), Environmental Management Act(Chapter 20:27), Country Programme to Phase Out ODS of 1994, The Refrigerant Management Plan, Recovery and Reclaim Project managed by Zimbabwe Ozone Solutions, Refrigeration Conversion Projects of 1996, the Inter Ministerial Committee for the Implementation of the Country Programme to Phase out ODS and the National Ozone Office. The Inter

Ministerial Committee became operational in September 1996 and is based in the Ministry of Environment and Tourism. This article will only focus on the regulations.

The ODS Regulations of 2004 use a number of measures to ensure compliance with the Montreal Protocol. The Regulations control the importation, exportation, production and consumption of ODS and Ozone Depleting Substances Dependent Equipment. Ozone Depleting Substances and Ozone Depleting Substances Dependent Equipment are listed in the Second and Third Schedules respectively of Statutory Instrument 134 of 2004. Anyone who wishes to import ODS and ODS dependent equipment or any substance for that matter that is controlled under the Montreal Protocol is required to apply for an import or export licence (section 4 of statutory instrument 134 of 2004). The processing of the application is done by the National Ozone Office. The office also keeps a register of all the importers and exporters and the licence issued is only valid for a year and it is not transferable. All these measures are aimed at enforcing the control measures as pronounced under the protocol.

The importers and exporters are also required to keep the Ozone Office informed about ODS and ODS substance dependent equipment through annual reports which give information about their quantities and sources (section 7 of statutory instrument 134 of 2004). Importers, exporters and consumers of ODS are also required to clearly label and package their products (section 9 of statutory instrument 134 of 2004). Furthermore, there are penalties for contravening these provisions and the penalties include fines, imprisonment, both fine and imprisonment and cancellation of the licence (section 10 of statutory instrument 134 of 2004). These penalties act as deterrents and in the process this helps to enforce the control measures as required by the Montreal Protocol.

Constraints faced by Zimbabwe

Zimbabwe faces a number of constraints in enforcing the Montreal Protocol control measures. These constraints affect its ability to meet its obligations. As noted earlier on, Zimbabwe has the regulatory framework for enforcing control measures in the form of the Environmental Management (Control of Ozone Depleting Substances and Ozone Dependent Equipment) Regulations. However, it takes more than just having a regulatory framework to achieve effective enforcement.

Effective implementation, monitoring and enforcement of the control measures is dependent on a number of factors. Firstly, there is need for well trained, well resourced customs officers with specialized knowledge of identifying and dealing with ODS and equipment containing ODS. The need for specialized knowledge is increasingly becoming critical due to illegal trade. As ODS have been phased out in developed countries those who are involved in its trade are developing and using sophisticated mechanisms. As United Nations Environmental Programme notes:

The problem is complicated by the fact that some production and consumption in industrialized countries is still legal: for example, for essential uses and for export to developing countries. Recycled material and material released from stock piles produced before phase out can also be still legally used. This makes detection of

illegal material more difficult, providing an additional manner in which it can be disguised.

Mislabeled, Concealment and Disguise are some of the major methods through which illegal trade is conducted and hence the need for the specialized knowledge capable of detecting these illicit activities.

The constraint that Zimbabwe faces is limited resources that will enable it to train customs officers to acquire such specialized knowledge and skills. There is also need for resources to buy advanced equipment like pressure gauges for use by customs officers at ports of entry. Pressure gauges are capable of detecting the contents inside and thereby helping custom officials in those instances where containers have been mislabeled to conceal their contents

The national ozone unit has a programme to train customs officers. However, the constraint is that the training workshops that have been conducted are inadequate (personal communication with Mr. Chaumba). The inadequacy of these workshops has been linked to limited resources. The other problem is that Zimbabwe Revenue Authority (ZIMRA) under which the customs department falls has a high staff turn over. As a result, many trained customs officers have left the department. This is mainly attributed to the economic problems that are prevailing in the country today. A lot of skilled professionals among them custom officers have left the country in search of greener pastures.

The other challenges that Zimbabwe is facing is lack of effective border controls and this may result in ODS substances being smuggled into the country. In August 2006, the Reserve Bank of Zimbabwe launched a project called operation sunrise where by they were introducing new currency. However, within hours new Zimbabwe currency notes were available in neighbouring countries when most people in Zimbabwe were yet to get them. This was despite the fact that security was said to be very tight at all border posts. If this could happen when security is “very tight” what will happen under normal circumstances. Though the phase out dates are still sometime away (2010 & 2015) there is evidence that illegal trade is already happening in Zimbabwe. Mr. Chaumba, the National Ozone Officer pointed out that there are instances when companies and individuals have been found with some ODS and the importers from whom they got them are not registered with the National Ozone Office as prescribed by the regulations. The possibility that some of these were smuggled in due to lack of effective border controls can not be ruled out. The smuggling is bound to increase after the phase out date.

The economic hardships in Zimbabwe have also led to the emergence of a vibrant informal sector where second hand products like refrigerators which produce Chloro-fluoro Carbons (CFCs) are imported and sold. The informal sector’s activities are very difficult to monitor and regulate.

Inter- agency cooperation is also important in the enforcement of trade control measures. This requires the relevant government departments and ministries like Environment and Tourism, Trade, Justice, Home Affairs to work together and where possible to coordinate

their activities. This coordination will help in raising awareness, training, defining and determining responsibilities, the identification and tracking of import and export licences, border controls and checks, setting of fines and prosecution of offenders. This inter agency cooperation has worked very well in enforcing control measures for ODS in developed countries like the United States. Zimbabwe has an Inter Ministerial Committee for the Implementation of the Country Programme to Phase out ODS but it appears as if it has not done much towards achieving this objective.

Penalties are also an important mechanism of enforcing control measures. However, for penalties to be effective, they have to be deterrent enough. In other words, the fine should outweigh the economic gain that will result from breaking the law. Currently, the fines are set in terms of level fourteen. However, Mr. Chaumba the national ozone officer is of the view that the fines are not deterrent hence companies break the law in the knowledge that whatever they are fined they will be able to recover it as part of the business cost. In other words, it makes more economic sense for them to commit the offence and pay the fine.

The other constraint is that there is no harmonized regional ODS Regulatory framework for the Common Market for Eastern and Southern Africa (COMESA) sub region. The Vienna Convention which laid the framework for the Montreal protocol requires parties to “adopt legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit or prevent human activities resulting in ozone modification (Article 2(b) of the Vienna Convention). The absence of a harmonized framework affects Zimbabwe’s ability to effectively implement the trade control measures as ODS products from other countries are regulated by different frameworks. A harmonized regulatory framework will be easier to enforce.

The economic problems that Zimbabwe is currently facing are also a contributory factor. Industries’ priorities at the moment are to survive and are therefore unlikely to afford investments in ozone friendly equipment. Ozone friendly materials and equipment are imported and this needs foreign currency. Under a performing economy, foreign currency would have been easily available from the Reserve Bank of Zimbabwe. However, this is not the case. As such, importers have been forced to acquire foreign currency from the black market at exorbitant prices.

Consumer awareness is another big constraint. In developed countries, consumer awareness and choice also helps in enforcing trade control measures. Industries dealing with ODS and ODS equipment are in business because there is a market for their products. However, with the economic problems in Zimbabwe today consumers are only interested in products for which their pockets can afford. This is compounded by the fact that the alternative, that is non-ODS products are more expensive.

The Biofuel Debate: For Food or For Fuel?

By Gilbert Makore

The conflicts in Middle East countries like Iraq and Iran have resulted in ever increasing world oil prices and turbulence in world markets. In addition, pressure from the unassailable evidence that climate change is no longer a future scenario and is largely caused by fossil fuels has meant that world super powers like the United States and indeed developing countries are now looking at alternative fuels. The growing appetite for biofuels with rising oil prices has heightened demand for maize and driven up commodity prices. This is the basis of the current debate on bio fuels. Bio-fuels can potentially come from different sources or crops including soya beans, maize, sugarcane, sunflower and jathropha.

Bio-fuels have been touted as the panacea to the problems emanating from fossil fuel use. These problems include an unhealthy reliance on oil and excessive green house gas (GHG) emissions. In Zimbabwe this reliance on oil importation means that the country is unable to meet development objectives due to high oil prices. A bio-diesel processing plant was commissioned at the end of year 2007 and significant acres of land have been put under the jathropha plant that produces bio-fuel.

In South Africa the key driver for bio fuels is the foreseen impact on carbon emissions and the economy. It is hoped the bio-fuels plan will meet at least 75% of the country's renewable energy target. This is in compliance with the Kyoto protocol on climate change, which encourages nations to reduce their reliance on fossil fuels. It is also hoped that biofuels will create some 55000 jobs, particularly in the agricultural sector and contribute to economic growth.

Despite these seemingly positive impacts of bio-fuels, there have been some concerns. The demand on bio-fuels resources from poor communities is one such concern. Some development experts foresee a situation in which developing countries abandon planting food crops for jathropha. Farmers in developing countries may plant food crops such as soya beans; however, these may end up being diverted to bio-fuelling instead of contributing to food security. If food sources become fuel sources, food security is inevitably compromised. Replacing foodstuffs with energy cash crops may erode efforts to fight hunger in sub-Saharan Africa, a region prone to food shortages and famine with some 200 million malnourished inhabitants, according to United Nations estimates.

Following principles of market forces there is a danger that increased demand on food crops for fuel will result in shortages and increasing prices. A related concern is that biofuels will support big agri-business and commercial farmers with huge tracts of land at the expense of small subsistence farmers who will not be able to keep up due to the use of older agricultural techniques and inability to compete on the world market.

There is also a school of thought that argues that bio-fuels may not be a clean energy alternative. Proponents in Brazil and the United States say bio-fuels such as maize-based ethanol is a clean energy alternative that comes from resources that are renewable. However the production of ethanol itself is energy intensive and requires fossil fuel to process and transport. Intensive farming normally requires large amounts to feed machinery, uses hazardous inputs and causes soil degradation. Another concern by environmentalists is that there is little knowledge on the jathropha plant. It is therefore, argued that jathropha may be an invasive alien species. It is also feared that the introduction of jathropha and other foreign crops or plants may lead to a loss in agro biodiversity.

What these concerns present is a challenge to development proponents to come up with a policy and or tools to facilitate what can be termed a “just transition”. Thus, instead of totally discounting the introduction of jathropha because it is potentially invasive, environmental assessments for any land to be put under jathropha can be made mandatory.

The policy could also take into account the need to make sure that it is the small subsistence farmers who benefit first from the local ethanol industry. This can be achieved in part by introducing an accelerated programme to train small scale farmers to produce enough food for their own needs and to earn a little extra cash from bio-fuels. African governments should also make significant strides to empower the landless black majority in a fair and pragmatic way. Security of land tenure would ensure that the poor participate in any anticipated boom in green fuels. There may also be need to support bio-fuel production from crop by-products rather than the crops themselves.

Bio-fuels therefore present an opportunity and a challenge to development practitioners. They could signify increased incomes for rural economies and overall national economic growth. Biofuels may also contribute to the fight against climate change. However, if these objectives are to be met without potentially increasing inequalities and worsening environmental degradation there is need for more research in bio-fuels. Research into bio-fuels would then inform national policies that embrace tenets of sustainable development. These include improving rural livelihoods from proper management and exploitation of natural resources.

Women, Environment and Development in Zimbabwe

By Makanatsa Makonese

The environment is an area where one is least expected to bring in women's issues and women's rights. To suggest that women's issues should be included in environmental policy making and implementation or that environmental issues should be included in programmes that address women's rights issues would be viewed as putting too much in the envelop. Project officers at all levels are used to viewing women's issues and environmental issues as two distinct issues that need to be looked at differently. Yet women especially in Zimbabwe as in the rest of Africa can not be separated from the environment. In Zimbabwe 70% of the population lives in rural areas and the majority of rural residents are women. Women in rural areas depend on environmental resources for their daily sustenance and for that of their families. From the trees and shrubs, they obtain the fruits, roots, leaves for food and medicine. Non timber forest produce like caterpillars (madora), honey and mushrooms form a significant part of the diet in areas where they are available whilst any excess that is harvested is an important source of income. In addition, women need grass for thatching their huts and timber for the construction of the same huts. All these resources are environment based and dependant entirely on the good management of the environment.

Land is another environmental resource on which women are dependant especially in the rural areas and the commercial farming sector. As indicated above, women form the majority of rural residents and they depend significantly on farming for food and for income when they sell the surplus that they would have produced. In commercial farming areas, whilst the men might claim "ownership" of the land, the majority of the people who work and produce on the farms are women and therefore this role that women play should be recognised in policy formulation and implementation.

In the urban areas of Zimbabwe, women are most affected by the burst sewer pipes which occur mainly in the residential areas because the majority of them are housewives who spend a significant proportion of their time at home. They also have to bear the extra burden of protecting the family from diseases by trying to maintain hygiene in the home under extremely difficult circumstances. They have to boil the drinking water, sweep the sewage flows away or try to block the flow so that it doesn't come too close to their homes. If any family member(s) including children are affected by diseases caused by environmental pollution like cholera, dysentery, diarrhoea or malaria, women also bear the burden of care for the same family members. This is in addition to other chores that women are expected to perform. Environmental pollution and degradation therefore have a profound negative effect on women.

Yet women are never taken seriously in the management of the environment in Zimbabwe. At the local level, the various community based organizations (CBOs) formed by communities to deal with environmental issues are dominated by men with women coming in almost as window dressers. If women are included in the management structures (mostly boards of trustees) in the CBOs, it is either as secretaries (woman's

job) or committee members. In very few instances does one find women as chairpersons, treasurers or vice chairpersons. The Zimbabwe Environmental Law Association (ZELA) has over the past three (3) years been involved in the registration of CBOs with the Registrar of Deeds of Zimbabwe in order for these organizations to be recognised as legal entities. This helps them to transact as recognizable entities with other institutions, with government, open bank accounts and apply for funding for their activities. But the trend has been that women are marginalized in the management structures of these organizations. This means that the decisions that are taken are unlikely to put into consideration the special environment related needs and aspirations of women in the communities that the CBOs represent.

ZELA has also over the years been organizing and facilitating community workshops on the environment and environmental law awareness and information. The organization's members have also attended and facilitated at similar workshops organized by partner organizations including the Environmental Management Agency. A disturbing trend that has been noticed at these workshops and meetings is that most women are relegated to the fireplace where they are expected to prepare meals for the few women and majority male delegates participating in the deliberations. The result is that they come to these meetings and workshops supposedly to learn and acquire environmental law and environmental management information but are in fact denied this fundamental right which is overshadowed by their gender ascribed role (that of cooking)

The call is therefore for the recognition of women as important players in environmental management. They should be given an opportunity to participate at all levels, from community to national. Sustainable development cannot be achieved when more than half of the population of Zimbabwe (women) are excluded from this process. Their ideas and input will form a critical part of the development discourse.

It is also important to recognise that the participation of women in environmental management and in accessing environmental resources is an internationally recognized human right. The following articles from selected human rights instruments will illustrate this point:

1. Article 19: Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa states that

“Women shall have the right to fully enjoy their right to sustainable development..... (including)..... access to and control over productive resources like land.....

2. Article 20: Rio Declaration on Environment and Development:

“Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development”

3. Convention on Biological Diversity (CBD): Preamble recognises *“the vital role that women play in the conservation and sustainable use of biological diversity (and affirms) the need for the full participation of women at all levels of policy making and implementation for biological diversity conservation”*

Recognising the role of women in environmental management by Zimbabwe will therefore be in line with international best practices and will in fact be compliance on our part as a country with international human rights instruments which the country is party to. Institutions and individuals at all levels are therefore urged to take women on board in the management of the environment and to ensure that women's participation is genuinely embraced. Women should also be given an opportunity to access environmental resources and uses these resources for their social and economic transformation.

MUTOKO GRANITE MINING: A DISASTER IN THE MAKING

By JOSIAH CHINHERENDE

Zimbabwe is endowed with several mineral deposits that are sparsely spread around the country. The range of minerals includes gold, coal, nickel, platinum, diamond, chrome, cobalt and granite. Granite mining is concentrated in Murewa and Mutoko areas in the North-East of the country. Although mining is a major contributor to economic growth, the environmental damage associated with the extraction of minerals, if not properly managed, may outweigh the benefits to the nation in the long term. It is therefore important for mining operations to comply with the applicable legislation and standards in order to minimize environmental damage.

Granite miners are mostly interested in black granite. The rock is mined through quarrying, a process which involves blasting, cracking, cutting and shunting. The mining processes result in environmental damage and interfere with the livelihoods of communities in the mining areas. Mining claims are on land occupied by communities and rock waste is dumped on land that is being used for farming and livestock breeding. This directly reduces the community's arable and pastoral land. Open pits and rubble dumps resulting from quarrying exposes both domestic and wild animals to injury. During site visit to Mutoko and Murewa by the Zimbabwe Environmental Law Association and Environment Africa birds could be seen flying continuously in the area, a clear sign that blasting noise scares them away

Granite quarrying also results in deforestation as miners destroy trees to access the mineral rocks. Deforestation results in soil erosion and interferes with the ecosystem by destroying the natural habitats of wild life and contributes to climate change in the long run. During the visit to mining sites it was observed that soil erosion was rampant and no preventive measures were being taken to minimize environmental harm. Soil erosion results in siltation of rivers thereby interfering with the area's natural waterways.

The Environmental Management Agency and Mutoko Rural District Council have expressed concern over the operations of granite mining companies in Mutoko. The major concern has been non-compliance with the requisite environmental and mining laws. Most of the companies in the area have refused to prepare environmental impact assessment reports as well as environmental management plans despite the issuance of orders and spot fine tickets by the Environmental Management Agency. At the end of the day there are no measures taken to mitigate environmental damage resulting from quarrying activities. Huge open pits and unsightly rubble deposits are common sight in the mining areas. Mined areas are not reclaimed as miners move to new areas. The major challenge to the council has been the enforcement of applicable legislation in light of allegations of corruption involving chiefs, police officers and senior politicians in the area.

ZELA is currently considering ways of assisting affected communities, local council and the Environmental Management Agency to stop the ongoing environmental damage in Mutoko and Murewa. Indications are that negotiations among stakeholders have failed and it might be necessary to approach the courts for remedy.

PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENTS IN ZIMBABWE: THE CASE FOR LEGAL REFORM

By George Gapu

In 2007, the minister of environment and tourism promulgated the Environmental Management (Environmental Impact Assessment and Ecosystem Protection) Regulations, 2007, statutory instrument no. 7 of 2007. These regulations provide for procedures to be followed when an Environmental Impact Assessment (EIA) is being done. The regulations have scope for public participation in the EIA process but the provisions are weak and inadequate as will be shown below.

The Environmental Management Act (EMA) specifically provides for the principle of public participation in section 4 (2) (c). It states that; *“the participation of all interested and affected parties in environmental governance must be promoted and all people must be given an opportunity to develop the understanding, skills, and capacity necessary for achieving equitable and effective participation.”* The law not only ensures public participation but goes further to provide for effective public participation by specifically providing for the prerequisite that the concerned people should be given adequate information to enable them to make informed contributions and decisions. The principle of public participation is a key element in modern environmental law principles and is captured in principle 10 of the Rio declaration together with the right of access to information and access to justice.

The issue of public participation is significant in EIAs which ultimately determine whether all proposed projects with an impact on the environment should be given licences to proceed. It should be noted that under the first schedule to the Act, all projects which may impact on the environment need an EIA before they can be implemented. The list includes among others, forestry, housing developments, Industry, infrastructure, mining, petroleum production, power generation, waste treatment and disposal, and tourist and recreational developments. EIAs are considered and approved by the Director General of the Environmental Management Agency. Informed input by the local public affected by such projects is clearly critical in enabling the Director-General to make an informed decision on the project as it is the local people who will live with the environmental consequences of the project.

The regulations governing EIA processes would be expected to make adequate provisions safeguarding public participation. Regrettably this is not the case with S.I. 7 of 2007. Section 10 (4) provides that; *“Before any environmental impact assessment report is furnished to the Director-General, the developer shall carry out wide consultations with stakeholders”*. In terms of subsection 5, the Director-General is obliged to verify whether *“full stakeholder participation was undertaken when the environmental impact assessment report was prepared”*.

The regulations do not provide any guidelines on what is “wide consultations” and who is a “stakeholder”. This is unfortunate because the definition is then left to the developer

and the Director- General. It would have been useful if the regulations had at least defined the core of the stakeholders to include all local people affected or likely to be affected by the proposed project, and all environmental groups, companies and other organizations operating in the proposed project area.

Furthermore, the regulations should have provided guidelines for the manner in which the consultations are supposed to be held so that they are not reduced to a mere formality and substantive issues are adequately captured for consideration by the Director- General. This includes the manner in which meetings are called for to ensure that the notice reaches as many people as possible. Since the Agency has officers in all districts in Zimbabwe, the law should make it mandatory for the developer to, at his own expense, ensure that the local Agency officer is present when the consultations are held for monitoring purposes and to ensure that the local people have adequate information on the positives and negatives of the proposed project to enable them to make an informed decision on the project. The developer should also be compelled to advertise in the newspapers and radios when and where consultations will be held so that all interested persons can attend. Before the report is sent to the Director- General, there should be scope for its verification to ensure that the contributions and concerns of the stakeholders are captured.

Even though the assessment is carried out by a supposedly independent consultant, the independence of the consultant is compromised by the fact that he is engaged by the developer and his fees are paid by the developer. It is unlikely that the developer would engage a consultant who is likely to give an adverse report and accordingly, one cannot expect a thorough and accurate report merely on the basis that the consultant is supposedly independent.

The decision of the Director-General should also be made public and it should be made clear in the regulations that anyone who is dissatisfied with the decision can challenge it on appeal to the minister or on review in the High Court. This will put an extra obligation on the Director-General to ensure that his decisions can withstand judicial scrutiny. The present scenario gives the impression that the buck stops with the Director-General.

The report which is furnished to the Director-General should also be a public document. Not only does this ensure compliance with section 4 (b) of the Act which provides that every person has a right to environmental information, but it also enables interested persons to check the accuracy of the report and make own representations to the Director-General on any aspects which may have been omitted by the developer. In this regard, the regulations should oblige the Director-General to call for and consider any objections to the application for a licence by the developer and to issue his reasons for the decision subsequently made.

In conclusion, it is hoped that the minister will amend the regulations and ensure that they incorporate the above concerns. In that way our law would not only be clearly giving force to modern principles of environmental law, but it would also be strengthening the

voices of the rural masses and members of the public generally who have been left out in environmental governance.

NOTES ON THE NEED TO ADOPT A RIGHTS BASED APPROACH TO POVERTY IN ZIMBABWE

By Shamiso Mtisi

The spirit behind these theoretical notes is to reflect on the feasibility of adopting a rights based approach to poverty from an environmental perspective in Zimbabwe. What looms large in this picture is how the law can best respond to the fundamental social, cultural and economic needs of the jobless, the hungry, the uneducated, those without shelter, transport, clean and adequate water and those with limited access to natural resources. Hence, this legal brief is informed by the assumption that poverty is a social justice issue that should enjoy and assume legal or more importantly human rights protection. Although the term poverty has a rich vocabulary, for purposes of this brief the term will be used in its broader sense or the multidimensional approach which entails a set of indicators such as incomes (*living on less than a dollar a day*), discrimination, deprivation, marginalization in economic activities, natural resources use, or access to basic needs such as water, food, shelter, education, security, health, transport, communication, freedom, dignity and self-esteem among others.

The case for adopting a rights based approach to poverty and the environment in Zimbabwe arises out of the fact that community rights to access adequate and clean water, shelter and to benefit from natural resources have not been given due respect. On the other hand, poverty alleviation strategies, plans and policies are mostly couched in non-binding documents. The existing policy frameworks are fluid and are often manipulated and ignored by politicians. As a result, they have not been effective in the fight against poverty. Additionally, the wrong budget priorities and economic policies of governments are sometimes as a result of lack of legal mechanisms for communities to compel government to invest and deliver in sectors that can significantly contribute to poverty alleviation such as the water supply sector, provision of shelter, food security, agriculture, transport and the natural resources sector. Rural and urban communities have also been marginalised and deprived as a result of the absence of effective grassroots institutions that are capable of advancing their collective rights. This is because knowledge about available rights and capacities to claim them are often limited at the local level.

Therefore there is need for a human rights paradigm shift to be reconstructed in principles and structures that respond to the needs of the poor and create wealth for all and give people the capacity to demand their rights. Put differently, the rights based approach can work as a form of empowerment and vehicle for inclusion and an instrument through which communities and civil society seeking to alleviate poverty can mount political pressure for improved living standards in rural and urban areas. Firstly, poverty should be recognised as a serious breach of human rights law. A right against poverty or freedom from poverty should be made part of the human rights agenda in Zimbabwe. This will ensure that it is justiciable and enforceable. In terms of formulation the right can be couched in language that captures and guarantees legal remedies when government fails to comply with its positive obligations to provide services to the poor.

Key conditions for making poverty a human rights and legal issue include the will by the state to create legally binding obligations as this may be resisted thinking that it is unnecessary and that guaranteeing poverty rights is beyond the country's financial capabilities. In fact lack of resources should never be a justification for failure to guarantee poverty rights. The other factor is creating and strengthening an independent judiciary that is not susceptible to the whims of the state. Public interest litigation and advocacy campaigns should be promoted and strengthened to uplift the rights of the poor to access natural resources and other services that are critical for poverty alleviation. In principle, civil society organisations should intensify their efforts as the voice and guardians of the poor through litigation, education, lobbying and advocacy. Further, civil society should assist community based groups involved in natural resources management to build strong grassroots institutions and advocate for tenural and property rights reforms.

It is also practically possible to promulgate an anti poverty legislation that takes into account all the positive aspects of the current poverty strategies, policies, projects, programmes and activities. This will be a way of making poverty provisions legally binding for purposes of eliciting positive impact, respect of poverty issues as well as promoting accountability and legitimacy in the fight against poverty. The poverty legislation may just be formulated as a framework law that sets out standards, guidelines and principles that should drive all the poverty projects, programmes and activities. The all encompassing legal framework on poverty may take care of all the basic things that any poverty reduction legislation should have such as shelter, health, adequate and safe food, water, basic education, personal security and, access to justice and percentages of benefits for the rural poor from natural resources use among other poverty indicators. However, there is need for a thorough study to detail the finer aspects of an anti poverty legislation. The rationale for developing this kind of legislation will be to ensure that poverty issues are not just driven by non binding policy and political rhetoric, but are legally binding and coupled with enforcement mechanisms.

Another alternative is to poverty proof all existing and prospective natural resources legislative frameworks. Poverty proofing is a strategy used in the Irish Republic to ensure that policies and legislation do not run counter to the National Anti-Poverty Strategy (NAPS). It is a process through which government, local authorities and state agencies assess and review policies, programmes, budgets and legislation at the design and review stages for their likely impact on poverty. The value of poverty proofing is that the impact of laws on poverty will be assessed to determine if they reduce, ameliorate, increase or address inequalities. In light of this it is recommended that an exhaustive and serious critique of existing and proposed laws should be undertaken to determine their impact on poverty in Zimbabwe.

**This brief has been heavily informed by a study commissioned by the Trade Governance Programme at the Advocates Coalition for Development and Environment (ACODE- Uganda) on Assessing the Feasibility of Developing a Poverty Responsive Legislation in Uganda.*

Mercury in the Environment and effects on human health

By Makanatsa Makonese

Ever imagined that mercury is so toxic that it can affect a foetus' nervous system and growing brain, effectively affecting the intelligence quotient (IQ) of the child as it grows. Impacts on cognitive thinking, memory, attention, language and fine motor and visual spatial skills have been seen in children exposed to low levels of methyl mercury in the womb. Mercury also has an effect on the cardiovascular system, immune system, liver and kidneys. Various cancers have been associated with mercury poisoning. (See: The Global Movement for Mercury-free Health Care by Health Care Without Harm; (www.noharm.org)

The Zimbabwe Environmental Law Association (ZELA) recently participated in a Southern African Conference on the elimination of mercury use in the health care sector. The conference was held from the 23rd - 26th of October 2007 in Kempton Park, South Africa and attracted delegates and experts in mercury issues from across the globe including a high powered delegation from the United Nations Environment Programme (UNEP). The Conference was organized by groundWork South Africa in Collaboration with Health Care Without Harm, Mercury Free Health Care and the United Nations Environment Programme. The conference was an eye opener to the participants especially those from Southern Africa who before the conference did not fully appreciate the dangers posed to the environment and human health by mercury and mercury poisoning.

Below is a detail of some of the information that we need to know about mercury and mercury poisoning.

Mercury is a naturally occurring heavy metal. Natural sources of mercury include volcanic eruptions and it can be mined like any other minerals. It easily vaporises and can change from one form to another and is capable of being transported for long distances either in the air or through flowing water

How does mercury affect our health?

Mercury can enter the body through three different ways

1. Inhalation (breathing of the mercury vapours)
2. Ingestion (eating e.g. when we eat mercury contaminated fish)
3. Dermal (through the skin e.g. when there is a spill and it comes into direct contact with our bodies)

When mercury enters the body through these means, it has the effect of causing the health problems explained above.

Sources of mercury

Besides natural sources of mercury, mercury is also produced through human activities like coal burning for electricity generation as well as cement manufacturing. Incineration of medical waste and other mercury containing waste is also a source of mercury in the atmosphere. Gold mining and in particular small scale artisanal mining also contributes significantly to mercury pollution especially in water sources because small scale artisanal miners use mercury in the gold extraction (purification) process. When government authorities stand up against illegal mining activities, we should therefore support them not least because of the unsightly pits and gullies, but also because the mercury used in the process is poisonous to people and the environment.

Other equipment that we use on a daily basis also contains mercury and when broken or discarded in the dumps after their usefulness or incinerated can release a lot of mercury in its various forms into the environment. The equipment include

- Mercury thermometers
- Mercury sphygmomanometers (blood pressure measuring machines)
- Oesophageal dilators (also called bougie tubes)
- Batteries
- Fluorescent lamps and high intensity lamps
- Pressure gauges
- Some electrical switches used for lights and appliances
- Mercury is also found in the dental amalgam that is used to fill our teeth when they develop cavities. (Poison in our mouths???)
- Mercury is also used in vaccines as a preservative

Most of this equipment and in particular the medical equipment has non mercury alternatives and therefore the next time you consider buying any of this equipment, think health, think environment and consider buying the non mercury alternatives. It is accepted that the non mercury alternatives come at a cost. However the long term effects on our health, the environment and our children should be incentive enough for all of us to consider the slightly more expensive but environmentally friendly alternatives.

Fish and mercury

Fish! Yes, the fish that we love so much and which is touted by nutritionists as an important source of protein is the biggest source of ingested methyl mercury in human beings. Methyl mercury bio-accumulates in larger predatory fish which contain higher levels than non predatory fish because they eat the smaller fish that are also contaminated with mercury. Examples include the tuna. So the next time you pick that expensive tin of canned tuna from the upmarket suburban supermarket, think twice before you pay for it. The smaller fish that are found in our freshwater sources also contain increasing amounts of mercury although not as much as in large predatory fish. In an attempt to reduce mercury poisoning from fish consumption, the European Commission through the European Food Safety Authority (EFSA) has recommended that women who might become pregnant, are pregnant or are breastfeeding and young children should not eat

more than a small portion (100 grams) of fish per week. The message however should be that “lets get the mercury out of the fish and not the fish out of our mouths” because we all enjoy eating fish and it has beneficial nutritional attributes. We can only achieve this through fighting mercury pollution and mercury poisoning by eliminating the use of mercury and mercury containing devices in our daily lives. But for now “EAT FISH WITH CARE”

How do we achieve a mercury free environment?

- By putting in place policies in our institutions (no matter how small) for the elimination of mercury and mercury containing devices for example in school labs, in hospitals and in our homes. It might look like a small initiative but as with everything else “it begins with you” and that way the information and knowledge can spread
- Big mercury polluters like power generation and cement manufacturing plants should switch to cleaner technologies
- Let’s advocate for the elimination of mercury use in the country and encourage our policy makers to put in place policies that comply with World Health Organization and United Nations Environment Programme standards with regards to mercury and mercury use. The United States of America and countries in the European Union have already taken the switch and are moving away from the use of mercury in various areas.

The topic of mercury and the use of mercury devices can generate interesting debate and therefore interested parties are encouraged to contact ZELA in order to carry the debate forward. Resources on mercury, mercury use, mercury containing devices and related issues can be found on the following websites:

Community Participation in Waste Management

Bernadette Mandisodza

In the past government and local authorities, took the responsibility for the delivery of services such as water supply, construction of roads and waste collection. However, the Government of Zimbabwe and local authorities are unable to provide these services citing lack of resources. In most cities and towns residents are suffering from the lack of services. Section 4 of the Environmental Management Act Chapter 20:27 states that every individual has a right to stay in a clean, safe and healthy environment but this right is being denied

There is poor management of waste in Zimbabwe in the various aspects of waste management ranging from the generation, storage, collection and disposal as evidenced by the mushrooming of illegal dumpsites that have become a common feature in most cities and towns particularly in high density areas. Recently (in January 2008) two Local Authorities (Harare and Chitungwiza) were summoned by the Environmental Management Board for failure to collect waste and were fined for their inaction. It is very worrisome when local authorities that are put in place to provide these services to the citizens have to be forced through fines to carry out their responsibilities.

What Is Waste

Waste can be defined as something which the original owner or user no longer requires and has therefore been disposed of whether legally or illegally, or whether properly or improperly. Waste is usually found in solid or liquid form. Solid waste includes left over food, clothes, broken glass etc and liquid waste includes used oil, milk that has gone bad and any waste that is watery. There are three global options of dealing with waste and these are:-

- To collect the waste and transport it to legal and well protected dumpsites, where it can be disposed of and in this case waste becomes waste
- To reuse, or recycle it. This includes composting of any waste that can rot in this case waste becomes something useful again
- To treat waste. This includes controlled burning and controlled burying of waste and in this case it becomes a source of energy. (Source ILO)

However because of the current problems that the country is facing in relation to waste management, community groups in urban areas have organized themselves into waste management groups. There are so many ways in which these groups and the community at large can be involved in waste management for their economic development and the protection of their neighbourhood from environmental pollution. They can participate in decision making e.g. in deciding which waste in the community should be collected by a community based waste management enterprise and whether the waste will be recycled, delivered to a dump site or treated. They can also decide on whether community members should pay fees when their domestic waste is collected by the community based waste management enterprises. Communities and community based waste management

groups can also participate in raising awareness on the importance of environmental cleanliness and waste management in line with Sect 4 2(d) of the Environmental Management Act.

The Zimbabwe Environmental Law Association has helped a number of Community Based Organisations (CBOs) in different communities such as Dzivarasekwa Environmental Conservation (Group) Trust in Dzivarasekwa, Two by Two Waste Recovery and Management Trust in Epworth, Zimbabwe Urban Environment Waste Management in Highfeild, Green Africa Network in Chitungwiza etc on the legal aspects of waste management as well as how to constitute themselves into trusts. ZELA has also gone further to train members of the trusts on how to run trusts including fundraising and financial management.

Most of these communities and members of the community based waste management enterprises have made a living out of waste. A good example is that of Mabvuku Environmental Trust which recycles used paper and makes very beautiful picture holders and jewelry boxes. So it is important to note that what one may regard as waste may not necessarily be waste to someone else. This is also supported by the fact that at most dumpsites there are always people waiting to pick up something from the “waste”.

In light of the above one can therefore conclude that communities can play an important role in waste management at the same time benefiting from managing waste. Instead of waiting for responsible Authorities to do most of the work it is upon each individual to be responsible for their own environment since the environment is for all and knows no boundary of any form. Would it not be great if everyone could leave in a litter free environment? The initiative has to start with you and me.

Is it worth exploiting our finite natural resources for the benefit of humanity or should we preserve them for posterity and future generations?

By Jeremiah Mushosho¹

It remains a question that needs a universal answer, whether it's worth exploiting our finite natural resources for the benefit of humanity than preserving the natural capital for posterity and future generations. Yes resources must be exploited but the consumption of these resources must be kept at a sustainable level. This should not exceed the maximum possible sustainable yield of the natural resources. Anything beyond the maximum sustainable yield causes depletion of the resources. Exploitation of resources must ensure that present development needs are met at the same time ensuring that future generations will be in a position to meet their own needs and to preserve for posterity as well.

The whole issue of preservation and conservation lies in the context of sustainable development. Sustainable development is whereby vector 'D' does not decrease over time, where vector 'D' are the natural resources versus the level and rate of exploitation by humans. If sustainable development is to be met, three preconditions should be met that is:

- (a) Eco-justice (*ecological justice*)(*equity*)
- (b) Environmental protection
- (c) Economic efficiency

Ecological justice entails the equitable and just distribution of natural resources between and within generations (*inter and intra-generational equity*). Our day to day life activities must not disadvantage the future generations and we must preserve for posterity as well. The future generations have the right to see and experience what we experience now, they need an unchanged climate, a healthy and safe environment and things in their unchanged natural settings. A good example is that of preserving historical and cultural sites to preserve wildlife for elephant riding, bird viewing (watching) and game parks.

The natural settings include the *Natural Afromontane Ecosystems like the Chirinda Forest*. This forest can serve tourist purposes and at the same time being preserved for posterity. There is need for the equitable and fair distribution of natural resources between and with in generations.

Eco-justice is also an important issue since the richer states are exploiting the natural resources at the expense of the poor and the weaker states. There should be fair distribution of resources (*within generations*), between the rich and the poor, the old and the young and also between men and woman.

Sustainable development is one of the millennium development goals to be achieved by the year **2015**.

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Sustainable development's major aim is to promote conservation, preservation and environmental management practices that are friendly to the environment, socially as well as economically sustainable. These are in a bid to generate and maintain benefits for the present and future generations and within the present generation. There is a direct link between poverty and environmental degradation. This is so because the worst perpetrators of environment degradation are the richest and the poorest, because the poorest heavily depend on the natural resources to sustain life while the richest have the world's greatest technologies that degrade and pollute the natural environment. In this case environmental law can play a role of ensuring that the consumption of natural resources mostly by the rich and the poor is kept sustainable.

Poverty also needs to be addressed as it hampers sustainable development since the poor heavily depend on the natural resources. This causes degradation and exhaustion of the natural resources. The poor people tend to lack alternatives such that they put pressure on the natural resources to sustain life rather than preserving for the future generations at the expense of their survival. This problem can be countered by engaging or employing economic efficiency by introducing cleaner technologies and offering alternative energy sources. An efficient system converts all inputs into outputs without much waste being produced in the process. This way sustainable development can be achieved.

Unsustainable use of natural resources may lead to various environmental crises and these crises have manifested themselves in different ways and scales. Unsustainable use of water resources in Southern Africa has led to the depletion of freshwater resources. The future of Africa is threatened by the worries of aridity and semi aridity caused/enhanced by unsustainable use of resources and this is not doing justice to the future generations.

Testimonial by Nyasha Chengeta: Environmental Law Intern

For my 2007 third year attachment, I was attached to the Zimbabwe Environmental Law Association (ZELA), an environmental law non-governmental organisation. The organization focuses on raising awareness on the environment in Zimbabwe, assisting communities, individuals, local authorities, government departments, industries and other NGOs to promote environmental protection and sustainable natural resource management in the country through research, advocacy, training and litigation. During the period of my attachment, I attended and actively participated in a number of workshops. After the workshops I would prepare reports on the proceedings for use by the organization.

The following are some of the workshops that I attended and participated in:

- Chinhoyi workshop held at The Pastoral centre on 13 June 2007
- Marange workshop held in Mutare on 15 June 2007
- Wedza workshop held at Wedza Rural District Council
- Unilever workshop held at Unilever offices on 17 August 2007.
- The Dzivarasekwa Community Trust workshop held at Dzivarasekwa Community Hall
- The Guruve workshop held at Guruve Council Offices on 6 September 2007
- I also had an opportunity to attend the ILO meeting hosted by Self Employed Women's Association on solid waste management held at the Environmental Management Agency (EMA) offices in Harare on 6 July 2007

At these workshops, I learnt how ZELA together with other organisations are educating people on issues pertaining to the environment through workshops. People were educated and later on, given an opportunity for discussions, asking questions on pertinent issues that they required clarification on.

During my attachment period, I also discovered that ZELA carries out public interest environmental litigation on behalf of communities as it did for the Svosve community in Marondera, the Dora Community in Mutare, the Chitungwiza people and the Mambanjeni people in Gweru. In the Dora community case, the Mutare City Council was and still is polluting the Sakubva River which is the source of water for the Dora community with raw sewage. The case is still pending in the High Court and hopefully the case will be decided without delay because the situation poses a serious health hazard for the community.

At the ILO meeting, I learnt that people in any given community can make a living out of waste collection and can also create employment for themselves. It is for this reason that the Self Employed Women's Association on solid waste management has come up with a proposal for such a program starting with a small area in Harare. ZELA assisted this Trust in its registration and continues to support such environmental organisations with registration as trusts and giving legal advice. Through such awareness programs,

ZELA at times is invited to present on different environmental laws applicable in Zimbabwe and companies also invite the organisation to carry out audits.

- I also attended a Policy Review Dialogue on land tenure in Zimbabwe held at Bronte Hotel on 25 July 2005

On this dialogue, I discovered that the current land policies and laws make it difficult for Banks to invest into the agricultural sector particularly the 99 year leases. Financial institutions are finding it very difficult to lend money to the farmers since they do not have security

Apart from these workshops, I also researched on a number of areas including

- Transboundary conservation areas in Zimbabwe and their implications on the Human Rights Regime
- Dispute resolution mechanisms provided for in the Environmental Management Act and any other legislation that can be utilised to resolve environmental disputes
- A critical analysis on how foreign players in the mining sector are exploiting the resources and how the Zimbabwean government is trying to address the issues of empowering their own people
- A research on electronic waste in Africa and how African countries are addressing the problem
- Environmental Management Act and its implications on industries in Zimbabwe

Until I came to ZELA, I should admit that I regarded environmental issues as trivial. ZELA opened my eyes to the extent that I now have the environment at heart and I will jealously use the God given natural resources in a sustainable manner for the benefit of the present and future generations. In a nutshell, I can safely say my attachment program was indeed a success and I should thank the ZELA staff for their unwavering support in making my attachment program a success and I encourage many more participants to join hands in preserving the environment since there is a need to. I would also urge my compatriots in the law school to join public interest law work especially in the environment area as a career path so that they can help in fighting environmental injustice and assist poor and disadvantaged communities facing environmental problems as ZELA is doing.

***Editor's note:** Nyasha Chengeta is now a 4th Year law Student at the University of Zimbabwe's School of Law. As part of their training, all law students at the University of Zimbabwe are required to go on attachment with a law institution, be it a law firm, a court or a law related Non Governmental Organization (NGO)*