



**UNIVERSITY OF ZIMBABWE**

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**MASTER OF LAW DEGREE (LL.M)**

*A Critique of the Legal Framework Regulating the Human Right to  
Water in Zimbabwe.*

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*A research project submitted to the Faculty of Law, University of Zimbabwe in partial  
fulfilment of the requirements of the Master of Law Degree.*

## DECLARATION

I, CHIBAYA SIBUSISIWE, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in Acknowledgements, References and by comments included in the body of the thesis, and that it has not been submitted in part or in full for any other degree or to any other university.

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CHIBAYA SIBUSISIWE

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Date

## ACKNOWLEDGEMENTS

With pre-existing morbidities such as a heart condition and high blood pressure, all glory and honour are to my heavenly father for the ability to breathe, think and write in this era of COVID 19. I owe this research to numerous individuals who stood by me throughout my studies. First and foremost, much appreciation goes to my energetic, motivating and supportive supervisor, Dr. J. T. Tsabora for the guidance and thoroughness. I would like to acknowledge my mother and my siblings for always seeing the best in me. My friends and acquaintances including Lazarus and Linda are special for being the catalyst to the LLM. Lastly, my gratitude goes to my classmates and lecturers of 2018-2020 for their support during the course work.

## DEDICATION

I dedicate this thesis to my dear children, **Tinashe Tanyaradzwa Timba** and **Zoe Anesu Nyabereka**.

## ABSTRACT

This study traces the legal frameworks on the human right to water. It analyses the resolutions and conventions that have addressed the subject of the right to water. The thesis examines the national (Zimbabwe) international and regional legal and policy regimes for the promotion and protection of the human right to water. Particular interest in the study is on the conventions and treaties ratified by Zimbabwe. United Nations General Comment number 15 as well as some African conventions are reviewed and juxtaposed to the Zimbabwean frameworks with a view to establish existence of gaps if any. The study shows that the international provisions are hardly binding, and where they do, a country would be either a member state or ratified the provisions thereof. The position of the law in Zimbabwe's on the right to water is also studied in comparison to South Africa. The core finding is that within the international provisions and indeed the Zimbabwean and South African legal regimes, there exists the human right to water. This right inheres in several other rights such as the right to life, dignity and health. Both South Africa and Zimbabwe promulgated water related legislations to correct injustices of a colonial past and to trigger development towards effective, equitable and efficient water resources management influenced by policy decisions in and the need to respect economic and social human rights. A comparison of both jurisdictions would show the need for legal reforms to enable a full realization of the human right to water. Although there be a constitutional right to water in Zimbabwe, literature reviewed in the thesis indicates that while Zimbabwe has constitutionalized the right to water, courts are still to satisfactorily read the right to water into existing rights, especially the right to life. The study observes that practically, there is a dearth in case law in terms of seriousness to implement the right. It is recommended that there be not only enhanced judicial activism in promoting this right but also a political will and the government's seriousness in respecting, protecting, and fulfilling the human right to water. It is recommended that there be a willingness to give content and effect to the human right to water in national legal obligations and responsibilities and a focus on providing real remedies where violations to the right exist. Citizens interest in advocating for their legal right to water equally needs attention.

## ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AU	African Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CCPR	Covenant on Civil and Political Rights
CEDAW	Convention on Elimination of all forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
ECOSOC	Economic Social Council
EMA	Environmental Management Act
EIA	Environmental Impact Assessment
ICTY	International Criminal Tribunal for the former Yugoslavia
NEMA	National Environmental Management Act
UDHR	Universal Declaration of Rights
PPPs	Public Private Partnerships
WHO	World Health Organization
U.N	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
ZINWA	Zimbabwe National Water Authority
ZELA	Zimbabwe Environmental Lawyers Association

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# CHAPTER 1

## INTRODUCTION AND OVERVIEW ON THE HUMAN RIGHT TO WATER

### 1.0 Introduction

Water plays a pivotal role for the survival of almost all forms of living organisms including human beings. It is axiomatic that human beings can at best survive for only a few days without water. Indeed, water is life and life is water, as scientifically water constitutes at least 60% of the human body. Apart from being a precious commodity for survival, water has other indispensable primary and secondary uses necessary for human life and development. It is also a scarce and finite resource that must be used sustainably and distributed equitably. For this reason, access to water is a fundamental human right guaranteed in international and regional human rights instruments as well as laws of many countries including Zimbabwe.

Although the right to water is well recognised and entrenched under the Zimbabwean laws<sup>1</sup>, a major challenge has been its delineation in terms of water security,<sup>2</sup> water management<sup>3</sup> and provision. Other challenges abound in our jurisdiction which militate against the full realisation and enjoyment of the right to water in Zimbabwe. These challenges include but are not limited to drying up of water sources that supply urban areas, pitiable distribution of boreholes, low maintenance of dams, land reform related upheavals, as well as the reduced institutional capacity of the Zimbabwe National Water Authority (ZINWA).<sup>4</sup>

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<sup>1</sup> See section 77 of the Constitution of Zimbabwe Amendment (Number 20) Act 2013.

<sup>2</sup> “Water security’s common denominators relate to *access* to water for human needs like drinking in acceptable *quality and quantities*. Access includes the means to get water and the cost of getting water. Striving for water security involves the *provision* of sufficient water that meets human health and well-being. Adequacy relates to water that is fit for human consumption and necessary to promote human dignity, life, and health.” See CB Soyapi, ‘Water Security and the Right to Water in Southern Africa: An Overview,’ 2017. Vol. 20 No.1. *Potchefstroom Electronic Law Journal*, Accessed 27 January, 2020. [journals.assaf.org.za](http://journals.assaf.org.za) at p.1.

<sup>3</sup> JR May & E Daly, *Global Environmental Constitutionalism*, Cambridge University Press, New York, 2015.344 has aptly stated that ‘water requires management that air and soil do not.’

<sup>4</sup> World Bank Report, “Zimbabwe’s New National Water Policy-Findings” March 2012. Accessed on 18 January 2020.

[siteresources.worldbank.org](http://siteresources.worldbank.org)

The legal root of the Human Right to water<sup>5</sup> appears dispersed as it is found in differing rights. This right to water sits on a kaleidoscopic and nebulous legal foundation. Provisions guaranteeing the right to life, health, a healthy environment, and the right to dignity are symbiotic and interweaved with the right to water. This thesis seeks to trenchantly critique the available legal frameworks regarding respect, fulfilment, and advancement of the human right to water in Zimbabwe.

This chapter seeks to provide a general overview of the right to water in Zimbabwe. The chapter also deals with research justifications, objectives, questions, methodology, and a brief literature review. An outline of the structure of this thesis will be provided in this chapter. Albeit the objective of this research is to critique the legal framework on the right to water in Zimbabwe, the intention is not to exhaust the content of the right to water in as far as it relates to areas such as sanitation, irrigation, and farming.<sup>6</sup>

### **1.1 Overview on Water Resources in Zimbabwe**

A general overview will show that Zimbabwe has limited water resources, with much of the country being semi-arid and characterised by highly variable rainfall patterns.<sup>7</sup> Although Zimbabwe shares its watercourses with neighbouring countries, it is renowned for developing one of the most advanced water systems in Africa.<sup>8</sup> Zimbabwe's storage capacity is the second-highest in Sub Saharan Africa with more than 8,000 dams built by the government and the private sector.<sup>9</sup>

Soyaphi argues that with the growth in population, the human right to water in Zimbabwe has continued to be threatened by a scant budget allocation to water,<sup>10</sup> poor quality of potable water;

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<sup>5</sup> In this thesis, the term 'human right to water,' 'right to water' and 'water rights' will be used interchangeably.

<sup>6</sup> 'Zimbabwe and the right to water: Government of Zimbabwe Policies in relation to the provision of water.' Accessed 20 December 2019.

[www.kubatana.net](http://www.kubatana.net)

<sup>7</sup> G Matchaya, O Kaaba & C Nhemachema, Justiciability of the right to water in the SADC region: A critical appraisal, 2 May 2018.1. Accessed 2 December 2019.1

[www.mdpi.com/journal/laws](http://www.mdpi.com/journal/laws)

<sup>8</sup>Ibid

<sup>9</sup> Ibid

<sup>10</sup> Zimbabwe and the Right to Water (n 6 above).

inadequate water supply and in some cities' exorbitant charges for potable water.<sup>11</sup> Zimbabwe has contended with providing clean water<sup>12</sup> to its citizens, with most cities and towns continuing to receive dirty and discoloured water posing health challenges. In pursuit of the national water policy, the 2012 World Bank Report<sup>13</sup> stated that an estimated 43 sewage treatment plants were polluting rivers and basins with untreated sewage. An extensive release of industrial emissions into rivers was also observed. Waterborne diseases such as cholera and typhoid associated with lack of access to safe drinking water were reported.<sup>14</sup> An astounding 98 592 cases and 4 288 deaths were reported in Zimbabwe in 2009.<sup>15</sup> Gold panning activities affected water quality as they were catalysts to riverine destruction, introducing mercury, a potent neurotoxin into the rivers.<sup>16</sup>

Generally, in urban areas, water rates are reported to be high and unaffordable for most citizens who have encountered arbitrary water disconnections.<sup>17</sup> Disconnecting water supplies has been used by landlords or local authorities to force people out of dwellings.<sup>18</sup> City authorities tend to hesitate to connect slums on the basis that they are illegal settlements, with suppliers of services also arguing that slum-dwellers cannot pay and ensure cost recovery. Slum-dwellers do not have documents to prove that they are entitled to services.<sup>19</sup> Unprotected wells and contaminated drainage channels or vendors who sell at high costs become the slum-dwellers solution to their quest for water. Local authorities deny slum dwellers access to safe drinking water because slum dwellers also known as squatters lack secure tenure.<sup>20</sup>

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<sup>11</sup> H Rwambiwa, Legal Policy and Regulations Analysis Paper, (undated). Accessed 18 January 2020. [www.kubatana.net](http://www.kubatana.net)

<sup>12</sup> Soyaphi (n 2 above) 2 Water security also includes water quality. Water must be devoid of pollutants, clean and safe for drinking.”

<sup>13</sup> World Bank Report (n 4 above).

<sup>14</sup> Soyaphi (n 2 above) “This crisis was caused among other reasons by the lack of clean water, burst and blocked sewage and uncollected refuse that overflowed into the streets. Poor management and lack of funds for water purification caused the deaths of thousands of people and led to the disease across borders.”

<sup>15</sup> World Health Organization Cholera Country Profile: Zimbabwe, Global Taskforce on Cholera Control, 31 October 2009. Accessed 30 December 2019.6. [www.who.int](http://www.who.int).

<sup>16</sup> Ibid

<sup>17</sup> United Nations Human Rights; UN-Habitat and the World Health Organization. The right to water. United Nations Fact sheet number 35. Office of the High Commissioner of Human Rights, 18, UN Habitat. Accessed 30 December 2019. (hereinafter U.N Fact Sheet). [www.ohchr.org/publications>factsheet35en](http://www.ohchr.org/publications>factsheet35en).

<sup>18</sup> Ibid p. 13

<sup>19</sup> Ibid p. 18

<sup>20</sup> Ibid p. 13

Local authorities have failed to provide water services in most areas in Zimbabwe where they are mandated to do so.”<sup>21</sup> Obsolete infrastructure, increase in population, rapid urbanisation, and low storage capacity have contributed to the water woes.<sup>22</sup> Infrastructure is not only aged but also overloaded and sometimes non-functioning in urban areas.<sup>23</sup> Human capital constraints with widespread skills flight and limited technical capacity were regarded as obstacles.<sup>24</sup> Other constraints included large deficits in funding for operations and maintenance, rehabilitation, expansion and low-cost recovery due to billing and collection inadequacies, including faulty meters and reduced willingness to pay for unreliable services.

In rural areas, challenges included the land reform process, which led to new settlements with little access to safe drinking water facilities and sanitation. In 2012, the World Bank found that 43% of rural populations were using any form of sanitation facility, with a third of the population having no toilet facilities and practicing open defecation. Over 4000 rural deaths were associated with poor hygiene practices and poor access to safe water and basic sanitation.<sup>25</sup> The world over, water has not been steadily available to vulnerable members<sup>26</sup> in society. These marginalised special groups include ‘women, children,<sup>27</sup> the disabled,<sup>28</sup> the detained,<sup>29</sup> the poverty-stricken.<sup>30</sup> Furthermore, the economically marginalised rural and urban poor<sup>31</sup> who have to endure walking

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<sup>21</sup> Zimbabwe and the Right to Water (n 6 above).

<sup>22</sup> E Munemo, Republic of Zimbabwe National Water Policy: A desk review of the gaps between the policy and its implementation, 2015, *International Journal of Public Policy and Administration Research*, 2015.63.

<sup>23</sup> Areas flagged for perennial water shortages in Harare include Budiriro, Msasa Park, Tafara, Mabvuku, Greendale, St. Mary’s and Epworth whereas in Bulawayo its Mahatshula, Romney Park, Belmont, Magwegwe and Amakhokhoba. See Zimbabwe and the Right to Water (n6 above).

<sup>24</sup> Zimbabwe and the Right to Water (n6 above).

<sup>25</sup> World Bank Report (n4 above).

<sup>26</sup> PW, Birnie & AE Boyle, *International Law and the Environment* 2<sup>nd</sup> Ed, Oxford University Press, 2002, 253.

<sup>27</sup> U.N Fact Sheet 35 (n. 17 above) 14 “Every year some 1,8 million children die of diarrhoea and other diseases caused by unclean water and poor sanitation.”

<sup>28</sup> The Convention on the Rights of Persons with disabilities, United Nations Human Rights Office of the High Commissioner. Accessed 21 February 2020. [www.ochr.org](http://www.ochr.org). (Article 2 enjoins State parties to recognise the right of persons with disabilities to social protection and the environment. The Convention seeks to, “ensure equal access by persons with disabilities to clean water services.”

<sup>29</sup> U.N Fact Sheet 35 (n. 17 above) 14 “Discriminatory on access to safe drinking water includes discriminatory laws, policies, denial, limited participation in decision making.”

<sup>30</sup> One woman said, “I stay in a slum. There are four public toilets, which is a great inconvenience, especially for women, because men and children can relieve themselves anywhere outside. Men go to the canal to take a bath. Women take a bath in their huts. See U.N Fact Sheet 35 (n. 17 above).

<sup>31</sup> “The poorest tend to get less water of a lower quality, they are often charged the most.” See United Nations Development Program, Humanitarian Report– ‘Beyond Scarcity,’ May 21,2012. Accessed 13 March 2020. [www.undp.org](http://www.undp.org).

long distances<sup>32</sup> in search of water. The vulnerable also face a high incidence of disease caused by lack and contaminated water. Rural women lack time for income-generating activities as a result of spending time walking in search for water and focussing on the sick, who are diseased due to water-related issues. The United Nations has estimated that children lose at least 443 million school days per annum due to water-related diseases.<sup>33</sup> Lack of legal recognition or protection of the right to water has negative implications for women's enjoyment of the right.<sup>34</sup>

World-wide it is reported that almost a billion people lack access to safe water for primary use.<sup>35</sup> In recent decades, the impact of water's increasing scarcity<sup>36</sup> has grown more distinct, and so too has its meaning in the community awareness.<sup>37</sup> The global water crisis has become a topical issue, generating complicated and extensive debates within the United Nations (UN) and other international forums.<sup>38</sup> Secondary effects of lack of access to water include reduced school attendance by girls, low yields on subsistence farming.<sup>39</sup> Carrying water from distant sources rather than going to school affected the girl child's right to education.<sup>40</sup> There also appears to be

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<sup>32</sup> Zimbabwe and the Right to Water (n 6 above) 21. "In Zimbabwe, it is not news that women wake up as early as 4 am to go and fetch water, and it takes at least 30 minutes for a 20-liter bucket to be full".

*See also* UN Fact Sheet 35(n 17 above) 35 "Women and children lack privacy and security and are therefore vulnerable to harassment, attacks, violence or rape where water and sanitation are not provided within the home. Instead of spending time studying and conducting other businesses or any other activities of their choice, women spend time fetching water, and this is detrimental in terms of development as it leads to unproductive work and would long term reflect by way of uneducated and jobless women folk who are only capable of fetching water from boreholes."

<sup>33</sup> See Preamble to the United Nations Human Rights Council Human Rights and Access to Safe Drinking Water and Sanitation. 2010. para 6. Accessed 30 December 2019.

UN DocA/HRC/15/L 14

<sup>34</sup> UN Fact Sheet 35 (n. 17 above) 24

<sup>35</sup> World Health Organization and United Nations Progress on Sanitation and Drinking Water, Progress on Sanitation and Drinking Water: Joint Monitoring Programme update 2012. Accessed 30 December 2019.

[www.who.int](http://www.who.int).

<sup>36</sup> Water scarcity is an environmental problem because it concerns a resource from the physical world (water) adversely impacted by human action (overuse, inequitable distribution, pollution from erosion, wastewater treatment plants, industries and mining and neglect of technological and ecological infrastructure with resulting problems for humans (shortage or contamination) and non-humans (shortage or contamination). *See* D Takacs, South Africa and The Human Right to Water, Equity, Ecology and The Public Trust Doctrine, 2016. *Berkeley Journal of International Law*, Cvo.65

<sup>37</sup> Harvard Law Review, "What price for the priceless? Implementing the Justiciability of the Right to water (2007) 20 *Harvard Law Review* 1067-1068.

<sup>38</sup> UN Fact Sheet 35(n 17 above).

<sup>39</sup> The United Nations said concerning the right to education, "where no toilet block is set aside for girls in educational institutions, parents will often not allow their daughter to attend schools, especially once they have started menstruating." *See* UN-Water "Sanitation contributes to dignity and social development" United Nations Fact Sheet number 3,2009. (Hereinafter Fact Sheet Number 3).

<sup>40</sup> K Moyo, Privatization of the Commons: Water as a right; Water as a commodity, 2011. *Stellenbosch Law Review*

a linkage between poverty and water.<sup>41</sup> Lack of access to water has a profound negative impact on various human rights, such as the right to life, health, and dignity. People need water for consumption, for survival and other subsidiary services. Water is a multipurpose resource used not only for personal, domestic, industrial, and agricultural use, but also essential for food security, economic development, and for securing livelihoods.<sup>42</sup>

## 1.2 Problem Statement and Justification of The Study

As critical as the right to water is, limited case law gives the impression that Zimbabwean citizens have not yet grasped the importance of claiming and enforcing their right their right to water. It also appears the government is not serious in fully honouring the people’s right to water. For instance, countries promised to halve the statistics of persons deprived of access to potable water,<sup>43</sup> yet to date, Africa and Zimbabwe, in particular, faces steep challenges to meet the minimalist yet seemingly ambitious undertaking.<sup>44</sup> Zimbabwe still faces a daunting task in providing its citizens with adequate potable water.

Despite perennial shortages of water in households and communities, it seems there is little evidence of citizens approaching the courts to assert their rights. It would seem as though the government is not doing enough to respect, protect, and fulfil the legal right to water. These concerns justify the need to investigate the efficacy or lack thereof of the current legal frameworks in safeguarding the human right to water. The purpose of this thesis is to discuss, analyse, review, explore, discover, interpret and recommend the implementation of the human right to water in Zimbabwe, given the challenges that persist in affecting the enjoyment of the right. Although the Constitution expressly recognises socio-economic rights, whether the judiciary has progressively rendered ground-breaking jurisprudence in the area of the human

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804.18

<sup>41</sup> M Williams, “Privatization and the Human Right to Water: Challenges for the New Century,”2006-2007, *Michigan Journal of International Law*. 47.

<sup>42</sup> IT Winkler, *The Human Right to Water: Significance, Legal Status, and Implications for Water allocation*, 2012, Hart Publishing.

<sup>43</sup>The year 2003 was identified as the International Year of Freshwater. See Millennium Development Goals (MDGs)Report of 2009. Accessed 10 October 2019.

<https://www.un.org/millenniumgoals>.

<sup>44</sup> TS Bulto, The Human right to water in the corpus and jurisprudence of the African human rights system, 2011, *African Human Rights Law Journal*.1. Accessed 30 December 2019. [www.ahrlj.up.za/bulto-ts](http://www.ahrlj.up.za/bulto-ts) African Human Rights Law Journal.

rights to water cannot be ignored. Case law would show that the courts have entertained excuses by Councils on failure to remedy the various harms to the right to water.<sup>45</sup> It is necessary to research the extent to which the existing legal frameworks provide for the right to water. In so doing, it is critical to explore and expose potential gaps in the law on the question of the human right to water. The available literature on the right to water is scant and topsy-turvy hence necessitating a critical appraisal.<sup>46</sup> It appears at this stage that there is limited and shambolic literature on how courts have advanced the realisation of the right to water, and the dearth of literature is more conspicuous in Africa and Southern Africa in general.<sup>47</sup>

### **1.3 Research Questions**

The research questions that this thesis seeks to answer are structured as follows:

1. To what extent does the current legal framework provide for the human right to water in Zimbabwe?
2. To what extent does the Constitution of Zimbabwe conform to international legal instruments on the right to water?
3. To what extent does Zimbabwe's subsidiary legislation answer or give effect to the right to water as envisaged in the Constitution and international human rights law?
4. Are there any gaps in the current legal frameworks on the human right to water?
5. On a comparative footing, to what extent does the Zimbabwean legal framework on the right to water compare with other jurisdictions like South Africa?
6. What legal and policy reforms are appropriate to guarantee the human right to water in Zimbabwe?

### **1.4 Research Methodology**

The journey to intellectual discovery regarding the legal rights to water in Zimbabwe and various countries, including South Africa, will largely be informed by the doctrinal legal research methods, which is essentially a 'research in law' or 'in the black letter of the law'. This

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<sup>45</sup> *Moses Mazhambe & Others v Chitungwiza Municipality* HC 111552/03

<sup>46</sup> May & Daly (n 3 above) 344.

<sup>47</sup> *Ibid.*



methodology would be utilised in Chapters 2 and 3. To some extent, Chapter 1 of this thesis will have a fusion of non-doctrinal legal research whose emphasis is, therefore, ‘research about law’ or ‘socio-legal research,’<sup>48</sup> since the subject of human rights is fundamentally linked to social matters. Chapter 4 will contain a comparative legal research methodology, while Chapter 5 will be a combination of socio-legal and doctrinal undertakings for findings, evaluation, recommendations, and conclusions.

Doctrinal and non-doctrinal legal research approaches are the two broad legal research methods available to a legal scholar.<sup>49</sup> Doctrinal legal research is defined as a study into legal dogmas through examination of statutory provisions and cases by employing the clout of reasoning.<sup>50</sup> Non-doctrinal research on the other hand, is defined as research into the relationship of law with other behavioural sciences.<sup>51</sup> Doctrinal legal research involves, “a methodical exposition, analysis and critical evaluation of legal rules, doctrines or concepts, their conceptual bases, and interrelationship.”<sup>52</sup>

Doctrinal legal research<sup>53</sup> encompasses exhaustive research into legal doctrine and helps the researcher to sieve and synthesise’ the law.<sup>54</sup> Doctrinal legal research gives emphasis on exploration of legal rules, principles or doctrines while non-doctrinal legal research gives prominence to relationship of law with people, social values and social institutions.<sup>55</sup>

In Chapter 2 and 3, will have a close analysis of the right to water as provided in the Constitution of Zimbabwe<sup>56</sup>, legislation (statutes),<sup>57</sup> international instruments and to leading judicial decisions respectively. Secondary data shall therefore be used in the form of the data already available, as collected through desk research. In-depth examination of different secondary data such as

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<sup>48</sup> K Vibhute & F Aynaem, (2009) Legal Research Methods, 2009.44. Accessed 8 January 2020 [chilot.wordpress.com](http://chilot.wordpress.com)

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Doctrinal legal research has been nicknamed ‘armchair research’ or ‘basic or fundamental research,’ while non-doctrinal research focuses on other sources other than law and is also known as socio-legal research or sociology of law. *See* Vibhute and Aynaem (n 48 above)71.

<sup>54</sup> P Birks, *The Academic and the Practitioner*, Legal Studies, Oxford University Press,1998. 399.

<sup>55</sup> Vibhute & Aynaem, (n 48 above).

<sup>56</sup> Constitution of Zimbabwe (No.20) Act, 2013.

<sup>57</sup> Acts of Parliament including but not limited to The Water Act [Chapter 20:25] (1998) and The Environment Management Act [Chapter 20:27].

international instruments, treaties, journals, the internet, textbooks and other academically accepted sources will be carried out to further understand the nature of issues surrounding the human right to water. In terms of primary sources, focus will be on published academic and professional legal periodicals, theses as well as underlying policies of different jurisdictions. In that regard pertinent rules, principles, concepts and doctrines are critically evaluated .

This thesis shall also apply a comparative legal research<sup>58</sup> in Chapter 4 by comparing South African and Zimbabwean laws. A comparative approach will be useful in exhibiting the lessons that can be learnt from each jurisdiction's failures and achievements. The comparison is hoped to liven up the important and distinct legal features within which the right to water is adjudicated in Zimbabwe and South Africa respectively. The review seeks to understand how the right to water was conceived and adjudicated where applicable and how the right is interpreted in various provisions depending on various legislative frameworks in other countries. The desktop research will assist in drawing value judgments and conclusions regarding the right to water.

## **1.5 Literature Review**

The right to water is meant for consumptive and non-consumptive purposes of water.<sup>59</sup> The right to water denotes legal rights as they are created according to a legal system, thus having legal consequences. Where a dispute arises, a right holder is necessarily able to legitimately expect a valid right to be upheld by the court of law and enforced through the state's machinery.<sup>60</sup>

Human rights are often difficult to separate from moral rights. Human rights represent the minimum standards of fair treatment to which individuals have a natural entitlement.<sup>61</sup> These rights can be appropriated within legal structures as legal rights. In this realm, citizens become rights holders, and governments become duty bearers. Human rights have different kinds of

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<sup>58</sup> Vibhute & Aynaem, (n 48 above)72.

<sup>59</sup> S Hodgson, *Modern water rights: Theory and Practice*. Issue 92 of FAO legislative study, Food and Agriculture Organization of the United Nations, 2006. Accessed 7 June 2020.  
[www.fao.org](http://www.fao.org).

<sup>60</sup> *ibid*

<sup>61</sup> J African, *Making sense of human rights*, 2<sup>nd</sup> Edn, Oxford Blackwell Publishing, 2009. Accessed 7 June 2020  
[www.rem-main.rem.sfu.ca](http://www.rem-main.rem.sfu.ca).

institutional forces in different legal frameworks.<sup>62</sup>

It is argued that the human right to water could be recognised as an actionable or non-actionable standard.<sup>63</sup> For example treaties and jus cogens norms at the international law level, are the actionable standard whose defilement gives ground for legal action.<sup>64</sup> Actionable rights tend to be used to organise society, whereas non-actionable ones tend to have a symbolic function directly. A suitable comparator would be the rights enshrined in a constitution to those contained in the Universal Declaration of Human Rights of 1948. A human right can be validly founded as either a statute or as a customary standard. Statutory norms are formally and authoritatively constructed by the legislature, whereas customary norms are identified through the substance of community and are then adopted into law.<sup>65</sup> This distinction is argued to be critical in the debate about the introduction of the human right to water.

According to Langford and Russell, the right to water has precipitously developed from relative vagueness to claim a noticeable domicile in human rights theory and practice.<sup>66</sup> The rights-based approach state that water is a legal entitlement rather than a commodity or service provided on a charitable basis.<sup>67</sup> The inclusion of the right to water in international law, and increasingly in national law, is argued to be only a preliminary step and will not automatically lead to implementation.<sup>68</sup> The adoption of the right to water in national legislation becomes only meaningful if it is accompanied by a plan of implementation and plan of financing. In practice, the right to water is often not applied for reasons including lack of resources, absence of a political will, inadequate institutional capacity, insufficient awareness of rights, lack of means to seek legal recourse.

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<sup>62</sup> J Allouche, The right to water: the right approach Institute of Development Studies, STEPS Centre, 2003. Accessed 7 June 2020.  
[on www.who.int](http://www.who.int).

<sup>63</sup> J Chocie & Z Adeel, Legal and Ethical Dimensions of a Right to Water. Accessed 7 June 2020.  
<http://rem-main.rem.sfu.ca/papers/adeel/2012/Water Security Chapter 3.1.>

<sup>64</sup> Nickel (n 61 above).

<sup>65</sup> *ibid*

<sup>66</sup> M Langford & A Russell, The Human Right to Water: Theory, Practice and, Prospects, Cambridge University Press, 2017. Accessed on 7 June 2020.  
[www.cmi.co](http://www.cmi.co).

<sup>67</sup> Nickel (n 61 above).

<sup>68</sup> *Ibid*.

### 1.5.1 Schools of thought on human rights

A reading of academic literature reveals that human rights are not conceived the same way. In scholarship, the human rights concept is often not explicitly defined or left vaguely defined. Dembour puts across four schools of thought on human rights, these being the natural scholars who conceive human rights as God-given; deliberative scholars who say rights are agreed upon; protest scholars who see rights as fought for and discourse scholars who believe that rights are merely talked of.<sup>69</sup>

The natural scholars believe human rights are god given. Human rights are treated as natural or quasi-natural entities whose existence is constant. Natural scholars refer to those entitlements one possesses because they are human. These rights would naturally include the right to water. These rights are universal, absolute, and negative. They are described as negative because they impose an obligation on the government or others not to interfere with them. In the international law realm, most treaties and conventions are influenced by the natural law school, for example, the Universal Declaration of Human Rights' which stipulates that everyone is born in dignity and right. Chapter 4 of the Zimbabwean Constitution is the embodiment of rights that cannot be derogated. Section 44 of the Constitution proceeds to give the state a duty to protect, promote and fulfil these rights.

The deliberative school of thought establishes that human rights are agreed upon. Liberal societies, therefore, tend to choose to adopt agreed viewpoints such as constitutional laws. Section 77 of the Zimbabwean Constitution of 2013 provides one excellent way to express the human rights values that are agreed upon, such as the human right to water. To the deliberative school, human rights are conceived from political action. Political rights guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy.

Dembour posits that the protest school views human rights as merely being about addressing injustice. They are claims on behalf of the poor, underprivileged and oppressed. The protest scholars advocate for relentless fighting for human rights. The argument for water rights shows

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<sup>69</sup> MB Dembour, What are human rights? Four schools of thought, *Human Rights Quarterly* Vol32, No. 1,2010. Accessed 20 May 2020. [www.brighton.ac.uk](http://www.brighton.ac.uk)

that it has been a protracted battle that has seen water as a human right concern that has evolved from implicit responsibility to explicit obligation to independent right.<sup>70</sup> Finally, Dembour establishes that the discourse school sees human rights as merely spoken about. The discourse scholars have no reverence for human rights as they argue that human rights do not deliver their promises. The discourse paradigm argues that the right to water, for example, is merely spoken about, but practically it is found to be sectoral. The four schools of thought benefit this thesis to navigate on the diverse views regarding universal human rights and the right to water in particular.

### **1.5.2 Recognition of Water as a Human Right**

The evolution of the human right to water begins with the Universal Declaration of Human Rights proclamation that every human being has the right to “a standard of living adequate for the health and well-being of himself and his family.” In 1966, this right was codified under international law.<sup>71</sup> Early recognition of the right to water came in 2002 when the United Nations Economic and Social Council (ECOSOC) indicated that the right to water was essential.<sup>72</sup> In 2006, the United Nations Development Programme recognized for the first time that access to drinking water and sanitation services was a human right. The dialogue on the water as a human right was sealed at the United Nations General Assembly (UNGA) of 2010<sup>73</sup> when it was formally and explicitly recognised. Resolution 64/292 accepted the human right to water and established that dirt-free potable water and sanitation are critical to the achievement of all human rights.<sup>74</sup> The resolution urged member states to devote sufficient financial resources and build capacity and technology transfer, particularly in developing countries to ensure that the right is served. The international community has increasingly recognised that access to safe drinking

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<sup>70</sup> Nickel (n 63 above).

<sup>71</sup> Codification happened in the 1966 International Covenant on Economic, Social and Cultural Rights.

<sup>72</sup> United Nations Social and Economic Council, 2002. Accessed 30 December 2020.  
[www.un.org](http://www.un.org).

<sup>73</sup> On 28 July 2010, the United Nations General Assembly through resolution recognised water as a human right, through Resolution 64/292, *See* Resolution 64/292, United Nations General Assembly, July 2010. Accessed 4 November 2019.  
[www.un.org](http://www.un.org).

<sup>74</sup> International Decade for action, ‘Water for Life’ 2005-2015, United Nations Department of Economic and Social Affairs. Accessed 1 October 2019.  
[www.un.org](http://www.un.org).

water must be considered within the human rights framework.<sup>75</sup> The human right to water entitles every citizen “sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses.”<sup>76</sup>

As a human right, water is not a self-standing human right in international treaties.<sup>77</sup> The human right to water is a right conferred by other international treaties and conventions such as inter alia the Convention on the Rights of the Child<sup>78</sup>; the Convention on Elimination of all forms of Discrimination against Women (CEDAW)<sup>79</sup>; the Convention on Rights of Persons with Disabilities<sup>80</sup> and the United Nations Committee on Economic, Social and Cultural Rights.<sup>81</sup> Water is thus an economic and social right and is recognised as a self-standing human right.<sup>82</sup>

Human rights proponents have gone to the extent of regarding water as a vital human need, a human right and a civic good whose commodification<sup>83</sup> would lead to a lack of access, especially by vulnerable members of society.<sup>84</sup> In *Mazibuko and Ors v City of Johannesburg and Ors*<sup>85</sup>, the court in its introductory remarks held that all over the world diverse cultures recognise the significance of water and that, “human beings need water to drink, to cook, to wash, and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.”

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<sup>75</sup> ‘Human rights are the idea of our time,’ See L Henkin, eds Introduction in the International Bill of Rights, Columbia University Press, 1981.

<sup>76</sup> Every 22 March is set to commemorate water; it is the ‘World Water Day. See the Right to safe, clean, and potable water, United Nations Fact Sheet number 5, Promoting active citizenship to defend and enforce the socio-economic rights in the Constitution p.2. (hereinafter UN Fact Sheet 5). Accessed 30 December 2019. [www.unwater.org](http://www.unwater.org).

<sup>77</sup> UN Fact Sheet 35 (n 17 above) 3.

<sup>78</sup> Paragraph 2 (c) of Article 24 requires State parties to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water.”

<sup>79</sup> Article 14 paragraph 2 provides that “State Parties shall ensure to women the right to enjoy adequate living conditions, particularly in relation to water supply.” See Convention for Elimination of Discrimination Against Women (hereinafter CEDAW) (Zimbabwe acceded to CEDAW on 12<sup>th</sup> May 1991). Accessed 12 February 2020. [www.un.org/womenwatch/daw/cedaw](http://www.un.org/womenwatch/daw/cedaw).

<sup>80</sup> Article 28(2)(a) sets out the obligation of States to “ensure equal access for people with disabilities to clean water services”

<sup>81</sup> UN Fact Sheet 35 (n 17 above) 1.

<sup>82</sup> *Hopcik investment (Private) Limited v Minister of Environment Water and Climate & City of Harare* HH 137-16 HC1796/14

<sup>83</sup> R Giulianiotti, “Supporters Followers, Fans and Flaneurs: A Taxonomy of spectator identities in Football” 26 *Journal of Sport and Social Issues* 25, 26, 2002. Accessed on 7 June 2020. <https://www.semanticscholar.org/paper>.

<sup>84</sup> V Shiva, *Water Wars: Privatization, Pollution and Profit* ix, Cambridge, South End Press.2002.

<sup>85</sup> *Mazibuko and Ors v City of Johannesburg and Ors* CCT 39/09(2009).

### 1.5.3 Type of human rights

Human rights exist in three levels being the ‘blue’, ‘red,’ and ‘green’ rights. It is argued that environmental rights do not fit neatly into any category or ‘generation’ of human rights; instead they straddle all three categories. They could thus be used to give individuals and groups access to information, judicial remedies, and political processes.<sup>86</sup> To that extent, environmental rights’ role is one of empowerment, facilitating in decision making and compelling governments to meet minimum standards of protection of life and property from environmental harm.<sup>87</sup>

The first generation rights, which are commonly called ‘blue rights,’ include civil rights, and political rights which protect the individual from abuse by the state.<sup>88</sup> Examples include, “the right to equality, the right to human dignity, and the right to life.”<sup>89</sup> First generation rights in practice impose a negative obligation on the state, not to take the rights away from their people.<sup>90</sup> Civil and political rights, are therefore, more strongly protected than other categories of human rights and give individuals the greatest opportunity to invoke international institutions ‘assistance in cases of violation.’<sup>91</sup> The first generation rights are protected under the International Covenant on Civil and Political Rights (ICCPR).<sup>92</sup> The right to life and human dignity are rights that have a direct relationship with the right to water, in that there is no life without water. Without water a person’s dignity is derogated.

Second-generation rights, also known as red rights relate to socio-economic issues and are protected under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>93</sup> These are concerned with encouraging governments to pursue policies that create conditions of life, enabling individuals or groups to develop equally to their full potential.<sup>94</sup> The

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<sup>86</sup> Birnie & Boyle (n 26 above)253.

<sup>87</sup> Ibid.

<sup>88</sup> J Dugard, *International Law. A South African Perspective* 4<sup>th</sup> ed. Juta Press, 2011.325.

<sup>89</sup> Ibid 327.

<sup>90</sup> Matchaya et-al (n 7 above)5.

<sup>91</sup> Birnie & Boyle (n 26 above) 252.

<sup>92</sup> MAS Salman & LS McInerney, *The Human Right to Water, Legal and Policy Dimensions Law, Justice, and Development series*, The World Bank, 2004. 39.

<sup>93</sup> Ibid

<sup>94</sup> Birnie & Boyle (n 26 above)252.

right to water, education, and to sufficient food are examples of socio-economic rights.<sup>95</sup> Second-generation rights impose positive obligations on governments to behave in a certain way to ensure that the governed can realise the rights.<sup>96</sup> These rights are seen as “programmatic, requiring progressive realisation in accordance with available resources.”<sup>97</sup>

Third generation rights (green rights or solidarity rights) whose realisation relies on the action of all actors, public and private alike, and include peace, development and the right environment.<sup>98</sup> Some human rights lawyers are against the third-generation rights as they argue that that they cheapen the concept of human rights.<sup>99</sup> There is thus a nexus with the right to water in all the generations of rights. Understanding this yoking is a critical base to this research’s evaluation of the legal frameworks on the right to water.

#### **1.5.4 Interrelatedness of rights**

Every human has certain inalienable entitlements which may not be encroached upon by the state, except to the magnitude which such encroachments are sanctioned by law.<sup>100</sup> According to Wiseberg, every human person is entitled to human rights by virtue of being human. The rights are, “are non-derogable rights.” The desecration of human rights can never be reasonable under any circumstance.<sup>101</sup> Weisberg further states that it is not the State that offers these rights and the State cannot deny its citizens of their human rights. International provides that a person is born with human rights, and the rights in their diverse forms are interconnected and cannot be separated.<sup>102</sup>

Accordingly, no hierarchical categorisation should be made between these rights.<sup>103</sup> It has been submitted that, attention and urgent consideration should be given to the implementation,

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<sup>95</sup> Dugard (n 88 above)330.

<sup>96</sup> Matchaya et-al (n 7 above)5.

<sup>97</sup> Birnie & Boyle (n 26 above).253.

<sup>98</sup> Ibid

<sup>99</sup> Ibid

<sup>100</sup> Dugard (n 88 above)325.

<sup>101</sup> LS Wiseberg, Introductory Essay, in Edward Lawson, Encyclopaedia of Human Rights, XIX 2<sup>nd</sup> Ed, Taylor and Francis, 1996.

<sup>102</sup>Wiseberg (n 101 above)24.

<sup>103</sup> Ibid.



advancement, and fortification of economic, social, cultural, civil and political rights.<sup>104</sup> Therefore, the right to water is essential and should not be derogated in the discovery that all rights are profound and multitiered.<sup>105</sup> The UN Committee on Economic, Social, and Cultural Rights advocates that access to clean water is a human right because it is obligatory for leading a life of human dignity and a leads to the achievement of all other human rights.<sup>106</sup>

The right to water is interwoven with the right to life, dignity, health, and food. If a human being is deprived of water, he or she cannot enjoy any other essential right.<sup>107</sup> Having access to safe drinking water is a fundamental precondition for the enjoyment of other rights, such as the rights to education, housing, health, life, and work.<sup>108</sup> If one were to consider the peremptory *jus cogens* norms, like freedom from slavery and torture, an individual can survive those actions but cannot survive without clean, safe water.<sup>109</sup> Water is a peculiar ‘primary need’ because it is the only such need a government can provide for which there is no substitute.<sup>110</sup> To fail to recognise a fundamental right to water, would be fatal and a denial to the world’s primary human rights declarations and covenants<sup>111</sup>

### **1.5.5 Enforceability of human rights**

It has been contended that water is found under environmental rights. However, not every right is enforceable through legal proceedings. The term ‘rights’ is said to be used by supporters of environmental rights to assign importance to the interests and claims of particular entities.<sup>112</sup> The supporters’ intend being to force lawmakers and institutions to take into account those interests, to accord them some priority, and make them part of the context for interpreting legal

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<sup>104</sup> The General Assembly of the United Nations Resolution 32/130. Accessed 3 January 2020. [www.un.doc](http://www.un.doc).

<sup>105</sup> Salman & McInerney (n 88 above)28.

<sup>106</sup> Committee on Economic Social and Cultural Rights General Comment 15, 2002. Accessed 7 February 2020. [ICESCR docx http://www.ohchr.org](http://www.ohchr.org).

<sup>107</sup> Y David, South Africa and the Human Right to Water: Equity, Ecology and the Public Trust Doctrine, 2016. *Berkeley Journal of International Law*. Accessed 4 February 2020. [bekerlylawir.tind.io](http://bekerlylawir.tind.io), p.64

<sup>108</sup> UN Fact Sheet 35 (n 17 above)2

<sup>109</sup> Takacs (n36 above)34.

<sup>110</sup> Ibid

<sup>111</sup> The U.S Water expert Peter Gleick said these words in Takacs (n 36 above)65.

<sup>112</sup> Birnie & Boyle (n 26 above) 250

rules.<sup>113</sup> Critiques are quick, however, to reason that the term ‘rights’ introduces flexibility and an open ended-ness that no rule can capture.<sup>114</sup> In this research, it is submitted that proper protection of human rights is critical not only for the law but also for other fields, including economics, business, and development in general.<sup>115</sup> Without robust protection of human rights, it is therefore unlikely that society can have order and minority interests be protected. Explicitly outlining these rights helps ensure that the rights exist in both theory and practice.<sup>116</sup>

## **1.6 Dissertation Structure**

The thesis is organised into five chapters exploring the various aspects of the human right to water.

### **Chapter 1**

This chapter introduces the research topic on the human right to water. The study, articulates the problem statement/justification of the study, the research questions, research methods, and literature review highlights.

### **Chapter 2**

The chapter interrogates the Constitution of Zimbabwe concerning the right to water, water provision, management, and distribution in Zimbabwe. The Constitution in which the right has been recognised is critically evaluated against the international instruments. Further, the chapter discusses the extent to which Zimbabwe respects, promotes, and fulfils the human right to water. The chapter will also attempt to identify any gaps in the legal framework regulating to the right to water.

### **Chapter 3**

Chapter 3 will focus on a discussion of Zimbabwe’s subsidiary frameworks on the right to water against the Constitution and international legal regimes for human rights. International and

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Matchaya et-al (n 7 above) 4.

<sup>116</sup> Ibid.

regional conventions as well as treaties relating to this right will be analysed with a view exposing any gaps in the law.

#### **Chapter 4**

The Chapter undertakes a comparative analysis of how the human right to water is treated in general under African conventions and treaties and then specifically juxtaposes the South African and Zimbabwean jurisdiction. South Africa's extent of applying the four-fold typology to respect, promote, protect and fulfil the right to water for its citizens is evaluated in this chapter.

#### **Chapter 5**

Chapter 5 is the concluding chapter, and it, therefore provides a summary of the findings, conclusions, evaluations, and recommendations reached throughout the study. It will also seek to articulate the study's contribution to further research in this field and provide critical legal and policy implications for Zimbabwe.

## CHAPTER 2

### CONSTITUTIONAL RIGHT TO WATER IN ZIMBABWE

#### 2.0 Introduction

The right to water as a construct of international law and its treatment by the Zimbabwean's Constitution is of interest in this chapter. The extent to which Zimbabwe's Constitution conforms to international conventions, treaties and policies will be determined. Significant and notable international legal frameworks and policies regulating the human right to water as well as the Constitution of Zimbabwe will be reviewed. The review is compelling because human rights are a universal language on the international plane and have been a formidable force towards positive change.<sup>117</sup> The right to water has a solid foundation not only in the local jurisdiction but in international and regional human rights law.

The right to water is expressly or implicitly provided in both universal and regional human rights provisions. Although there have been suggestions that international law or practice as it is today has failed to fully develop the human right to water,<sup>118</sup> it is established that the human right to water has been protected as necessary to secure other human rights, such as health, well-being, and life.<sup>119</sup> Divergent views will be outlined and discussed as this thesis analyses the different elements of the right to water as manifestly expressed in the international instruments<sup>120</sup> as well as in the supreme law of Zimbabwe.

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<sup>117</sup> The Human Right to Water- A guide for Nations Communities and Advocates Human Rights Watch, March 2019. Accessed 7 February 2020

[www.hrw.org](http://www.hrw.org)

<sup>118</sup>EB Bluemel, The implications of formulating a Human Right to water, University of California,2004.957.

<sup>119</sup> The 1972 Stockholm Declaration mentions the need to protect natural resources, including water resources, for future generations in the context of environmental health. *See* Declaration of the United Nations Conference on the Human Environment 1972. Accessed 31 December 2019.

<http://www.unep.org>

<sup>120</sup> S Woolman and M Bishop Constitutional Law of South Africa 2<sup>nd</sup> Edition, Juta & Co Ltd,2013. Chapter 56B Water. Accessed 7 February 2020

<https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap56B.pdf>

## 2.1 International Instruments on the right to water

Key international instruments are discussed, albeit not exhaustively given the limits of this thesis. These include universal treaties that expressly provide for the right to water, include the Convention on the Rights of the Child;<sup>121</sup> Convention on the Elimination of all forms of Discrimination Against Women (CEDAW);<sup>122</sup> and the Convention on the rights of persons with disabilities.<sup>123</sup> These international instruments are subject to signature and ratification, and once in force become legally binding on the States that ratified them. International Covenants that implicitly provide for the right to water are also evaluated in this chapter, and these include the Covenant on Economic, Social and Cultural Rights (CESCR),<sup>124</sup> and its General Comment Number 15.

Zimbabwe's Constitution guides the extent to which treaties and conventions become binding on country. Section 34 of the Constitution of Zimbabwe provides that "the State must ensure that all international conventions, treaties, and agreements in which Zimbabwe is a party are incorporated into domestic law." Section 327(2) of the Constitution provides that:

"an international treaty which has been concluded or executed by the President or under the President's authority (a) does not bind Zimbabwe until it has been approved by Parliament, and (b) does not form part of the law unless it has been incorporated into the law through an Act of Parliament."

Further section 326(1) states that customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament. Section 326(2) states that when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe..."

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<sup>121</sup> Article 24(2) (c), Convention on the Rights of the Child, 20 November 1989, United Nations General Assembly. Res 44/25- United Nations Human Rights Office of the High Commissioner. (Zimbabwe ratified this convention on 11 September 1990) Accessed 21 February 2020.

[www.ohchr.org](http://www.ohchr.org).

<sup>122</sup> CEDAW Article 14(2) (h). (n 79 above).

<sup>123</sup> Article 28 (2) (a), The Convention on the rights of persons with disabilities (Zimbabwe ratified the convention on 23 September 2013). Accessed 21 February 2020.

[www.ohchr.org](http://www.ohchr.org).

<sup>124</sup> (n 107 above) Article 11 and 12 of CESCR.

In providing an appraisal of international instruments, this thesis considers those treaties and conventions ratified by Zimbabwe.

## 2.2 Asserting water as an international human right

It is difficult to define the international human right to water concisely. An investigation of treaty law reveals that there exist no instruments that guarantee accessible, good quality water in adequate supply as a fundamental human right.<sup>125</sup> However, relevant sources of international law (both treaty and custom) reveal that a right to water exists in positive law, and that both its normative content and related obligations can be outlined independently of other rights.<sup>126</sup> The human right to water is a concept that recognises that all people require basic access to clean water to live healthy and dignified lives. Human rights are needed even when they are not virtually guaranteed by law and practice.<sup>127</sup> State practice, legal opinion, and treaty interpretation all currently point toward the existence of an independent, universal right to water in international law.<sup>128</sup>

The idea of water as a human right settled from the appreciation that treating the right to water as a commercial resource may result in an affordability difficulty for some communities, thus denying them of access to water.<sup>129</sup> The human right to water is vital for living a life of human dignity.<sup>130</sup> A human right to water would assure access to protected and inexpensive water in adequate amounts, exclusive of bias.<sup>131</sup> Furthermore, it would enjoin the State to act in order ensure access.<sup>132</sup> Access to water is regarded as essential to sustaining human life and indispensable to ensure a healthy and dignified life. Put differently, it is posited that the ‘right to

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, IUCN Water Law Series, 2009. Accessed on 7 February 2020.

<http://cmsdata.iucn.org>.

<sup>126</sup>GS McGraw, ‘Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence, Dig Deep Right to Water Program, *Loyola*, 2011, Volume 8, Issue 2: 127-137. *University of Chicago International Review* Accessed 7 February 2020.

[lawcommons.iuc.edu](http://lawcommons.iuc.edu).

<sup>127</sup> J Donnelly, *International Human Rights* 22 (3<sup>rd</sup> Ed), Westview Press, 2007.

<sup>128</sup> McGraw (n 127 above) 135.

<sup>129</sup> Bluemel (n 119 above) 957.

<sup>130</sup> Zimbabwe Human Right to Water (n 6 above).

<sup>131</sup> “The poor are systematically excluded from access to water by their poverty, by their limited legal rights or by public policies that limit access to the infrastructures that provide water for life and livelihoods.” See the United Nations Development Program, *Human Development Report*, 2006. Accessed 7 February 2020, [hdr.undp.org](http://hdr.undp.org)

<sup>132</sup> (n 107 above) paragraph 2.

water’ should be distinguished from the ‘right to access to water,’ with the latter being only one facet of the right.<sup>133</sup>The concept of the right to water has specific ‘freedoms’ and ‘entitlements. These include

“protection against arbitrary and illegal disconnections; prohibition of unlawful pollution of water resources; non-discrimination in access to safe drinking water and sanitation; non-interference with access to existing water supplies, and ensuring that personal security is not threatened when accessing water.”<sup>134</sup>

Entitlements also accrue to the right to water.<sup>135</sup> These include, “access to a minimum amount of safe drinking water to sustain life and health, access to safe drinking water, sanitation in detention and participation in water and sanitation-related decision making at the national and community levels.”<sup>136</sup>

Implementing the right to water often requires a review of the legislation and policies related to water services regulation, water quality management, environmental management, public services regulations, social security services, human rights, and citizens’ complaints institutions.<sup>137</sup>The 1977 United Nations Water Conference in Mar de! Plata, Argentina, marked the novel pronouncement of ‘concept of basic water requirements to meet fundamental human needs.’ The right to water was not existent in the annals of history until the Mar de! Plata Declaration.<sup>138</sup> The Mar de! Plata conference was dedicated completely to discoursing the embryonic water resources snags and issued the Mar de! Plata Action Plan to tackle the challenges.<sup>139</sup> Subsequent to the Action Plan was the proclamation of the period 1981 to 1990 as

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<sup>133</sup> El Hadji Guisse, proposed the removal of the term ‘access.’ He is the one who prepared a report on the right to drinking water, which was then accepted and further elaborated in General Comment No. 15. *See* J Scanlon, A Cassar, and N Nemes, International Union for Conservation of Nature, Environmental Policy and Law Paper No. 51, The World Conservation Union, 2004.

<sup>134</sup> UN Fact Sheet 35 (n 17 above) 1.

<sup>135</sup> *Ibid* p.7.

<sup>136</sup> *Ibid* p.8.

<sup>137</sup> T Kiefer, I Winkler, F Cacciaguidi, N Pastove, A Khalfan & C Fairstein, C “Legal Resources for the Right to Water and Sanitation” International and National Standards, 2<sup>nd</sup> Ed, Centre on Housing Rights and Evictions, 2008.1. Accessed 23 January 2020.  
[worldwatercouncil.org](http://worldwatercouncil.org).

<sup>138</sup> The right to water was not existent in the annals of history until 1977 when the Mar de! Plata Declaration announced that, “[A]ll people’s, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs. *See* Woolman and Bishop (n 124 above).

<sup>139</sup> Salman & McInerney (n 92 above) 7.

the “International Drinking Water Supply and Sanitation Decade,” during which governments would pledge to considerable advances in the potable water allocation and sanitation sectors.<sup>140</sup> The Water Conference has therefore, been considered as the genesis point for the discourse on the right to water.”<sup>141</sup> The conference concluded that all human beings have the right to access potable water, and called this “the commonly agreed premise.”<sup>142</sup>

In 1999, the United Nations General Assembly affirmed that “the right to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”<sup>143</sup> This was the most unambiguous declaration of the human right to water.<sup>144</sup> Subsequently, several treaties have referred to ‘safe potable water’ as a human right.<sup>145</sup> However, the resolutions, declarations and action plans were merely statements of policy that do not possess formal legal enforceability.<sup>146</sup> It is noted that resolutions and declarations don’t generate binding effects and are not subject to signing and ratification, though they may provide the impetus for later binding instruments and further definition of policy and principle in a given area.<sup>147</sup>

### **2.3 The Universal Declaration of Rights**

The United Nations Charter contains the modern history of ‘contemporary international human rights law’<sup>148</sup> In its preamble, the Charter reaffirmed faith in, “fundamental human rights, in the dignity and worth of the human person.” Article 1 of the Charter states the purposes of the United Nations include ‘promoting and encouraging respect for human rights.’ When the Commission for Human Rights was established it introduced the United Declaration of Human Rights (UDHR), which brought about the notion of the inherent dignity and the equal and

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<sup>140</sup> Ibid.

<sup>141</sup> UN Fact Sheet 35 (n 17 above) 3.

<sup>142</sup> Despite the special attention to water at the Rio Conference, the Rio Declaration on Environment and Development, does not contain a specific reference to water. *See* the Rio Declaration on Environment and Development. Accessed 4 January 2020. [www.un.doc. A. A/Conf.151/26/Rev.1](http://www.un.doc. A. A/Conf.151/26/Rev.1)

<sup>143</sup> Resolution 54/175 of 17 December 1999, 83<sup>rd</sup> plenary meeting paragraph 12. Accessed 4 January 2020. [research.un.org](http://research.un.org)

<sup>144</sup> Salman & McInerney (n 92 above) 11

<sup>145</sup> UN Fact Sheet 35 (n 17 above) 3.

<sup>146</sup> UN Fact Sheet 35 (n 17 above) 12.

<sup>147</sup> Ibid

<sup>148</sup> <https://www.un.org/aboutun/charter/index>. Accessed 3 January 2019.



inalienable rights of all persons as well as the idea that human rights are both universal and international.<sup>149</sup>

It is maintained that the UDHR was never meant to be binding,<sup>150</sup> however other authors argue that provisions of the UDHR were part of the customary international law and binding to that extent.<sup>151</sup> Human rights were still pronounced in general and not specific to water. Water being the most basic ingredient for life is interestingly not contained in the Universal Declaration on Human Rights.<sup>152</sup> The UDHR states that the foundation of freedom, justice, and peace in the world. is premised on appreciation of inborn dignity and of equal and inalienable rights of all humans.<sup>153</sup> However, the absence of a wide-ranging warranty of the human right to water in the universal human rights treaties has vicariously been dubbed ‘odd’,<sup>154</sup> at best and ‘startling’.<sup>155</sup>

Section 51 of the Zimbabwean Constitution, states that, ‘every person has inherent dignity and the right to have that dignity respected and protected. There is a vital link between water and human dignity. Water’s fundamentality to human dignity is indisputable, and an international consensus has grown to reflect this fact.’<sup>156</sup> In *Minister of Home Affairs v Watchemuka*,<sup>157</sup> it was aptly stated that,

“human dignity has no nationality. It is inherently in all people, citizens, and non-citizens alike—simply because they are human. Though not binding, the UDHR is now considered customary international law, reasserted in many international instruments. Even though water is not explicitly enshrined in the UDHR, Article 25 of the UDHR proclaims

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<sup>149</sup> In 1946, the Commission for Human Rights was established under the Economic Social Council (ECOSOC) See Salman & McInerney (n 92 above) 20

<sup>150</sup> *ibid*

<sup>151</sup> H Hanmun, *The Status of the Universal Declaration of Human Rights in National and International Law*, 1996. 25

<sup>152</sup> Woolman & Bishop (n 121 above) 3

<sup>153</sup> Universal Declaration of Human Rights, G.A. Res.217(iii) A, U.N. Doc A/REso/217 December 1948 hereinafter UDHR. Accessed 30 December 2019.

[www.un.org/udhrbook/pdf](http://www.un.org/udhrbook/pdf).

<sup>154</sup> SC McCaffrey, ‘The basic right to water’ in EB Weiss et-al (eds) *Fresh Water and International economic war*, Oxford University Press, 2005. 93-94.

<sup>155</sup> M Craven, ‘Some thoughts on the emergent right to water’ in Riedel. E and Rothen P(eds), *The Human right to water* Berliner *Wissenschafts Verlag*, Germany, 2006. 37-39.

<sup>156</sup> McGraw (n 127 above)138.

<sup>157</sup> *Minister of Home Affairs v Watchemuka* 2004(4) SA 326(SCA) para 24.

‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.’<sup>158</sup>

The term ‘including’ is thought to show that satisfying the standards of the Declaration cannot be done without water of sufficient quantity and quality to maintain human health and well-being.<sup>159</sup> The UDHR also paved the way in declaration of rights by authoring guarantees to the right to life, liberty, and security of the person for everyone.<sup>160</sup> It is common cause that water is considered as life and therefore the right to water is implied in the right to life. In section 48, the Constitution of Zimbabwe does provide for the right to life, and water is a fundamental element of the right to life.

The non-binding rights preserved in the UDHR were split into two covenants, one protecting civil and political rights namely International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>161</sup> Common article 1(2) of both Covenants speaks against dispossessing people of their means of survival and this must necessarily include water.

## **2.4 International Covenant on Economic, Social and Cultural Rights**

The right to water is recognised as a human right ‘that is essential for the full enjoyment of life and all human rights.’<sup>162</sup> The ICESCR acknowledged access to water as an enabler for the enjoyment of other rights. Enablement is realised wherein the right to housing, for example, includes ‘safe drinking water’, ‘sanitation and washing facilities,’ and site drainage.<sup>163</sup> On the other hand, the right to education demands an adequate school with safe drinking water, and sanitation facilities for both sexes.<sup>164</sup>

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<sup>158</sup> PH Gleick, “The Human Right to Water,” *Water Policy* 1(5), 1999. 487-503.

<sup>159</sup> *Ibid.*

<sup>160</sup> UDHR, Article 3 (n 156 above).

<sup>161</sup> This thesis will dwell on the ICESCR and its General Comment number 15.

<sup>162</sup> Resolution 64/292, paragraph 1 (n 73 above)

<sup>163</sup> General Comment 4 The right to adequate Housing (Sixth Session, 1991). Accessed 4 January 2020. [www.U.N.Doc.E/1992](http://www.U.N.Doc.E/1992).

<sup>164</sup> General Comment 13: The right to education (23<sup>rd</sup> session, 1999). Accessed 4 January 2020. [www.U.N.Doc E/C.12/1999/10/1999](http://www.U.N.Doc E/C.12/1999/10/1999).

In terms of the right to health, the Covenant on Economic Social and Cultural Rights(CESCR) identifies access to safe and potable water, and adequate sanitation as critical components of the availability, accessibility, and quality of healthcare services.<sup>165</sup> It is noted that the new Constitution of the Republic of Zimbabwe in its declaration of rights,<sup>166</sup>enshrines socio-economic rights, and among them the right to water.<sup>167</sup> The second- generation rights also known as ‘welfare rights’ include those aspects of the UDHR that pertain to people’s fundamental rights such as food, health, work, shelter, and education. Article 11 of the ICESCR states that, “everyone has the right to an adequate standard of living, including food, clothing, and housing.” The Committee on CESCR reasoned that the use of the word ‘*including*’ suggests that this litany of rights was never envisioned to be comprehensive.<sup>168</sup> According to the CESCR, the right to water is one of the most important premises for survival.<sup>169</sup>

ICESCR made passing references to water by regarding water as a ‘basic right.’<sup>170</sup> To this extent, there are many competing water needs in Zimbabwe, but the right to drinking water takes precedence; hence, section 77 provides a right to drinking water.<sup>171</sup> Section 77 of Zimbabwe’s Constitution is the *crux* of the law regulating the right to water in Zimbabwe.<sup>172</sup> It establishes the right to safe, clean, and potable water and sufficient food as justiciable rights. The Constitution introduced procedural and substantive legal issues on the human right to water.<sup>173</sup> Potable water itself is a significant resource for human development and is a fundamental human right for all citizens.<sup>174</sup> The inclusion of the right in the Declaration of rights entails that the right is

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<sup>165</sup> General Comment 14: The Right to highest levels of attainable standard of health (twenty second session, 2000). Accessed 4 January 2020.

[www.U.N.Doc.E/C.12/2000/2\(2000\).](http://www.U.N.Doc.E/C.12/2000/2(2000).)

<sup>166</sup> See part 2 of the Constitution of Zimbabwe Amendment No.20 Act for the fundamental rights and freedoms provided therein.

<sup>167</sup> (n 1 above)

<sup>168</sup> General Comment 15 at para 2. (n 107 above).

<sup>169</sup> General Comment 15. The Committee also states that the right can be derived from the right to health in Article 12, although it devotes less attention to this argument. (n 107 above).

<sup>170</sup> General Comment number 6. Accessed 7 February 2020.

[Socialprotection-humanrights.org/resource/un-com](http://Socialprotection-humanrights.org/resource/un-com)

<sup>171</sup> UN Fact Sheet 5 (n 76 above) 9.

<sup>172</sup> The right to water is now a constitutional right, and this ties with the United Nations Resolution of 2010 to be discussed in Chapter 3, which guaranteed the right to water.

<sup>173</sup> Rwambiwa (n 11 above) 2

<sup>174</sup> Munemo (n 22 above) 1

justiciable, that is, the courts enforced it.<sup>175</sup> This inclusion of the right to water as justiciable is applauded.

The Committee on Economic Social and Cultural Rights (CECSR) used not only the ‘teleological and derivative approaches,’ to the invention of the human right to water but also referred to its consistent practice that has addressed the right to water in the course of consideration of State Parties’ Reports.<sup>176</sup> For example, in 1995 in Cameroon, the Committee expressed dismay regarding violation of the human right to water. The Committee regretted the lack of access to potable water for large sectors of society, especially in rural areas and called upon the State party to make safe drinking water accessible to the entire population.<sup>177</sup> State Parties silence regarding ICESCR disparagements of the domestic implementation or violation of the human right to water has been taken as evidence of tacit assent by the States to the fact that ICESCR contains the human right to water and consequent state obligations.<sup>178</sup> It is postulated that through teleological interpretation, derivative approach to the right and submission of States in the reporting procedure, the ESCR Committee has founded a steady legal foundation for the human right to water and attendant State obligations in ICESCR.<sup>179</sup>

It is opined that there is a convincing normative basis for the human right to water and attendant State obligations in ICESCR.<sup>180</sup> It has also been contended that the conception of rights under ICESCR was vague and aspirational rather than ‘true’ ‘justiciable’ legal rights.<sup>181</sup> It has been submitted that the vagueness of the normative implications of the various rights of ICESCR has been its outstanding feature as well as “the compounding factors of the dearth of jurisprudence

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<sup>175</sup> The Constitutional right to water 13/2015, 26 June 2015. Accessed 30 December 2019.

[www.veritas.mango](http://www.veritas.mango).

<sup>176</sup> Bulto (n 44 above).

<sup>177</sup> ESCR Committee Conclusions and Recommendations: Cameroon, 1999 paras 22 and 40. Accessed 4 January 2020.

[www.UN Doc E/C 12/1 Add](http://www.UN Doc E/C 12/1 Add).

<sup>178</sup> Bulto (n 44 above) 359.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Craven (n 155 above) 92.

on such rights and the failure of the international community to develop a jurisprudence of any significance.”<sup>182</sup>

#### 2.4.1 General Comment Number 15

The CESCR addressed the human right to water in 33 out of 114 concluding observations it adopted in 1993 as well as in the adopted binding soft law instrument that recognize water as a human right such as the General Comment 15.<sup>183</sup> The catalyst for the international recognition of the right to water has been the authoritative but non-binding General Comment 15 on the Right to Water.<sup>184</sup> The ICESCR’s General Comment Number 15 is considered the greatest potent legal source to date for an understanding of an independent human right to water. Generally, the General Comments are not binding per se, because the CESCR does not have the authority to create new obligations for the State Parties to the ICESCR.<sup>185</sup> Although non-binding, the CESCR’s mandate, coupled with its expertise and representation of member States, gives the Comments ‘considerable legal weight.’ This weight is based on the increasingly quasi-judicial nature of the Committee and the formalization of General comments.<sup>186</sup>

General Comment 15 underscores the fact that water is a finite natural resource and a public good vital for life and wellbeing and that water is a prerequisite for the enjoyment of other rights.<sup>187</sup> Under Article 12(1) of the ESCR, the human right to water should be seen in conjunction with such rights as the right to the health; sufficient shelter; adequate food and other rights enshrined in the International Bill of Human Rights, chief amongst them being the right to life and human dignity.”<sup>188</sup> Article 10 of the General Comment 15 states that the elements of such a right must be adequate for human dignity, life, and health-which means that the full scope

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<sup>182</sup> P Alston, Out of the Abyss: The Challenges Confronting the new UN Committee on Economic, Social and Cultural Rights, 1987, *Human Rights Quarterly*. 351. Accessed 30 December 2019. [hrlibrary.umn.edu](http://hrlibrary.umn.edu).

<sup>183</sup> E Riddel, ‘The Human right to water and General Comment No 15 of the ESCR,’ in E Riedel and P Rothen P(eds) *The Human right to water* Berliner *Wissenschafts Verlag*, Germany, 2006. 19-25.

<sup>184</sup> In 2002 the ESCR Committee adopted a General Comment on the right to water, a right not recognized per se either in the UDHR or the ICESCR. See General Comment 15(n 107 above).

<sup>185</sup> Salman & McInerney (note 92 above) 48.

<sup>186</sup> Ibid

<sup>187</sup> General Comment 15 article 1 states that, “the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights”. General Comment 15 (n 107 above)

<sup>188</sup> General Comment 15(n 107 above) para 3

of the right is broader than mere survival interests.<sup>189</sup> General Comment 15 affirms thoroughly and comprehensively that sufficient water is vital to avoid death from dehydration, reduce water related maladies and provide for personal and domestic hygiene purposes.<sup>190</sup> General Comment 15 compares favourably to the Zimbabwean landscape as section 48 of the Constitution provides for the right to life, and section 51 provides for the right to human dignity. Zimbabwe conforms to the extent that section 77 of the Constitution provides for the right to potable water, and the Water Act discussed in the next chapter provides for water for primary purposes.

For emphasis, the normative content of the right includes both freedoms and entitlements. The right to water ensures that everyone has a core minimum quantity of water, of a certain quality to meet their essential needs.<sup>191</sup> Diverse conditions in different countries results in different interpretations of ‘water adequacy.’<sup>192</sup> It is inseparable from access to adequate sanitation because the resource would rapidly deteriorate without sanitation.” The ESCR is clear that the water supply for each person must be adequate and uninterrupted for individual and household uses, which comprise amongst other uses, potable water, water for washing clothes, cooking and personal, bathing and domestic cleanliness. However, it is argued that the scope of the right to water does not cover other domestic uses such as water for swimming pools or gardening.<sup>193</sup> The Zimbabwean Constitution compares favourably to the extent of directly providing for the right to drinking water only.

#### **2.4.2 Critical elements of the right to water**

According to General Comment 15, the content of the right to water entails three critical elements being *availability*, *quality* and *accessibility*. *Availability* refers to continuous and sufficient water supply for each person for personal and domestic use and is based on guidelines for human health developed by the World Health Organization, but tailored to local contexts.<sup>194</sup>

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<sup>189</sup> General Comment 15 (n 107 above) Article 11.

<sup>190</sup> General Comment 15 was issued by the Committee on Economic, Social and Cultural Rights at its 29<sup>th</sup> session held in Geneva, November 11 to 20, 2002. (n 107above).

<sup>191</sup> In the case of *Mazibuko c City of Johannesburg supra*, the Constitutional Court determined that the necessary quantity was 25 litres per person or 6 kilometres per household per month.

<sup>192</sup> Salman & McInerney (note 92 above) 54.

<sup>193</sup> UN Fact Sheet 35 (n 17 above) 8.

<sup>194</sup> McGraw (n 127above) 150.

Availability also relates to time and distance, physical security, and design of facilities. Section 77 of Zimbabwe Constitution implies that water is available to every person without discrimination hence its wording that, “every person has a right to safe, clean and potable water.” On the other hand, *quality* denotes that water should be safe for human consumption and personal and domestic hygiene. Quality water should be free from contamination and not negatively impact human health. It is acceptable in colour, smell, and taste, encouraging people to use safe sources.<sup>195</sup> It is suggested that section 77 of the Constitution of Zimbabwe speaks to the quality of water when it speaks of the right to ‘safe,’ ‘clean,’ and potable water.

*Accessibility* means that water must be accessible to everyone. Accessibility has four overlapping dimensions, namely, physical accessibility, economic accessibility, non-discrimination, and information accessibility.<sup>196</sup> Regarding the information accessibility dimension, the right to water must embrace the ability to seek, receive, and impart information that ensures the efficacy of its use.<sup>197</sup> Section 62 of the Constitution of Zimbabwe in conformity with international law trends, as well as regional trends, provides for the right to access information.<sup>198</sup> ‘Information’ has been aptly defined as “all information on the state of water, air, flora, fauna, land, and natural sites.”<sup>199</sup> Section 194(1)(h) of the Constitution states that “transparency must be fostered by providing the public with timely, accessible and accurate information.” The person interested in the information held by the State is required to show that the information is in the interest of public accountability and or information required for the protection of a right. The right to information is, however, not an absolute right.<sup>200</sup> Information may be restricted in the interest of defence and public security to the extent that the restriction is fair, necessary and justified.<sup>201</sup> Accessibility is, therefore, viewed as the main element of the right to water. Water must be within safe reach for all sections of the population. Water and water facilities need to be available even to the most

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<sup>195</sup> General Comment 15, Article 12(b) (n 107 above).

<sup>196</sup> General Comment 15, paragraph 12 (c) (n 107 above).

<sup>197</sup> General Comment number 15, paragraph 48 (n 107 above).

<sup>198</sup> Principle 10 of the Rio Declaration states that States shall facilitate and encourage public awareness and participation by making information available. (n 143 above).

<sup>199</sup> EC Council Directive on Freedom of Access to Information on the Environment (90/313/EEC), 1990. Accessed 4 January 2020.

[books.google.co.zw](https://books.google.co.zw).

<sup>200</sup> Section 82(2) Constitution of Zimbabwe.

<sup>201</sup> Section 62(4) Constitution of Zimbabwe.

exposed or ostracized people, therefore, be close to people’s homes, schools, healthcare facilities, and workplaces. The water facilities must be of sufficient quality and culturally appropriate.<sup>202</sup> It is established that incongruous resource distribution can lead to discrimination that may not be apparent.<sup>203</sup> States are therefore enjoined to make sure that women are included in decisions regarding water supplies and entitlements in a bid to alleviate the difficulties women face in water fetching.<sup>204</sup> The aspect of accessibility is also read as implied in section 77 of the Constitution of Zimbabwe. If ‘everyone’ has the right to drinking water, then it is implied that the water source is accessible to ‘everyone,’ including the elderly, pregnant women, the physically challenged and foreigners.

Economic accessibility is sometimes referred to as ‘affordability.’ General Comment 15 paragraph 12 (c) (ii) buttresses the need to safeguard water affordability to the extent of not compromising the individual’s ability to procure other necessities such as food and housing. Although the General Comment 15 steers clear of demanding water be provided free of charge, McGraw suggests that for some poor people, affordability may entail ‘free provision.’<sup>205</sup> The General Comment, however, provides options for making water affordable, including the provision of free or low-cost water, low-cost techniques, low cost technologies, and income supplements.<sup>206</sup> General Comment 15 postulates that water rights are also ascertained in a sustainable development paradigm.<sup>207</sup> Methods that promote non-wasteful uses of water and which do not destroy, or fully exploit available resources are recommended.<sup>208</sup> In Chile, for example, a water stamps system for families below the poverty line was introduced, and such vouchers can be used to pay for their water bills.<sup>209</sup> Subsidies to needy users, or tax benefits to suppliers are provided in Armenia.<sup>210</sup> It is yet to be heard of free water provision in households

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<sup>202</sup> Woolman & Bishop (n 121 above).

<sup>203</sup> Zimbabwe and the Human Right to Water (n 6 above) 3.

<sup>204</sup> Ibid

<sup>205</sup> Woolman & Bishop (n 124 above) 150.

<sup>206</sup> General Comment 15 at paragraph 27(n 107 above).

<sup>207</sup> General Comment 15 at paragraph 11(n 107 above).

<sup>208</sup> McGraw (n 127 above) 150.

<sup>209</sup> See World Water Council, World Water Vision, Commission report, A water Secure World: Vision for Water, Life and the Environment, 36(2000). Accessed 4 January 2020.

[www.ircwash.org/resources/worldwater](http://www.ircwash.org/resources/worldwater).

<sup>210</sup> Article 81 of The Water Code of the Republic of Armenia adopted 4 June 2002. Accessed 4 January 2020.

[www.unece.org/arm-WHP](http://www.unece.org/arm-WHP).



in Zimbabwe, save from community boreholes that are inconsistently drilled in various towns, cities, and rural areas.

### 2.4.3 Analytical devices on the right to water

Under General Comment 15, the CESCR agreed to consider the human right to water under three analytical devices being first, *derivation and inference*; second, *centrality and* thirdly, *necessity and prior recognition*.<sup>211</sup> In article 12, the use of the word ‘including’ was taken to imply the right to water since the catalogue was not exhaustive.<sup>212</sup> The Committee inferred the right to other rights enshrined in the International Bill of Human Rights, for example, the right to life, and human dignity.<sup>213</sup> This *derivation and inference approach* ties in pleasantly with the early scholar’s observation on the subject of the human right to water. After noting that the 1966 United Nations Covenants on human rights, did not mention water, the scholars concluded that, “if there is a right to water under the basic instruments or international human rights law, it must be inferred.”<sup>214</sup> In Zimbabwe, right to water can be inferred from the Constitution. For example, section 51 of the Constitution, which, provides for the right to human dignity and section 48 of the Constitution, which provides for the right to life.

As with the UDHR, access to water can be inferred as a, “derivative right accessory to meet the explicit rights to health and an adequate standard of life.”<sup>215</sup> Derivation of the right is further noted in emerging principles of environmental law, which establish that there is a form of an individual human right to environment, as well as a general right to environment, whereby States must acknowledge the importance of preserving nature for nature’s sake.<sup>216</sup> Section 73(a) of the Constitution of Zimbabwe states that every person has a right to an environment that is not harmful to their health and well-being. Accordingly, the right to water may be derived from the same. Article 1(2) of ESCR states that people should not be deprived of water’s means of

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<sup>211</sup> Salman & McInerney (n 92 above) 56.

<sup>212</sup> Article 12 of ICESCR states the “the right of everyone to an adequate standard of living for himself and his family, include adequate food, clothing and housing and the continuous improvement of living conditions. (n 189 above)

<sup>213</sup> General Comment 15, paragraph 3 (n 107 above).

<sup>214</sup> McCaffrey (n 154 above) 79.

<sup>215</sup> Gleick (n 159 above) 492.

<sup>216</sup> Salman and McInerney (n 92 above) 58.

subsistence and requires adequate access to water for subsistence farming, therefore bringing about the subject of *centrality* to the debate of the human right to water. Article 12(1) strengthens this argument by calling for the highest attainable standard of health where water is central to environmental hygiene. Water has an ineluctable place in the rights contained in the UDHR that is the right to life and human dignity.<sup>217</sup>

The third factor of *prior recognition* pointed to the existence of international legal instruments that recognize the right to water. The Committee cited article 14(2) of the International Convention on the Elimination of All forms of Discrimination against Women (CEDAW).<sup>218</sup> CEDAW expressly provides for the right to water in the context of ensuring that rural women have access to adequate water were critical for the prevention of disease and promotion of good health care.<sup>219</sup> Further, CEDAW provides that State parties shall guarantee women the right to ‘enjoy adequate living conditions, particularly concerning housing, sanitation, electricity, and water supply.’ CEDAW obliges State Parties to eliminate discrimination against women, particularly in rural areas.<sup>220</sup> The Convention expressly condemns discrimination against women. It obligates States to ensure that their legal systems guarantee equal rights to women in all spheres of life.<sup>221</sup> Its enforcement system weakens compliance with the Convention.<sup>222</sup> It is silent on the user’s duty to not only conserve water, use it in a sustainable manner but also pay for it.<sup>223</sup>

The CESCR also cited Article 24(2) of the *Convention on the Rights of the Child*. The Convention has a different emphasis as it recognizes a child’s right to enjoy the highest attainable standard of health in-order to “combat disease and malnutrition, including within the

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<sup>217</sup> General Comment number 15, paragraph 3 (n 107 above)

<sup>218</sup> CEDAW (n 79 above)

<sup>219</sup> CEDAW General Comment Number 24, 20<sup>th</sup> session, 1999 at para 28. Accessed 30 December 2019.  
[www.reworld.org](http://www.reworld.org)

<sup>220</sup> Ibid

<sup>221</sup> General Comment 15 (n 107 above). Article 1 of CESCR states that, discrimination means any distinction made based on sex, “which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights in any field.”

<sup>222</sup> D Van Wyk et-al, *Rights and Constitutionalism*. The New South African Legal Order. Clarendon Press Oxford, 2004.179.

<sup>223</sup> Neither ICESCR and ICCPR refers to the duty of individuals, however, article 29 of the UDHR deals with duties.

framework of primary healthcare. This is attainable through *inter-alia*, “the provision of adequate nutritious foods and clean drinking water.”<sup>224</sup> The emphasis in this Convention is more to do with children’s health; hence the pressing water issue is on its quality rather than any other issues.

The Committee’s previous recognition of the right to water in General Comment No. 6 on economic, social, and cultural rights of older persons was reaffirmed. It is therefore established that General Comment No. 15 recognizes the right to water through derivation and inferences from article 11 and 12 in the ICESCR. Recognition of the right is also through an analysis of the centrality and necessity of water to other rights under ICESCR and other instruments under the Bill of Human Rights as well as various other international legal instruments, thus providing a solid basis for recognizing a human right to water.<sup>225</sup>

#### **2.4.4 Specific legal obligations**

The General Comment 15 elaborates what its terms ‘specific legal obligations,’ namely duties to *respect, protect, and fulfil*.<sup>226</sup> These obligations are ‘negative’ and require the State party’s forbearance. The State and local authorities have a duty to provide clean and potable water in Zimbabwe. The Constitution reflects Zimbabwe’s obligations to provide water to people in Zimbabwe as required in the human rights instruments that the country has accepted. Different obligations are imposed on State parties, including the obligations to respect, protect, and fulfil.

Section 45(2) of the Constitution of Zimbabwe unequivocally provides that the Declaration of Rights binds not only the State but private persons and enjoins them to respect, protect, fulfil and promote the rights enshrined under Chapter 4 of the Constitution, which include the right to water. Section 85 of the Constitution deals with the enforcement of these fundamental rights and freedoms. Generally, therefore, every legal person is entitled to the right to water. The provision of clean and potable water is essential for the full enjoyment of the right to life<sup>227</sup> and other rights

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<sup>224</sup> CESCR Article 24(2)(c) (n 107 above).

<sup>225</sup> Salman & McInerney (n 92 above) 64.

<sup>226</sup> Salman & McInerney (n 92 above) 82.

<sup>227</sup> See section 48 of the Constitution, which, provides for the right to life. Water is life!

like right to human dignity,<sup>228</sup> and health. Section 44 of the Constitution of Zimbabwe obligates the State and ‘every person’ “and every institution and agency of the government to *respect, protect, promote and fulfil*” human rights. Private persons are also bound, including human beings and juristic persons, with the legal capacity to act independently. The obligation to respect and protect is of immediate effect and is not subjected to the availability of resources.<sup>229</sup> States parties are obligated not to disturb directly or indirectly with the enjoyment of the water right. The State is charged to refrain from engaging in activities that limit equal access to water and unlawfully diminishing or polluting the water.

The obligation to *respect* enjoins that State parties refrain from meddling with the enjoyment of the right to water.<sup>230</sup> States parties are prohibited from engaging in any practice that denies or limits equal access to adequate water, or arbitrarily interferes with customary or traditional arrangements of water allocation, or unlawfully diminishes or pollutes water. It also requires that State Parties refrain from any action that limits access to or destroys water services or infrastructure as punitive measures.<sup>231</sup>

The obligation to *protect* requires “the State Parties to prevent third parties from interfering in any way with the enjoyment of the right to water.”<sup>232</sup> The human right to water is legally protected not only through international, regional human rights agreements and *status nascendi* in customary international law but also mainly through the Constitution.<sup>233</sup> The previous Lancaster House Constitution of Zimbabwe did not recognise environmental rights, nor did it recognise economic, social, or cultural rights.<sup>234</sup> Essentially, the old Constitution was characterised by a narrow declaration of rights. The 2013 Constitution of the Republic of

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<sup>228</sup> See section 51 of the Constitution, which, states that “every person has inherent dignity in their private and public life and the right to have that dignity respected and protected. The human right to water is a pathway to human dignity when it is fulfilled.

<sup>229</sup> Rwambiwa (n 11 above) 3.

<sup>230</sup> P Alston, ‘The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights’ in Salman and McInerney (n above 94) 67.

<sup>231</sup> Ibid.

<sup>232</sup> General Comment No.15, paragraphs 23-24 (n 107 above).

<sup>233</sup> Article 77 (a) Constitution of the Republic of Zimbabwe (2013) entitles everyone to ‘safe, clean, and potable water.’

<sup>234</sup> Constitution of Zimbabwe Amendment Act 1981, was repealed by the current Constitution of Zimbabwe Amendment (no. 20) Act, 2013. It came into existence in 1979 at the advent of independence.

Zimbabwe in its declaration of rights,<sup>235</sup> enshrines socio economic rights, the so-called second-generation rights, and among them is the right to water.<sup>236</sup>

There are many competing needs for water but the right to drinking water takes precedence hence section 77 of the Constitution provides for and protects everyone's right to drinking water.<sup>237</sup> Potable water itself is a major resource for human development and is an essential human right for all citizens.<sup>238</sup> In *Mushoriwa*,<sup>239</sup> the court was concerned with the unlawful, arbitrary disconnection of water based on a disputed bill. The court held that since the bill was disputed, it was improper for the City of Harare to disconnect water without obtaining a court order. In *Mushoriwa supra*, the court ruled that the respondent could not be allowed to be an arbiter in its case as this was despotic and tyrannical. The consumer deserved a chance to be heard by an impartial and independent arbiter. It was not going to be fair to cut off or deny the consumer access to a basic human right, in a case where they could have been right.

The obligation to protect involves adopting the necessary and effective legislative and other channels to curb third-parties from disallowing equal access to sufficient water. It also involves preventing the third parties (individuals, groups, and corporations) from compromising equal, and affordable access to water.<sup>240</sup> By adopting the necessitous measures and legislation, State parties would be effectively playing their role. Individuals must also be protected from third-party exploitation, for instance, from resource pollution by companies.<sup>241</sup> By protection, this means that authorities take proactive measures to prevent contamination of sources public water.<sup>242</sup> While the right to water is robustly protected in the 2013 Constitution as compared to its predecessor, one is persuaded that it could have been detailed in a manner that makes the right

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<sup>235</sup> See part 2 of the Constitution of Zimbabwe Amendment No.20 Act for the fundamental rights and freedoms provided therein.

<sup>236</sup> Section 77 of the Zimbabwe's Constitution 2013.

<sup>237</sup> Section 77 of the Constitution: The Right to safe, clean and potable water, Fact Sheet No.5, Promoting active citizenship to defend and enforce the social and economic rights in the Constitution Zimbabwe Lawyers for Human Rights(undated). Accessed 22 December 2019.

[www.zlhr.org.zw](http://www.zlhr.org.zw)

<sup>238</sup> Munemo (n 22 above) 1.

<sup>239</sup> *Farai Mushoriwa v City of Harare* HH 4266/13.

<sup>240</sup> Salman & McInerney (n 92 above) 68.

<sup>241</sup> McGraw (n 127 above) 151.

<sup>242</sup> JA Mavedzenge and DJ Coltart in association with international commission for Jurists & Zimbabwe Human Rights Association, A Constitutional Law Guide towards understanding Zimbabwe's fundamental socio-economic and Cultural Rights, 2014.14.

inclusive and meaningful to all concerned. There is not enough detail within the local jurisprudence on the interpretation of this right. It is submitted that the local courts will have to draw much guidance from international and comparative foreign law to determine the content and scope of this right.<sup>243</sup>

The last specific legal obligation is *fulfilment*, which can be disaggregated into obligations to facilitate, promote, and provide.<sup>244</sup> The duty to ‘*promote*’ includes the obligation to take proactive measures that seek to enhance the enjoyment of fundamental right to water. State Parties are required to take measures to assist citizens to enjoy the right to water. Fulfilment includes taking measures to raise public awareness of the Constitutional right to water.

The obligation to *promote* requires embarking on educational campaigns on the hygienic use of water, protection of water sources, and methods to minimize water wastage. Stakeholder participation in seeking fulfilment of the right to water could be done by translating the Constitutional right into all official languages and communicating it to all provinces of Zimbabwe.<sup>245</sup> Facilitation of access to information on the right to water is a sure way of promoting the right. The obligation to promote refers to the need for State Parties to adopt the necessary measures toward the full realization of the right to water, such as granting sufficient recognition to the right within national, political and legal systems; adopting a national water strategy, and ensuring the water is affordable for everyone.<sup>246</sup> The State has a duty to educate citizens on the hygienic use of water, protection of water sources, and methods to minimise water wastage.<sup>247</sup> In *Moses Mazhambe and others v. Chitungwiza Municipality*,<sup>248</sup> the High Court ordered the municipality to close the sewage drain, repair its sewage treatment works and rehabilitate the contaminated land. The *Mazhambe* case shows that civil litigation or threat of it can be an effective measure to compel action and compliance to water laws. The City of Chitungwiza sprung to action and sought funding from the government to upgrade the sewage

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<sup>243</sup> Ibid. 47

<sup>244</sup> Paragraph 37 of the General Comment 15 sets forth nine minimum essentials including: (a) ensuring access to the minimum amount of water that is safe and sufficient; (b) ensuring the right of access to water and water facilities on a non-discriminatory basis.

<sup>245</sup> See section 7(a) of the Constitution of Zimbabwe.

<sup>246</sup> Salman & McInerney (n 92 above) 68.

<sup>247</sup> (n 6 above) 4.

<sup>248</sup> *Moses Mazhambe and others v. Chitungwiza Municipality* HC No. 111552/03.

system after receiving the court order. Sadly, it is a common cause that most local authorities then plead poverty and or lack of funds as a defence.

#### **2.4.5 Critique of General Comment 15**

Whilst General Comment No. 15 was well received in some quarters, it has been criticized in others. The General Comment has been criticized for failing to recognise that the right to water and sanitation can be owed between states.<sup>249</sup> Critiques have argued against General Comment 15's article 11, which offers no interpretive space for 'new rights.'<sup>250</sup> An amendment to the ESCR was therefore found necessary for the incorporation of the right to water in the treaty. It was postulated that deference be given to the States' omission of water in the drafting of the Covenant.<sup>251</sup> It is argued that the CESCR failed to explicitly provide for the human right to water.<sup>252</sup>

The General Comment has been criticized for appearing to be silent on the role of water users, conferred with this right.<sup>253</sup> Only State Parties obligations are mentioned and not those of individuals, which reveals a significant shortcoming on the Comment. Other actors also ought to be fully involved in water resources management as emphasized in the Dublin Statement on Water and Sustainable Development, which advocated for water development and management through a participatory approach encompassing consumers, planners, and policymakers.<sup>254</sup> Such an approach vests user with both rights and corresponding duties with respect to water.<sup>255</sup>

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<sup>249</sup> Craven (n 155 above) 39.

<sup>250</sup> Woolman & Bishop (n 121 above).

<sup>251</sup> S Tully. "A human right to access water. A critique of General Comment No 15 23, 2005 *Netherlands Quarterly of Human Rights* 35-63.

<sup>252</sup> General Comment 15, paragraph 3 (n 107 above).

<sup>253</sup> Salman & McInerney (n 92 above) 74.

<sup>254</sup> Principle 2 of Dublin Rio principles (n 143 above).

<sup>255</sup> The World Bank Resources Management Policy Paper, 1993, states that "the participation of users in managing and maintaining water facilities and operations brings many benefits. (n 4 above).

McCaffrey<sup>256</sup> sees the worth of General Comment number 15 to States differently. The author submits that the Committee offers a coherent legal argument. It is argued that recognition of the right to water by States was done in General Comment No 15.<sup>257</sup> Accordingly, in July 2010, the UN General Assembly declared, “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>258</sup> The United Nations Human Rights Council shortly thereafter affirmed the derivation of the right from the right to an adequate standard of living, the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.<sup>259</sup> Pinpointing the right to water in related rights which enjoy unequivocal respect in international human rights treaties, provides another legal basis for the protection of the right to water.<sup>260</sup> Therefore, the efficacy of the ‘indivisibility’, ‘interdependence’, and ‘interrelatedness,’ of human rights that is embraced by the African Charter and proclaimed in the Vienna Declaration and Program of Action is confirmed.<sup>261</sup>

## **2.5 Principles emerging from the Constitution of Zimbabwe**

An examination of section 77 of the Constitution of Zimbabwe hereunder seeks to enumerate *principles* regarding the right to safe, clean, and potable water:

### *The principle of inclusivity and non-discrimination*

The Constitution of Zimbabwe defines the word ‘person’ to mean natural and juristic persons.<sup>262</sup> The words ‘*every person*’ in section 77, mean that discrimination is out-rightly shunned. Section 56 of the Constitution deals with equality and non-discrimination, with subsection 2 stating that,

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<sup>256</sup> McCaffrey (n 154 above).

<sup>257</sup> General Comment 15, paragraph 3 (n 107 above).

<sup>258</sup> The Human Right to water and Sanitation. Accessed 4 January 2020.

[www.un.org/waterforlifedecade/human\\_rights\\_A/64/L63/Rev1\\_\(2010\).](http://www.un.org/waterforlifedecade/human_rights_A/64/L63/Rev1_(2010).)

<sup>259</sup> Human Rights and Access to Safe Drinking water and Sanitation Accessed 4 January 2020

[UN. Doc A/HRC/15/L14 2010.](http://www.un.org/waterforlifedecade/human_rights_A/64/L63/Rev1_(2010).)

<sup>260</sup> Bulto (n 44 above) 357.

<sup>261</sup> The Vienna Declaration stipulated that “All human rights are universal, indivisible and interdependent and interrelated.” See Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights on 25 June 1993. Accessed 4 January 2020.

[AN/CONF 157/23 para 5](http://www.un.org/waterforlifedecade/human_rights_A/64/L63/Rev1_(2010).)

<sup>262</sup> Section 332 of the Constitution of Zimbabwe defines a ‘person’ as an individual or a body of persons, whether incorporated or unincorporated.



“women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Section 56, therefore, aptly supports principles underlying the promulgation of the human right to water, which right promotes non-discrimination in accessing it. The principle of non-discrimination is itself a fundamental human right and is included in all international human rights conventions.<sup>263</sup> It precludes distinction, exclusion, restriction or preference based on any ground (for example, race, colour, sex, language, health status, religion, political orientation, national or social origin, birth or other status.<sup>264</sup> The constitutional provision means that the government of Zimbabwe is obliged to provide water to everyone.<sup>265</sup> The *literal interpretation* of the word means that even foreigners are entitled to claim the right to water. This right is not a right necessarily reserved for citizens of Zimbabwe only. Further, the definition does not shun non-state actors such as corporates. These are not discriminated against either from claiming a human right to water.<sup>266</sup> However, the reading of the entirety of Section 77, would suggest that the intention was to have the right available to human beings because ‘potable’ means water that is meant for drinking. In this instance, juristic persons cannot drink water but can use it.

#### *The principle of quality and security*

Section 77 of the Constitution provides that water provided to every person to drink ought to be ‘safe.’<sup>267</sup> It is opined that water safety speaks to the quality of the ‘drinking’ water and safety of reach. Best quality water ought to be of acceptable colour, odour, and taste.<sup>268</sup> Safe drinking water can be said to be water that does not represent any significant risk to health over a lifetime of consumption. The United Nations Sustainable Development Goal 6 stipulates that in as much

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<sup>263</sup> Kiefer et-al (n 138 above)

<sup>264</sup> Ibid

<sup>265</sup> In *Mushoriwa v City of Harare* HC 4266/13 [2014] ZWHHC 195 (29 April 2014) it was held that water cannot be denied to a citizen without a just cause and that in terms of s44 of the Constitution every agency of government must respect and protect the rights and freedoms set out in the declaration of rights, more particularly s 77 of the Constitution which enshrines a fundamental right to water in the Constitution.

<sup>266</sup> *Hippo Valley Estates Limited and Triangle Limited v Minister of Environment, Water and Climate* HH 235-18 HC7770/16, the court held that the respondent violated s56 of the Constitution as she singled out the operations of the applicants only and published regulations for those alone. The respondent failed to justify the discrimination.

<sup>267</sup> Kiefer et-al (n 138 above), “water required for personal and domestic use must be ‘safe,’ therefore free from organisms, chemical substances, and radiological hazards that constitute a threat to a person’s health.

<sup>268</sup> Ibid.

as life hinges on water, it is hygienic water which defines civilization.<sup>269</sup> The Resolution 64/292 of the United Nations General Assembly of 2010, equally calls upon States and International Organisations to provide funding, capacity-building and technology transfer to assist developing countries in particular, to provide clean, accessible and affordable drinking water for all.<sup>270</sup>

An analysis of the very words ‘safe,’ ‘clean’ and ‘potable’ water suggests that section 77 of the Constitution provides little detail about what the rights require. In *Mushoriwa supra*, it was held that the Constitution recognises that the realisation of the right to safe, clean, and potable water is not an event. It is a process that must be guided by the limits of the resources available to the State. The court, however, did not fully utilize the opportunity to clarify the content and scope of the right to water.<sup>271</sup> Instead, the court emphasized that the role of the judiciary is to interpret and enforce the law when someone complains of rights violations.

It appears that there is no universally accepted definition of ‘safe drinking water.’<sup>272</sup> Nevertheless, the right to water dictates that water for personal and domestic uses must be safe and acceptable to the extent of being free of microbes, parasites, chemical substances, and radiological hazards that constitute a hazard to a person’s health.<sup>273</sup> Water must be of acceptable properties to ensure individuals will not resort to unhygienic alternatives.<sup>274</sup> It is established that the World Health Organisation Guidelines for drinking water quality, provide a basis for the development of national standards, which, if properly implemented, will ensure the safety of drinking water.<sup>275</sup> Section 73(1) (a) of the Constitution of Zimbabwe complies with General

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<sup>269</sup> OM Dinka, Safe Drinking Water: Concepts, Benefits, Principles, and Standards DOI:10.5772/intechopen.71352 2017. Accessed 22 January 2020.  
[intechopen.com](https://www.intechopen.com) at subsection 3.2.

<sup>270</sup> B Powell, Water as a Human Right, Water as a Commodity. Accessed 25 June 2020.  
<https://www.e-education.psu.edu/geog430/node/701>.

<sup>271</sup> Mavedzenge and Coltart (n 243 above) 47.

<sup>272</sup> Dinka (n 270 above).

<sup>273</sup> Ibid.

<sup>274</sup> Ibid p.9.

<sup>275</sup> J Bartram, *Flowing away: Water and Health Opportunities*, Third Edition, 2008). Accessed 17 December 2019.  
[www.who.int/water\\_sanitation\\_health](http://www.who.int/water_sanitation_health).

Comment 15 in that it provides that “every person has the right to an environment that is not harmful<sup>276</sup> to their health or well-being.”

For water to be considered as quality water, it must be clean, pure, wholesome, healthy, and potable. On the corollary, safe water is not necessarily pure as it may contain inter-alia traces of salt such as magnesium, calcium, carbonates.<sup>277</sup> Water of satisfactory quality is the fundamental indicator of the health, and well-being of a society and is critical for the development of a country.<sup>278</sup> As shown in Chapter 1, Zimbabwe has recorded deaths due to the ingestion of unclean water resulting in diarrhoea and related diseases. Water contaminated with faecal matter has been reported. Waterborne diseases point to the quality of water and sadly lives have been lost. The safety of water speaks to the security of access. Water has to be accessible for everyone within reasonable and safe distances of the water source from the point of demand.<sup>279</sup> Vulnerable groups must be able to access clean water too.<sup>280</sup>

### *The principle of duty/obligation*

The State has a duty or obligation towards the full realization of the right to water, using the maximum available resources. International law imposes a concrete set of obligations regarding water rights.<sup>281</sup> The CESCR insists on a ‘a minimum core obligation’ to ensure the fulfilment of, minimum necessary levels of each of the rights compulsory upon every state.’<sup>282</sup> The General Comment 3 states that the minimum core of the right to water has been established as one ensuring,

“an individual right to sufficient, safe, acceptable, physically accessible and affordable water to meet vital human needs at all times, distributed in a non- discriminatory way, acknowledged by the home government, and reinforced by deliberate, concrete and

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<sup>276</sup> Section 73 of the Constitution of Zimbabwe embodies a harm prevention principle.

<sup>277</sup> Ibid.

<sup>278</sup> There is a nexus between water and sustainable development. Its suggested that there is a strong linkage between water, food and energy. To this extent, the Millennium Development Goals of 2009 targeted to ‘halve the population without access to safe drinking water and basic sanitation’ in the period 1990 to 2015.

<sup>279</sup> Dinka (n 270 above).

<sup>280</sup> These include women, children, elders, the rural poor, and disabled people.

<sup>281</sup> Mc Graw (n 127 above) 162.

<sup>282</sup> General Comment No.3, The nature of State parties’ obligations,1990. Accessed 24 January 2020.  
<https://www.refworld.org/pdf>.

targeted State actions toward the enjoyment of the right's full scope, were a failure to do any of these things requires justification with reference to the maximum available resources."<sup>283</sup>

Quantifying the water is essential in-order to guide nations on what the minimum core protects. General Comment references the amounts stipulated by the WHO study and studies by Peter Gleick.<sup>284</sup> Both sources concur that while 20-25 litres per person per day is enough to ensure human survival, it may be argued that the amount poses a 'high risk' as hygiene cannot be assured. A rigid, context blind reliance on the standards ought to be avoided.<sup>285</sup> General Comment 15 notes additional water may be needed to meet health and climate.<sup>286</sup>

The core content of the right to water has been clarified to mean an entitlement to support basic needs. General Comment 15 lists core obligations that States are required to meet and prioritize immediately which entail ensuring that everyone has immediate access to the core content of the right.<sup>287</sup> These obligations include ensuring access to a minimum essential amount of safe water sufficient and safe for personal and domestic uses, to prevent disease and ensuring the right of access to water and water facilities a just basis. Under Article 2(1), 11(1), and article 23, State Parties are required to recognise the essential role of international cooperation and assistance and take joint and separate action to achieve the full realisation of the right to water. States are expected to take measures to prevent their citizens and companies from violating the right to water of citizens of neighbouring States.<sup>288</sup>

Therefore, it follows that when water is scarce, or provision is limited, water for survival takes priority.<sup>289</sup> The U.N Convention on Water Courses similarly insists that priorities be given to water to meet basic human needs in periods of conflict over resources.<sup>290</sup> The Berlin Conference

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<sup>283</sup> General Comment 15: Articles 11 & 12 (n 107 above).

<sup>284</sup> Ibid.

<sup>285</sup> Ibid

<sup>286</sup> General Comment 15, paragraph 12(a) (n 107 above).

<sup>287</sup> General Comment 15, (n 107 above).

<sup>288</sup> H Steiner, P Alston & R Goodman International Human Rights in Context: Law, Politics, Morals 266 (3<sup>rd</sup> Ed), Oxford University Press 2008. 360.

<sup>289</sup> Mc Graw (n 127 above) 158.

<sup>290</sup> Article 6 of United Nations Convention on the Law of the Non-Navigational Uses of International Water Courses, United Nations General Assembly, May 21 1997. Accessed 24 January 2020.

on Fresh-Water states that water ought to be sustainably and equitably distributed, with basic human needs taking centre stage.”<sup>291</sup> The Berlin Conference also underscored the fact that every human should have access to water to meet that individual’s vital human needs.<sup>292</sup> Consideration of resource constraints applying within Zimbabwe is read in in the assessment of minimum core obligations discharge.<sup>293</sup> The accommodation of resource excuses strikes as a major loophole that States like Zimbabwe have taken advantage of in failing to expedite the resolution of water rights-related challenges.

Obligations of immediate effect would include the obligation to establish concrete and targeted programs to achieve the full extent of the right to water.<sup>294</sup> However, the words ‘*progressive realization*’ in the Constitution suggests that the implementation of the right is not meant for ‘instant’ realization.<sup>295</sup> This means the State is expected to ensure the realization of the right within the resources available to it over some time.<sup>296</sup> Progressive realization, therefore, speaks to the principle of common but differentiated responsibility in line with principle 7 of the Rio Declaration.<sup>297</sup> Section 77(b) of the Constitution requires the State, “to take reasonable legislative and other measures, within the limits of resources available to it, to achieve the progressive realization of this right.” Section 77(b) complies with article 2 of the ICESCR which provides requires that parties to the Covenant undertake, not to implement the Covenant immediately as is the case with ICCPR but instead to take steps within their individual capacities, with a view to eventually achieving the full realisation of the rights.<sup>298</sup>

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[treaties.un.org](http://treaties.un.org).

<sup>291</sup> International Conference on Freshwater, Bonn, Germany, December 3-7, 2001, Recommended for action. Accessed 24 January 2020.

[enb.iisd.org/water](http://enb.iisd.org/water) SDH.

<sup>292</sup> Article 17(1) International Law Association ‘The Berlin Rules’ adapted at the Berlin Conference, 2004. Accessed 24 January 2020.

[www.carwater-info.net/library](http://www.carwater-info.net/library).

<sup>293</sup> ICESCR, Article 2(1) (n 107 above).

<sup>294</sup> Kiefler (n 138 above) 2.3.

<sup>295</sup> Mavedzenge & Coltart (n 243 above) 27.

<sup>296</sup> General Comment 3, Article 2, paragraph 9 (n 283 above).

<sup>297</sup> The principle includes two elements: the first concerns the common responsibility of States for the protection of the environment at national, regional, and global levels. The second concerns the need to consider different circumstances in relation to each State’s contribution to the creation of a particular environmental problem and its ability to prevent, reduce, and control the threat. See Rio Declaration (n 143 above).

<sup>298</sup> Article 2 of the ICESCR (n 107 above).

The rights' implementation is in-fact in accordance with the availability of resources, which renders them less capable of judicial determination.<sup>299</sup> The aspect of progressive realization is also espoused in section and 73(2) of the Zimbabwean Constitution. Section 73(2) of the Constitution stipulates that “the State must take reasonable legislative and other measures within its limits of the resources available to it, to achieve the progressive realization of the rights.” The wording “reasonable legislative and other measures,”<sup>300</sup> denotes that the State is obliged to enact legislation and other programs that seek to ensure the fulfilment of rights. Progressive realization speaks to a step by step approach, adoption of national laws, policies, strategies, and action plans and setting national targets and objective assessment of national priorities and resource constraints of the country. In Zimbabwe, it appears that there is dearth regarding the enactment or alignment of legislation to the right to water.<sup>301</sup> Courts are required to define the contours of these rights,<sup>302</sup> through enacting and reviewing legislation to enable the realization of the right. The statement of the ‘progressive realization’ makes implementation of rights, particularly water rights, subject to the availability of resources by the State.

The *Dora Community*<sup>303</sup> case and the *Mazhambe* case *supra* have revealed how municipalities have reasoned in court that they were facing financial challenges and could not fix waste effluent systems.<sup>304</sup> Such excuses defeat the whole idea of States being obliged to respect, protect, and fulfil environmental rights. Therefore, it has been recommended that environmental stakeholders should develop a policy framework that can guide the ‘progressive realization’ of environmental rights and that courts should adopt a narrower interpretation of the progressive realization of rights against any claims of lack of resources.<sup>305</sup>

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<sup>299</sup> Van Wyk et-al (n 223 above) 177.

<sup>300</sup> Article 2(1) of ICESCR provides that States are under obligation to progressively realize the right to water and sanitation to the maximum of their available resources, (n 107 above).

<sup>301</sup> For example, the Environmental Management Act Chapter 20:27 of 2006(EMA), which was enacted after the Constitution, evades speaking to the right to water directly.

<sup>302</sup> Zimbabwe Lawyers for Human Rights Briefing Paper “An Analysis of Provisions Relevant to Economic, Social and Cultural Rights in Zimbabwe’s 2013 Constitution” 10 December 2014, The International Human Rights Clinic at Harvard Law School. Accessed on 21 January 2020.

<http://law.harvard.edu/ESCR>.

<sup>303</sup> *Dora Community v Mutare City Council* HH 1312/05.

<sup>304</sup> Ibid

<sup>305</sup> Ibid

## 2.6 Critique of The Constitution

In the first instance, section 2 of the 2013 Constitution refers to the supremacy of the Constitution and states that the Constitution is, “the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”<sup>306</sup> Section 3 of the Constitution provides the founding values and principles that the nation of Zimbabwe is founded on, which include but are not limited to the supremacy of the Constitution, fundamental rights and freedoms as well as recognition of the equality of all human beings.<sup>307</sup> The water laws which do not align with the Constitution are therefore rendered invalid. The national law serves as the principal source of legal remedies for claimants. Moreover, environmental protection has been given constitutional status in Zimbabwe’s national legal system.<sup>308</sup> Section 3(2) focuses on the values and principles which bind the State and all institutions and agencies of government at every level. An assessment of the Constitution brings out other critical issues regarding the right to water:

### *Protection of the right to water*

In the first instance, the Constitution itself must ensure that the right to water is protected. It is unfortunate that the absence of protection of social, economic, and cultural rights in the Constitution, could result in alterations for political expediency. Section 328 of the Constitution allows for amendment of the Constitution by requiring that amendment pass both houses of parliament by a two-thirds vote and also be approved by a majority vote in a nationwide referendum. No special procedures are provided for amendments to the Declaration of rights.<sup>309</sup> Rights are, therefore, vulnerable to reform or repeal in the current state. It would be suggested that the Constitution limits the ability of the executive or the legislature to amend the Bill of Rights. The Constitution could be improved into stating that the Bill of Rights is unalterable, or that enumerated rights may only be added or augmented. If there are amendments, it then is proposed that a supermajority of the provinces approves of the same.<sup>310</sup>

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<sup>306</sup> Section 2 of the Constitution of Zimbabwe.

<sup>307</sup> In particular, section 3(2)(j) of the Constitution speaks of the “equitable sharing of natural resources.” and section 3(2)(k) provides for the “due respect of vested rights.”

<sup>308</sup> Section 73 of the Constitution of Zimbabwe.

<sup>309</sup> Zimbabwe Lawyers for Human Rights Briefing Paper (n 302 above).

<sup>310</sup> *ibid*

### ***Relationship between the right to water and other rights***

Section 73 of the Constitution promotes environmental rights and acknowledges environmental rights as human rights. That way, there is a perpetuation of the human right to water, as the right is part of environmental rights. The right is interconnected with other rights such as the right to life,<sup>311</sup> right to food<sup>312</sup> and dignity.<sup>313</sup> Human beings naturally need hydration and food to live and thrive. Section 73(a) states that “every person has the right to an environment that is not harmful to their ‘health’ or ‘well-being.’” The section is formulated as a negative obligation, which guarantees a minimum standard of environmental protection that can be inferred from the words ‘health’ and ‘well-being.’<sup>314</sup> Section 73(b) is a more directive principle that creates the State’s positive duties to protect the environment for present and future generations.<sup>315</sup>

Section 73 could extend to non-state actors if read in conjunction with section 165 of the Constitution. It has been argued that compartmentalisation of the right could asphyxiate the quest of broad social justice.<sup>316</sup> It is underscored that the possible struggle with supposing that the right to water is implicit in human rights is that the comprehension of such rights is not always a certainty.<sup>317</sup> Zimbabwe played a critical role towards recognition of the right to water by explicitly articulating the right in section 77 of the Constitution. This acknowledgment is vital, although the right is still read into other rights, and together, these rights should all have equal protection.

### ***Access to justice***

Section 69(3) of the Constitution gives ‘every person’ the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. Section 265(1) (a) of the Constitution enjoins councils to, within their spheres-(a) ensure good governance by being

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<sup>311</sup> Section 48 of the Constitution of Zimbabwe.

<sup>312</sup> Section 77b of the Constitution of Zimbabwe.

<sup>313</sup> Section 51 of the Constitution of Zimbabwe.

<sup>314</sup> Ministry of Environment, Water and Climate, Discussion Paper on the review and gap analysis of the Environmental Management Act (Ch. 20:27), 20 July 2016.10. Accessed 30 December 2019. [justice.gov.zw](http://justice.gov.zw).

<sup>315</sup> Section 73(b) of the Constitution states that ‘every person has a right to have the environment protected for the benefit of present and future generations.’ In so doing the Zimbabwean supreme law supports the principle of sustainable development.

<sup>316</sup> Soyaphi (n 2 above)5.

<sup>317</sup> *ibid*



effective, transparent, accountable, and institutionally coherent. The courts have a duty to safeguard human freedoms and the rule of law.<sup>318</sup> The Constitutional Court is the final arbiter where issues of human rights are in concern. Breach of obligations by legal or natural persons leads to a certainty of legal consequences.<sup>319</sup> However, section 77 intends to benefit natural persons who can ‘drink’ water, unlike the juristic persons who need it for commercial or business persons.

The merits of the inclusion of water as environmental right in the Constitution include ensuring that more substantial environmental rights are enacted and ensuring that the constitutional rights to a healthy environment can provide a safety net to protect against gaps in statutory environmental laws.<sup>320</sup> Better access to justice and accountability is safeguarded when environmental rights are supplemented with procedural remedies that allow citizens to readily access constitutional courts.<sup>321</sup> Further, the inclusion of water as a human right and an environmental right offers opportunities for the communities to approach the court for redress whenever they are affected by adverse environmental impacts such as water pollution and other forms of harm to health.<sup>322</sup> Section 194(1)(e) of the Constitution states that “people’s needs must be responded to within a reasonable time, and the public must be encouraged to participate in policymaking.

## **2.7 Interpretation of the right to water**

Section 46 of the Constitution sets out guiding principles on how courts must interpret constitutional rights, and this does not exclude the right to water. Section 46 states that, a court must give the full effect of the right when interpreting the right suggesting a wider than a narrow interpretation. Further, a court must consider international law and all treaties and conventions to which Zimbabwe is a party and may consider relevant foreign law, including court decisions of other countries. The Constitution and international human rights frameworks on the right to

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<sup>318</sup> Section 165(1) (c) of the Constitution of Zimbabwe.

<sup>319</sup> Zimbabwe Lawyers for Human Rights Briefing Paper (n 302 above ) 10.

<sup>320</sup> Ibid. 11.

<sup>321</sup> *ibid*

<sup>322</sup> *ibid*

water bring about both negative and positive obligations upon the State.<sup>323</sup> Zimbabwe is a signatory to the ICESCR General Comment 15, which entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses and is therefore obliged to comply.

In *Mushoriwa supra*, the court did not canvas the content of the right nor its scope but dealt with only one negative obligation of the right: the court said it was a violation of the right for the City of Harare to disconnect water without a court order. In the *Mushoriwa case*, *Mushoriwa* had challenged the provision in section 8 of Statutory Instrument 164/1913 which allowed local authorities to discontinue water supplies to consumers without paying compensation, by giving 24 hours' notice. *Mushoriwa* based his legal challenge on section 68 of the Constitution on administrative justice as well as provisions of the Administrative Justice Act.<sup>324</sup> Section 68 of the Constitution states that, "every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantial and procedurally fair. In that respect, arbitrary water disconnections are viewed as retrogressive and not progressive.

Therefore, it can be submitted that constitutional courts do have the power to enforce the constitutional right to a healthy environment. Adequate jurisprudence is available to implement constitutional rights through litigation. Justiciability is to the extent to which an environmental provision is enforceable and creates a legal entitlement that will compel the State to adopt and enforce policies, laws, and budgets to that effect.<sup>325</sup>

## **2.8 Limitations of the Constitutional right to water**

Rights generally are subject to limitations, and therefore not absolute.<sup>326</sup> The right to water, like other socio-economic rights in the Constitution, is subject to two limitations. Firstly, section 77 states that the State must take measures to implement the right to water, but "only within the

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<sup>323</sup> The Constitutional right to water (n 176 above)

<sup>324</sup> Administrative Justice Act [Chapter 10:28].

<sup>325</sup> Zimbabwe Lawyers for Human Rights Briefing Paper (n 302 above ) 12

<sup>326</sup> See the case of *Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC) where it was held that the truism that no right is to be considered absolute implies that from the outset of interpretation, each right is always already limited by every other right accruing to another citizen."

limits of the resources available to it.” In *Mushoriwa, supra*, it was aptly held that “the Constitution recognizes that the right to safe, clean and potable water is not an event, it is a process which must be guided by the limits of the resources available to the State.” In *Bothwell*<sup>327</sup> it was argued that the draconian measure of arbitrary disconnections was a necessary evil if the City of Harare was to have resources required to continue to provide clean, safe, and potable water.

The right is also subject to section 86 of the Constitution, which allows most rights in the Declaration of Rights to be limited. Section 86 of the Constitution provides that fundamental rights may be limited only in terms of a law of general application. The limitation is to the extent that the limitation is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity and freedom.<sup>328</sup> The factors are considered include (a) the nature of the right or freedom concerned (b) the purpose of the limitation (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others. It is established that ‘law of general application’ is an expression of the principle of law, wherein government action must be based on law.<sup>329</sup> Any limitation of fundamental rights, therefore, ought to be authorized by law. Law refers to all forms of legislation, principles of customary law, and common law.<sup>330</sup> It would be fatal to limit the right to water as this has a bearing on the right to life. Limiting access to water, as discussed above, also affects human dignity.

## **2.9 Remedies for Breach of the Right**

General Comment 15 clarifies that violation of the right to water can be either through ‘acts of commission’ or ‘acts of omission,’<sup>331</sup> Acts of commission include the adoption of retrogressive measures incompatible with State Parties’ core obligations, the formal repeal or suspension of legislation related to the right to water, or the adoption of legislation or policies that are

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<sup>327</sup> *Bothwell Property Co (Private) Limited v City of Harare and Tendai Mahachi* HH 360-16.

<sup>328</sup> Section 86 of the Constitution of Zimbabwe.

<sup>329</sup> I Currie & J De Waal, ‘The Bill of Rights Handbook,’ 6<sup>th</sup> ed, Juta & Company (Pty) Ltd, 2013.155.

<sup>330</sup> Mavedzenge & Coltart (n 243 above) 20.

<sup>331</sup> General Comment No. 15, paragraph 42 and 43 (n 107 above).

incompatible with pre-existing domestic or international legal obligations relating to the right to water. Failure to take appropriate steps toward the full realization of every person's right to water, failure to have a national policy on water, or the failure to enforce the relevant laws are examples of omissions.<sup>332</sup> The Committee used the specific legal obligations it developed to identify examples of such violations, that is, the obligations to respect, to protect, and to fulfil.<sup>333</sup>

From an international law perspective,<sup>334</sup> the violation of the right to water has transformed into prosecutable war crimes and crimes against humanity.<sup>335</sup> Denial of water may, “amount to the war crime of torture, inhumane treatment, cruel treatment, or wilfully causing great suffering or serious injury to the body or health.”<sup>336</sup> For example, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found in *Delic* that, “the creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and a *fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities, and medical care’ constituted both cruel treatment and wilfully causing great suffering or serious injury to body and health.”<sup>337</sup> The *Delic* case fittingly indicates that crimes against humanity encompass the deprivation of water.

Arbitrary or unjustified water disconnections, discriminatory or unaffordable increases in water tariffs, or pollution and diminution of water resources affecting human health are examples of violations of the obligation to respect the right to water. Where a State Party to take steps to safeguard persons within its jurisdiction from violation of the right to water by a third party, the violation of the obligation to protect is noted. Such violations include failure to enact or enforce laws to prevent the pollution and discriminatory extraction of water, failure to meritoriously regulate and control water services providers, or failure to protect water distribution systems.

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<sup>332</sup> Ibid

<sup>333</sup> Salman & McInerney (n 92 above) 69.

<sup>334</sup> It is debated that there is no international judiciary with automatic and compulsory jurisdiction to enforce international law principles. A state must give its consent before an international tribunal has jurisdiction over it. States tend to comply for fear of isolation as disregard attracts negative reactions from other states against the wrongdoer. See Dugard (n 88 above) 400-413.

<sup>335</sup> Woolman & Bishop (n 121 above) 56B-8.

<sup>336</sup> Article 3 of the Geneva Conventions and Article 4(2) (a) of Additional Protocol ii. Accessed 2 June 2020.

[ihldatabases.icrc.org](http://ihldatabases.icrc.org).

<sup>337</sup> *The Prosecutor v Zejnil Dlatić et-al* (16 November 1998) Case No IT96-21-T at para 422.

Violations of the obligations to fulfil occur through State Parties failure to take necessary steps to ensure the realization of the right to water including failure to implement a national water policy intended to ensure the right to water.<sup>338</sup>

In principle, States are obligated to amend their domestic legal order as necessary to give effect to their treaty obligations. Such action should guarantee ‘everyone to an effective remedy by the competent national tribunals for acts of violation of fundamental rights.’<sup>339</sup> The principle of legal equality is espoused as fundamental to the realization of the right to water.<sup>340</sup> Section 85(1) of the Constitution of Zimbabwe brings that ability for citizens to have *locus standi* and provides for public interest litigation. Section 85 opens up for recourse to civil litigation as an enforcement tool. Remedies ought to be just and equitable. A court has to ensure that effective relief is granted when a breach of any right has taken place.

Constitutional and common law remedies are available towards the enforcement of the right to water. It is for the courts to fulfil the fundamental rights. In legal parlance, judicial remedies such as criminal sanctions and civil action arise when there is a breach to ensure compliance and enforcement. For example, the Water Act in section 68 and section 57 of the Environmental Management Act prohibit water pollution and makes it a criminal offense punishable by fine or imprisonment. Although criminal sanctions may exist, there is an outcry on lack of appreciation and awareness of the elements of environmental crimes by magistrates, prosecutors, and police officers and even water quality inspectors.<sup>341</sup> Additional to this challenge, it has been observed that generally, the judicial systems in Zimbabwe take too long to resolve matters.

On the other hand, Civil law remedies, seek to enforce rights and compel compliance with water regulations in Zimbabwe, for those whose economic and social rights are harmed. The affected have a right to seek compensation and apply to the courts’ compelling polluters to cease polluting water sources or to take measures. Section 85(1) of the Constitution now brings

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<sup>338</sup> General Comment No. 15, paragraph 44, (n 107 above)

<sup>339</sup> UDHR, Article 8, many if not all of the provisions of UDHR are increasingly considered to form binding rules of customary law. (n 156 above).

<sup>340</sup> McGraw (n 127 above) 152.

<sup>341</sup> MA Rabie, C Loot, R Lyter & R Erasmus, “Implementation of Environmental Law” in Fuggle, RF, and Rabie, MA. Environmental Law in South Africa, Juta and Co, 1993. 128.

citizens that ability to have *locus standi* and provides for public interest litigation. Remedies ought to be just and equitable. Where a contravention of any right has taken place, a court is obligated to ensure that effective relief is granted.<sup>342</sup>

### 2.9.1 Constitutional Remedies

In *Fose v Minister of Security*, the Constitutional Court of South Africa stated that:

“Appropriate relief will, in essence, be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If necessary, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.”<sup>343</sup>

Through section 85, the new Constitution of Zimbabwe provides for robust enforcement mechanisms on how the right to water can be enforced by allowing broad locus standi. The court is not restricted to particular relief but to a plethora of any suitable respite that is capable of obtaining the protection, fulfilment and enforcement of the rights in question.<sup>344</sup> Section 45 of the Constitution explicitly provides that the Declaration of Rights binds not only the State but private persons and enjoins them to respect, protect, fulfil and promote the rights enshrined under Chapter 4 of the Constitution. Section 85 of the Constitution of Zimbabwe deals with the enforcement of fundamental rights and freedoms. It provides in section 85(1)

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

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<sup>342</sup> Mavedzenge & Coltart (n 243 above) 15.

<sup>343</sup> *Fose v Minister of Security* 1997(3) SA 786(CC) para 19.

<sup>344</sup> McGraw (n 127 above) 15.

Section 85 is open to both the violators of the law and the violated as it does not deny either category of seeking redress. Accordingly, “the rule that the court cannot entertain a claim by a person whose hands are legally dirty is now unconstitutional.”<sup>345</sup>

In *Mudzuru & anor v The Minister of Justice, Legal and Parliamentary Affairs*,<sup>346</sup> the court held that the object of section 85 was to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalized, and deprived sections of society. It was held that the paramount test should be whether the alleged infringement of a fundamental right or freedom has the effect of prejudicially affecting or potentially affecting the community at large.<sup>347</sup> The test covers cases of marginalized or underprivileged persons in society who, because of sufficient reasons such as poverty, disability, socially and economically disadvantaged positions, are unable to approach the court to vindicate their rights. As already espoused, the human right to water should necessarily be entitled to both natural and juristic persons.

Section 85 was therefore meant to provide a broad and generous approach to legal standing and present complete fortification to the fundamental human rights and freedoms in Chapter 4, and to ensure that the exercise of the right to access to judicial remedies is not hindered. In the case of *Mawarire v Robert Gabriel Mugabe*,<sup>348</sup> when determining section 85(1) (a) *locus standi*, the Court must adopt a liberal approach and should:

“not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat.”

The understanding is that the Constitution grants *locus standi* even where a litigant has not suffered the violation of their right to water but is only perceiving the same.

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<sup>345</sup> This rule was applied in the case of *Associated Newspapers of Zimbabwe v Minister of State for Information and Publicity* to deny the applicant locus standing on the basis that it had failed to comply with the law concerning the registration of newspapers.

<sup>346</sup> *Mudzuru & Anor v The Minister of Justice, Legal and Parliamentary Affairs* [2015] ZWCC 12. 13.

<sup>347</sup> *The Mudzuru case supra*.

<sup>348</sup> *See Jealous Mbizvo Mawarire v Robert Gabriel Mugabe* CCZ 1/13.8.

In *Mudzuru supra* the Constitutional Court held that section 85(1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of constitutional obligations imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of a breach. The court averred that,

“the right to remedy provided for under section 85(1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4.”

Unfortunately, there has not been meaningful litigation on the right to water or the right to a clean and healthy environment in Zimbabwe. Although in *Hove vs. City of Harare*,<sup>349</sup> the court held that, “...if there is a genuine dispute there should be a recourse to the courts for remedies...” it is noted that not many citizens have taken a stand to demand their right to water. In *Augar Investments v Minister of Water and Climate*,<sup>350</sup> the court observed that, ‘it is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment.’

### **2.9.2 Declaration of invalidity**

Section 167(3) of the Constitution provides that the court may make a declaration of invalidity of the infringing law or conduct. Such a declaration means that the law or conduct in question is of no legal force and cannot be enforced anymore.<sup>351</sup> The Constitutional Court is the one that makes the final decision on the constitutionality of legislation or conduct. In-fact the Constitutional Court and the High Court are competent to declare invalid any conduct or legislation which unconstitutionally infringes on the socio-economic right in question. In *Mushoriwa supra*, the court declared the City of Harare’s decision to disconnect the water supply to be unconstitutional, and therefore, invalid.

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<sup>349</sup> *Hove v. City of Harare* HH 205/16 HC 1728/15.

<sup>350</sup> *Augar Investments v. Minister of Water and Climate* HH 278-15.

<sup>351</sup> McGraw (n 127above)16.



### 2.9.3 Declaration of Rights and Compensation

Section 85(1) of the Constitution provides for the declaration of rights as a remedy. The remedy is available where there is a clear dispute or uncertainty about the existence or validity of a right. A competent court may grant an award of compensation as an appropriate remedy for a violation of a fundamental right. Compensation may be sought over and above another remedy. In the event of a financial loss as a result of a violation of fundamental rights, a person is entitled to claim damages. For example, the City of Mutare<sup>352</sup> was criminally charged and convicted of polluting the Sakubva river and failing to apply for an effluent discharge permit. The City of Mutare was ordered to pay a trifling fine of Z\$1,500,000. The only significant development further to a fine was that the City was ordered to repair its sewage treatment facilities and to construct a footbridge for the people to cross the polluted river without contracting diseases. The court reached its decision based more on the human rights aspects of environmental law.

### 2.9.4 Interdicts

Any person listed under section 85(1) (a-e) of the Constitution may approach the court and seek an interdict as an appropriate relief. An interdict can be *interim* or *final*. Subject to fulfilment of other requirements, an interim interdict is granted where an applicant succeeds to demonstrate some prima facie right.<sup>353</sup> Remedies to the breach of clear rights can be through an interdict. In a final interdict<sup>354</sup> an applicant must establish a clear right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interdict; and that he has no other satisfactory remedy. This was well settled in *Setlegelo v Setlegelo*.<sup>355</sup>

A *mandamus* is another type of interdict which can be used to compel the respondent in human rights litigation to perform a certain action or fulfil or protect the right in question.<sup>356</sup> For instance, a mandamus may be sought to compel a local authority to fulfil its duties under section

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<sup>352</sup> *Dora Farm v City of Mutare HC 1312/2005*.

<sup>353</sup> McGraw (n 127 above) 16.

<sup>354</sup> I Maja, *The Law of Contract in Zimbabwe*, Maja Foundation, 2018.

<sup>355</sup> *Setlegelo v Setlegelo* 1914 AD 221.

<sup>356</sup> McGraw (n 127 above)16

77(a) right to clean and potable water.<sup>357</sup> The *Mushoriwa case supra* was an urgent application for a spoliation order, coupled with an interdict. The relief sought was a final order to the effect of the termination by the respondent City of the applicant's water supply based on a disputed water bill and that respondent is interdicted from interfering with, disrupting, or terminating the applicant's water supply without a court order. In the interim, the applicant sought an order directing the City to reconnect his water supply, and barring the respondent from interfering with or terminating the water supply at his premises.<sup>358</sup>

In pursuing redress to the violation of the right to water, a *structured interdict* is another method of directing the violator to take steps to rectify a violation of a right under the court's supervision. When the court grants such an interdict, it will require the respondent to furnish the court with an affidavit setting out how the order will be implemented. Failure by public bodies and municipalities to guarantee adequate safe drinking water has resulted in residents, albeit a few, approaching the courts seeking redress using the methods cited above. In the case of *Manyame Park Residents v Chitungwiza Municipality*,<sup>359</sup> Chitungwiza Municipality was hauled before the courts for discharging raw sewage into the Manyame River, which is a source of domestic water. Justice was seemingly denied as the High Court accepted Chitungwiza Municipality's arguments that it had no resources to remedy the sewage problems. The court considered that at the time, the country was facing a serious economic crisis, which raises the question of what is the asking price of the right to water.<sup>360</sup> The low to absent penalties for water quality-related crimes could explain the poor number of water users seeking access to the justice system. Moreover, the court system may result in lengthy processes, which results in cases losing steam. It could be that the judiciary and law enforcement agencies have little or no environmental ethic.

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<sup>357</sup> McGraw (n 127 above)17.

<sup>358</sup> *Mushoriwa supra* p.1

<sup>359</sup> *Manyame Park Residents v Chitungwiza Municipality* HH 11152/03.

<sup>360</sup> *Ibid*

## **2.10 Conclusion**

It can be concluded that a number of legal instruments, even at the international level, have reinforced the recognition of the human right to water. This chapter has evaluated frameworks on the right to water by scrutinising international treaties, conventions, and bodies that Zimbabwe either acceded to or ratified. These addressed the human rights in general and the human right to water specifically. In some instruments, the human right to water was implicitly stated, in others explicitly, some being legally binding and others mostly aspirational. An evolution from the United Nations Charter on human rights into specific legal instruments like the UDHR and the ‘legally’ binding instruments such as ICESCR was done. The chapter did elaborate on how the ICESCR and its General Comments are the strongest international legal sources for the human right to water to which any State may have recourse. The chapter displayed that the right to water is a human right because it part of other human rights and is indispensable to the realisation of those rights as well as to the right to life itself. Although justiciability of the right has been largely through national institutions, this chapter has shown how the deprivation of water was regarded as ‘crimes against humanity’ in international tribunals such as ICTY. The Chapter has shown that that the right to safe and clean drinking water is equally recognised and protected by the Constitution of Zimbabwe. It was observed that the recognition of the right in Zimbabwe is relatively recent, having been introduced in the Constitution of 2013. The next chapter evaluates the extent to which Zimbabwe’s subsidiary legislation is aligned to its Constitution and international instruments in as far as the right to water is concerned.

## CHAPTER 3

### STATUTORY PROTECTION OF THE RIGHT TO WATER IN ZIMBABWE

#### 3.0 Introduction

The legal treatise in the previous chapter concentrated on constitutional and international protection of the right to water. This chapter seeks to delve into statutory protection of the human right to water in Zimbabwe. The chapter seeks to answer whether the legal frameworks give effect to the right to water as envisaged in the Constitution and international human rights law. There are various pieces of legislation that regulate water in Zimbabwe. Apart from the Constitution of Zimbabwe, subsidiary legislation exists which include the Water Act;<sup>361</sup> the Environmental Management Act,<sup>362</sup> the Zimbabwe National Water Authority Act,<sup>363</sup> the Water (Waste and Effluent Disposal) Regulations,<sup>364</sup> the Public Health Act,<sup>365</sup> and the Administrative Justice Act,<sup>366</sup> as well as the local authorities' bylaws. However, the research will not be exhaustive of all the legal enactments on the right to water but will focus on the major frameworks, particularly the Water Act, the Environmental Management, Act, and the Public Health Act.

#### 3.1 International Principles Related to the Human Right to Water

General principles guide international and regional instruments on the right to water. Principles guide in interpreting legal norms and fill in gaps in positive law. Principles appear in national constitutions and laws, where they are domesticated and incorporated into law. Principles then form part of local laws where they are referred to and influence jurisprudence. This discussion displays how the international principles dovetail into the Zimbabwean legislative arena on the right to water.

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<sup>361</sup> The Water Act Chapter (20:25) hereinafter called Water Act.

<sup>362</sup> Environment Management Act Chapter (20:27) hereinafter called EMA.

<sup>363</sup> Zimbabwe National Water Authority Act Chapter [20:25] hereinafter called ZINWA.

<sup>364</sup> The Water (Waste and Effluent Disposal) Regulations S.I 274/2000.

<sup>365</sup> Public Health Act [Chapter 15:09].

<sup>366</sup> Administrative Justice Act Chapter [10:28].

The right to water was recognised in the 1992 Dublin Principles action plans emanating from the intergovernmental summits held in Rio<sup>367</sup> and Cairo.<sup>368</sup> It was in Dublin, where the emerging global water resources picture was viewed as critical.<sup>369</sup> Four guiding principles for action were recommended at the Dublin Water Conference. It was espoused that all persons have the right to a secure, healthy, ecologically sound and sustainably developed environment which would not adversely harm the needs of future generations.<sup>370</sup> The rights include inter-alia, “freedom from pollution, environmental degradation and protection and preservation of water.”<sup>371</sup> These Dublin Rio principles include the following:

The *User Pays Principle* states that water has monetary value hence the Dublin International Conference on Water and the Environment’s proclamation that, “water has an economic value in all its competing uses and should be recognised as an economic good.”<sup>372</sup> According to this principle, clean water and sanitation must be provided at an affordable price.<sup>373</sup> Handling water as an economic good is an important way of achieving its efficient and equitable use, encouraging conservation and protection of water resources.<sup>374</sup> In the Dublin principles, it was submitted that traditional failure to respect water as an economic good led to wasteful and environmentally damaging uses of the resource.”<sup>375</sup> On a similar point, the World Commission for Water stated that “polluter pays, and user-pays principles must be enforced.”<sup>376</sup> Zimbabwe’s legislation appears to comply with the Dublin principles. Section 6(2)(d) of the Water Act enjoins the Minister to secure the provision of ‘affordable water to consumers,’ whilst section

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<sup>367</sup> Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21<sup>st</sup> Century. Accessed 31 December 2019.

[http://www1.umn.edu/human\\_arts/Dublin\\_water](http://www1.umn.edu/human_arts/Dublin_water).

<sup>368</sup> UNDP Program of Action of the United Nations: International Conference on Population and Development 1994 Accessed 31 December 2019.

<http://www.un.org>.

<sup>369</sup> Dublin Rio principles. (n 367 above).

[www.gwp.org](http://www.gwp.org)

<sup>370</sup> The UN Sub Commission on the prevention of discrimination and protection of minorities proposed in 1994, a ‘Declaration of Principles on Human Rights and the Environment’ cited in Birnie and Boyle (n 26 above) 254.

<sup>371</sup> Birnie and Boyle (n 26 above)255.

<sup>372</sup> International Law Association, ‘The Berlin Rules,’ 2004, Vol 41, No.3, *Journal for Water SRT*. Accessed on 13 March 2020.[books.google.co.za](http://books.google.co.za)

<sup>373</sup> Dublin Rio principles. (n 367 above).

<sup>374</sup> Salman & McInerney (n 92 above)71.

<sup>375</sup> *Journal for water* (n 373 above).

<sup>376</sup> World Commission for Water in the 21<sup>st</sup> Century, World Water Vision Commission Report, *A Water Secure World: Vision for Water, Life and the Environment*, 2 (2000).

6(2)(e) speaks to particular regard to the value of water and the economic good that may be derived from it. On the other hand, the ZINWA Act section 5(1)(a)(ii) specifies that the Authority's functions shall include "water pricing, water quality and pollution control, and environmental protection.

The *Polluter Pays Principle*<sup>377</sup> addresses the problem of water quality. The polluter must pay for the cost of contaminating and cleaning up. The Water Act of Zimbabwe, in its preamble, complies with the Dublin principles by providing for prevention and control of water pollution. Section 118(2) of the Water Act provides that any person who poisons water shall be guilty of an offense and liable to a fine or imprisonment. Section 4(2)(g) of EMA provides that "any person who causes pollution shall bear the cost of remedying such pollution and any resultant adverse effects, as well as costs of preventing, controlling, or minimizing further pollution."<sup>378</sup> Section 57(2) of EMA, equally prohibits water pollution and provides that any person found guilty of pollution shall pay for the removal of toxins or the cost of restoration of the damaged environment. Ultimately section 73(1) (b)(i) of the Constitution of Zimbabwe necessitates every person to have the environment protected through legislative and other measures that 'prevent pollution.'

*The Subsidiarity Principle* states that water development should be based on a participatory approach, involving users, planners, and policymakers. The basis of community participation means that decisions are made at the lowest appropriate level, with full public consultation and user involvement in the planning and implementation of water projects. This principle promotes greater participation of stakeholders. Zimbabwe shows compliance through section 6(2) of the Water Act, which states that it shall be the Minister's duty to encourage participation by consumers in the development, exploitation, and distribution of water resources. The Water Act provides a legal basis for the representation and participation of previously excluded water users, namely communal, resettlement, and small-scale commercial farmers. Part ii section 4(b) of

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<sup>377</sup> Principle 16 of the Rio Declaration states that the polluter bear the cost of pollution, with due regard to the public interest and without distorting international trade and investments. (n 143 above).

<sup>378</sup> While EMA does not directly speak to water rights, the rights are implied as section 2 of EMA defines the environment as "the natural and man-made resources, both biotic and non-biotic, occurring in the lithosphere and atmosphere, water, soil."

EMA similarly provides for every person to participate in the implementation of measures that prevent pollution and environmental degradation and ensure sustainable management of resources, including water. Although the Zimbabwean legislation complies with the Dublin principles, real participation can only be affirmed when citizens are informed and knowledgeable about the legal frameworks to water.<sup>379</sup>

The *Precautionary Principle*,<sup>380</sup> acknowledges that freshwater is a finite resource, essential to sustain life, development, and the environment. Because water sustains life, effective management of the water resources, demands a holistic approach, linking social and economic development with protection of natural ecosystems. The precautionary principle is relayed in that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Section 118(1)(d)(ii) of the Water Act complies with the precautionary principle in that it clearly articulates that any person who without lawful excuse the onus of proof of which lies with him, “wastes or does not take due precaution to prevent the waste of water shall be guilty of an offense and liable to either a fine or imprisonment. EMA section 4(1)(b)(i) similarly speaks to taking of policy and legislative measures ‘to prevent pollution and degradation.’ Moreover, section 4(2)(f) of EMA enjoins anticipation of negative impacts on the environment and on people’s rights to be prevented, minimized, or remedied.

Finally, the *Water user principle* views women as central in the provision, management, and safeguarding of water. The water user principle avers that it should be informed by equity principles that ensure that access is guaranteed to everyone, including socially disadvantaged groups. For example, women are seen as pivotal as providers and users of water and guardians of the living environment. This principle seeks to address women’s specific needs and equips

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<sup>379</sup> In a research conducted by S Mtisi, a participant said, “I did not know what the water reforms were and what was being discussed. I had never heard about the Water Act, let alone seen it. *See* S Mtisi, Water reforms during the crisis and beyond: Understanding policy and political challenges of reforming the water sector in Zimbabwe, Overseas Development Institute, 2011, Working Paper 333. Accessed 31 December 2019. [www.odi.org](http://www.odi.org).

<sup>380</sup> Principle 15 of the Rio Declaration states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” (n 143above).

and empowers them to participate at all levels in water resource programs, including decision making and implementation. Section 23 of the Constitution of Zimbabwe prohibits discrimination on the grounds of marital status or gender. Section 6 (1)(b) of the Water Act obligates the Minister to ensure the availability of water to all citizens for primary purposes. In contrast, section 6(1)(c) requires the Minister to ensure equitable and efficient allocation of the available water resources in the national interest for the development of rural, urban, industrial, mining and agricultural sectors. This provision implies that marginalized groups like women, the poor, the disabled, and children are catered for in line with the Dublin principles. A careful examination of Zimbabwe's legislation shows that the only challenge for Zimbabwe regarding the Dublin principles is that the right to water is implied and not directly addressed by the Zimbabwean legislation discussed above. The legislative provisions are also far from being aligned to the Constitution of Zimbabwe.

### **3.2 Environmental Management Act**

Although the Environmental Management Act is disappointingly not aligned to the Constitution to the extent of expressly providing for the right to safe, clean, and potable water, it has been hailed for its promotion of environmental rights. The Act was promulgated in 2002 way before the Constitution of Zimbabwe of 2013. The Act is a product of several international influences, including the Rio Earth Summit, whose focus was on the global environment in a political context.<sup>381</sup> The expectation is that the Act should have aligned to the constitution by now and captured the language of the supreme law of the land, which speaks to the people's right to potable water. Section 4(1) of the Environmental Management Act implies protection of the right to water as it provides for environmental rights in their diversity. Environmental rights are linked to other fundamental rights that enjoy constitutional protection such as the right to health, the right to information, and public participation. Section 4(1) provides for the right to (a) a clean environment that is not harmful to health; (b) access to environmental information and (c) the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures.

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<sup>381</sup> Gro Harlem Brundtland, Prime Minister of Norway, UNICED 1992 Rio Earth Summit, 1992. Accessed 31 December 2019. [www.who.int/Brundtland](http://www.who.int/Brundtland).



Environmental degradation poses a dire threat to universally recognisable human rights, such as the right to life and food.

Section 4 (1) (b) of EMA provides for the right of access to information. It is implied that the right to information also applies to information about water. The public has the right to have information regarding the protection of their rights. Section 4(2) (c) of EMA promotes environmental education, environmental awareness, sharing of knowledge and experience to increase the capacity of communities to address environmental management.<sup>382</sup> Section 5(1)(e) affirms the Minister's duty to coordinate the promotion of public awareness, and education on environmental management. The implementation of major projects like dams, irrigation schemes, forestry projects, and waste treatment requires the carrying out of Environmental Impact Assessments (EIA).<sup>383</sup>

The right to access to environmental information enshrined in EMA is not specified in the Constitution, and this may give rise to inconsistency with the Constitution. Section 3 (1) of the EMA states that, "except where it is expressly provided for to the contrary, this Act shall be construed as being in addition to and not in substitution for any other law which is not in conflict or inconsistent with this Act." Subsection (2) states that if any other law is in conflict or inconsistent with this Act, this Act shall prevail, but the section does not state the specific nature of laws being referred to.<sup>384</sup> It has already been shown that section 2(1) of the Constitution states that the Constitution is the supreme law of Zimbabwe, and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. It becomes essential that the environmental access to information clause in the EMA should specify clear conditions under which access to information can be restricted in line with the Constitution.

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<sup>382</sup> J Manjengwa, Environment and Development Issues in Zimbabwe Since 2000 and Beyond. Accessed 2 June 2020.

<https://www.slideshare.net/BrooksWorldPoverty/majengwa-presentation>.

<sup>383</sup> Section 97,98 and 99 of EMA provide for the carrying out of EIAs, which must occur before carrying out of the 1<sup>st</sup> Schedule of the Act.

<sup>384</sup> Ibid.32

The Environment Management Act does not have any provisions in respect of classes of information that may not be disclosed. The agency has to promote public environmental education and awareness to increase the capacity of communities to tackle environmental issues and propagate value, attitudes, skills, and behaviour consistent with environmental management.<sup>385</sup> The Act in section 4 (1) (c) guarantees the right to have the environment protected for the present and future generations. The implications of this provision being that environmental issues like water must be managed sustainably. The provisions of EMA have been generally criticised for not being sufficiently aligned to the Constitution as they fail to refer to the environmental rights, sustainable developments, EIA processes, to mention but a few.<sup>386</sup> There is a challenge in the manner in which the environmental right has been formulated in both the Constitution and the EMA.<sup>387</sup> In section 73(2) of the Constitution, the State is mandated to take “reasonable legislative measures, within the limits of the resources available to achieve the progressive realization of the rights set out in the section whereas, EMA, is silent on the justiciability of environmental rights.

EMA has a gap in addressing *locus standi*, which is in line with section 85 of the Constitution. Section 85 of the Constitution provides for specific classes of persons who can approach the court alleging that a fundamental right has been infringed upon, including environmental rights which are recognized as fundamental rights in the Constitution. Barriers to courts have to be lowered for those claiming violations of constitutional rights. For example, in Costa Rica, citizens are able to enforce their constitutional right to water even without legal representation, using a language of their choice and in any form including handwritten notes.<sup>388</sup> To that extent, EMA needs to have a *locus standi* clause to allow free access to the courts for remedies. Another noted gap is that there are no special courts in Zimbabwe to deal with environmental crimes. Courts generally have the jurisdiction to hear cases on the violation of fundamental rights that include environmental rights.<sup>389</sup>

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<sup>385</sup> Section 4(2) (d) of EMA.

<sup>386</sup> Zimbabwe Lawyers for Human Rights Briefing Paper (n 302 above )28.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid.34.

<sup>389</sup> Ibid.35.

### 3.3 The Water Act

The Water Act of 1998, was preceded by the Water Act of 1976 which attached water rights to land and title deeds. The 1998 Water Act does not directly speak to the right to water. In Part (VI) of the Act, the environment is treated as a ‘legitimate user’ of water, and this assertion implies respect for the human right to water. The Water Act is founded on economic efficiency, environmental sustainability, and equity of use. Under the Water Act, all water is vested in the President, and no person can claim private ownership of any water.<sup>390</sup> The Act generally provides for the development and utilization of water resources of Zimbabwe, establishment, powers and procedures of Catchment Councils and Sub-Catchment Councils granting of permits for the use of water; control of the use of water when in short supply; acquisition of servitudes in respect of water; protection of environment and prevention and control of water pollution.

Water pricing, quality, and pollution control as well environmental protection is, however, regulated under the Zimbabwe National Water Authority Act section 5(1) (a)(ii). In line with General Comment 15 propositions on water affordability, it is observed that both the ZINWA Act and the Water Act provide for water affordability. Section 62(1)(c)(ii) of the Water Act provides for the sinking of boreholes in Zimbabwe for primary purposes in quantities as the catchment council may authorize. This provision confirms what has been obtained in most urban centres’ facing water shortages where communities can fetch water at council boreholes free of charge. This option is, however, not well spread hence affecting equity in affording the right to water. Section 5(c) of the ZINWA Act appears to stipulate the minimum core obligations by providing the Authority’s functions to include securing equitable accessibility and efficient allocation, distribution, use, and development of water. In line with General Comment 15 provisions on minimum core obligations, the ZINWA Act’s section 5(c) only speaks to water adequacy without being specific on what ‘adequate water’ meant in quantities.

Section 6 of the Water Act places responsibility on the Minister to ensure the availability of water to all citizens for primary purposes and other uses. The primary purpose being, “the

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<sup>390</sup> See Zimbabwe Parliamentary Debates, 1998.1566 ‘In presenting the first reading of the draft Water Bill, the Attorney General emphasized that, “what the existing legislation has done is that the water is the President’s water, but the President then put in legislation to permit people to exploit it, and that is what is peculiarly known as the water right.”. Accessed 20 February 2020.  
[www.parlzim.gov.zw](http://www.parlzim.gov.zw).

reasonable use of water for domestic human needs.”<sup>391</sup> The State is obliged to respect and protect the right to primary water as embedded in the Act. Section 6 is therefore considered broader than section 77 of the Constitution as it provides for water uses. This obligation is to be fulfilled by the State, taking meaningful steps to address the shortage of water within the resources available to it. The State must ensure that local authorities have adequate powers, and resources to perform their duties. It must adopt appropriate legislative, administrative and financial measures to recognise citizens’ right to water fully. Part VI of the Act states that the State must ensure local authorities have adequate resources to maintain water quality.

The Water Act reformed the water sector to ensure a more equitable distribution of water and stakeholder involvement in managing water resources. The ‘priority date water right system’ has been replaced by the water permits of limited duration allocated by Catchment Councils.<sup>392</sup> Furthermore, in section 118 (3) (c), water is treated as an economic good, and the ‘user pays principle’ applies thus bringing more control over pollution with the ‘polluter pays principle’ being in the Act.<sup>393</sup> Section 2 of the Act defines pollution as “such contamination or other alteration of the biological chemical or physical properties of the water, including changes in colour, odour, taste.” The wording of section 2, that is to say, ‘colour, odour, taste’ crystallises with the provisions of General Comment Number 15 regarding the quality of water.

The Act requires the Minister to give effect to any international agreement to which Zimbabwe is a party, on shared watercourse systems in a spirit of mutual cooperation.<sup>394</sup> In as much as the domestication of international legal obligations is acknowledged, it is observed that it limits international obligations to those arising with shared watercourse. That excluded the international and regional human rights instruments that promote the right to water.

The 1998 Water Act has been described as technically sound with a solid base for sustainable and efficient water resource utilisation.<sup>395</sup> However, there is a glaring absence of an explicit right

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<sup>391</sup> Section 2 of the Water Act.

<sup>392</sup> Part III of the Water Act.

<sup>393</sup> Section 118 of the Act covers offenses and penalties.

<sup>394</sup> The preamble of the Water Act.

<sup>395</sup> H Makurira & M Mugumo, *Water Sector Reforms in Zimbabwe: The importance of policy and institutional coordination on implementation*, January 2005. 172. Accessed on 13 March 2020.

to water in the Act. This Act does not promote the right to water as provided in section 77 of Zimbabwe's Constitution. As outlined above, the Act is also not aligned with international human rights agreements on the incorporation of the right to water. The Act also appears weak on alignment to crucial features of General Comment 15, like the entitlement of everyone to sufficient, safe, acceptable, accessible, and affordable water. Therefore, the Water Act needs review to align with international human rights law and the Constitution of Zimbabwe. It must be specific on the legal content of the human right to water. In other words, it must be progressive rather than retrogressive in terms of its measures.<sup>396</sup>

The Act is silent on the provision of funding for potable water. Without resource availability, it would not be practically possible to provide clean water in a sustainable manner. The Act is not clear on the legal procedures, grounds, limitations, and processes for water disconnections and specific obligations on the human right to water.<sup>397</sup> The Act appears not to target economically deprived areas on access to water and does not stipulate any affordable tariffs for them. It also fails to provide for a grievance handling procedure. Further, the Water Act only refers to EMA in terms of water quality standards and maximum permissible levels of pollution to the exclusion of community participation and EIA procedures. The need to engage the public on projects that affect their right to water can never be over emphasized. The Act does not echo the devolution clause in the Constitution in section 264 of the Constitution,<sup>398</sup> regarding the extent of powers of the Minister. The alignment would ensure good governance of water service delivery. The Dublin-Rio Principles discussed in Chapter 3 are not incorporated in the Water Act, yet are closely linked with the principle of sustainable development.

### **3.4 The Public Health Act**

The Public Health Act [Chapter 15:17]<sup>399</sup> seeks to “provide for public health; to provide for the conditions of improvement of the health and quality of life and the healthcare of all people in

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[www.researchgate.net](http://www.researchgate.net)

<sup>396</sup> Rwambiwa (n 11 above)17.

<sup>397</sup> Rwambiwa (n 11 above)17.

<sup>398</sup> Section 264 of the Constitution of Zimbabwe speaks of devolution of governmental powers and responsibilities.

<sup>399</sup> Public Health Act [Chapter 15:17] Amendment No 11/2018.

Zimbabwe; to provide for the rights, duties, powers and functions of all parties in the public health system.” The Public Health Act, in its preamble, acknowledges the Constitution’s provision in section 44, which speaks of the duty of the State and every person to respect fundamental human rights and freedoms. However, section 77 of the Constitution, which expressly provides for the right to water, is somewhat not acknowledged. The fact that human rights are interrelated and interdependent persuades one to contend that the Public Health Act indirectly recognizes the right to water. Without access to adequate water, health cannot be assured. This line of thought is cemented by section 86(1) of the Act, which states that:

“every local authority, when required to do so by the Minister, shall provide, maintain or cause to be provided and maintained as far as may reasonably be possible, a sufficient supply of wholesome water for drinking and domestic purposes...”

Section 88 of the same Act provides that all waterworks vested in any local authority, shall be maintained by the local authority for the effective distribution of a supply of pure water for drinking and domestic purposes. The wording of section 88 is indicative that the right to water is, to some extent acknowledged albeit indirectly. The statute does provide a practical legal effect to the right to water and the right is implied! As much as the Act acknowledges the Constitution on the duty of the State and everyone to respect fundamental rights, it remains conspicuous in speaking directly to the human right to water.

### **3.5 Conclusion**

Various pieces of legislation such as the Water Act, Public Health Act, and the Environmental Management Act were analysed. The research shows that although subsidiary legislation exists, most are old and are not well aligned to section 77 of the Constitution. Various pieces of legislation herein assessed in this chapter do not address the right to water explicitly. The different enactments are also managed by different Ministries for example, the Ministry of Lands, Agriculture, Water, Climate, and Rural Settlement and the Ministry of Health and Child Care. Chaos is potentially introduced, overlays, repetitions, and sometimes divergences of laws. If amended, these laws must be mediums through which the right to water can be recognisable and enforced. The next chapter seeks to explore legal frameworks on the human right to water on a comparative basis. The general African regional discussion will be done with a view to

establish the extent to which African conventions and treaties have recognised the human right to water. Further, the South African jurisdiction's legal frameworks on the right to water will be juxtaposed to the Zimbabwean landscape. The objective being to develop a robust comparative assessment of the two Southern African jurisdictions.

## CHAPTER 4

### A COMPARATIVE APPROACH: THE CASE OF SOUTH AFRICA AND ZIMBABWE

#### 4.0 Introduction

The previous chapters sought to provide an international and national legal perspective on the right to water with a Zimbabwean bias. Zimbabwean Constitution and legislation regulating the right to water was juxtaposed to the international landscapes in Chapters 2 and 3, respectively. Chapter 4 seeks to undertake a comparative study of the right to water. The approach is first to highlight the African conventions and treaties that speak to human rights and then to engage in a comparative discourse by meticulously critiquing the relevant South African and Zimbabwean legal frameworks. Under the African regional human rights framework, discussed hereunder, the right to water is investigated under the African Charter on the Rights and Welfare of the Child,<sup>400</sup> the Protocol on the African Charter on Human and People's Rights on the Rights of Women in Africa,<sup>401</sup> as well as the African Charter on Human and People's rights.<sup>402</sup> The comparative excursion, though not intended to be exhaustive, will provide various dimensions on the right to water.

#### 4.1 African regional bodies on the right to water

##### 4.1.1 The African Commission & the Right to Water

The quasi-judicial innovation of the African Commission,<sup>403</sup> has been praised for bringing about the acknowledgment of the human right to water in the African human rights system.<sup>404</sup> The principles and guidelines adopted by the Commission are aimed at solving legal problems

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<sup>400</sup> The African Charter on the Rights and Welfare of the Child, Article 14(2)(c) (acceded by Zimbabwe on 19 January 1995). Accessed 21 February 2020.

[hrlibrary.umn.edu](http://hrlibrary.umn.edu).

<sup>401</sup> The Protocol on the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 15 (a) (ratified by Zimbabwe on 15<sup>th</sup> April 2008) Accessed 21 February 2020.

[hrlibrary.umn.edu](http://hrlibrary.umn.edu).

<sup>402</sup> The African Charter on Human and Peoples Rights (was ratified by Zimbabwe on 30 May 1986). Accessed 21 February 2020.

[hrlibrary.umn.edu](http://hrlibrary.umn.edu).

<sup>403</sup> The African Commission is a quasi-judicial body of the African Union inaugurated on 2 November 1987. It aims to promote and protect human and people's rights throughout the African Continent. Accessed 21 February 2020.

[www.achpr.org](http://www.achpr.org).

<sup>404</sup> Ibid.



relating to human and people's rights and fundamental freedoms.<sup>405</sup> Articles 4,5,15,16, 22, and 24 focused on the right to water and sanitation.<sup>406</sup> Thus, the right to water and sanitation found its way into regional jurisprudence only by means of advanced interpretation of the African Charter by its the African Commission.<sup>407</sup> However, the Commission approached the right to water from a narrow normative basis. A comprehensive legal basis and scope of the human right to water and attendant State responsibilities were, however, found wanting.<sup>408</sup>

From the African perspective, the right to water has been interpreted similarly to international provisions. The human right to water has been viewed as a subset to the right to dignity (article 5), the right to health (article 16), and the right to a healthy environment (article 24). In the case of *Free Legal Assistance Group and Others v Zaire*<sup>409</sup> administration's failure to provide basic services such as safe drinking water and electricity constitutes a violation of article 16 (right to health). Similarly, in a landmark case against Nigeria, the Commission decided that contamination of drinking water sources by State or non-state actors is a violation of article 16 (right to health) and article 24 (the right to a satisfactory environment).<sup>410</sup> Similarly, in the case of *Sudan Human Rights Organization & Another v Sudan*,<sup>411</sup> the Commission held that the right to water is also guaranteed by reading together articles 4,16 and 22 of the African Charter.<sup>412</sup>

The African Commission has been criticized for failing to attempt to explicate the right to water and failing to mention the gross violations of the right that were committed by respondent-State.<sup>413</sup> Therefore, it has been posited that,

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<sup>405</sup> African Commission (n 404 above)

<sup>406</sup> Bulto (n 44 above).

<sup>407</sup> Ibid.

<sup>408</sup> Ibid.

<sup>409</sup> *Free Legal Assistance Group and Others v Zaire* 2000 AHRLR 74 (ACHPR 1995) para 47.

<sup>410</sup> See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (SERAC case) (2001) AHRLR (ACHPR 2001) paras 49,50-54, 57 and 66.

<sup>411</sup> *Sudan Human Rights Organization & Another v Sudan* (2009) AHRLR 153(ACHPR 2009) para 207, 'in a case of alleged poisoning of wells and denying access to water sources in Darfur region, the African Commission ruled that, "the poisoning of water sources, such as wells, exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter."

<sup>412</sup> Bulto (n 44 above)346.

<sup>413</sup> *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43(ACHPR 2008) para 51 states that "In the detention camps which were initially used to house animals, detainees were provided two buckets of

“lacking a comprehensive legal protection in the main regional instrument, the human right to water creates a hierarchy within a hierarchy, as it sits on the lowest rung of the already marginalized socio-economic rights.”<sup>414</sup>

The African Commission is accused of the grounded legal basis of the right to water in provisions guaranteeing the right to health, the right to a healthy environment, and the right to dignity.<sup>415</sup> There remains doubt as to whether the right is an autonomous entitlement per se or is an auxiliary guarantee that is used to ensure the realization of other rights in the Charter.<sup>416</sup> Zimbabwe and South Africa are one of the few African countries to have respectfully observed the right to water as a unique stand-alone right in its section 77 and section 27 of the constitutions respectively, although the right is also implied in other rights as outlined in their Bill of Rights.

It is contended that the Commission has grounded the right to water on a narrowly defined legal basis. The view is that the Commission’s derivative approach to elucidating the right to water is a double-edged sword, as it carries potentially contradictory implications about the legal basis of the right.<sup>417</sup> The right to water, therefore, is seen as lacking autonomous existence and limited in scope. The human right to water is viewed as a subset of the parent right, secondary to other explicitly protected rights.<sup>418</sup>

In the context of the Commission, the right to water lacks an independent standing, and right holders cannot demand its realization per se!<sup>419</sup> Despite its innovative approach to locating the human right to water in the African Charter’s corpus, the Commission stands accused of conspicuously failing to elaborate its normative basis and content and turning a deaf ear when

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water per day for 500 detainees. The Commission could only find the respondent state in violation of the right to dignity and the protection against inhuman and degrading treatment. It was silent on the right to water”.

<sup>414</sup> Bulto (n 44 above).

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

<sup>417</sup> Ibid.

<sup>418</sup> “the African Commission’s approach to the human right to water has therefore been consistently to treat the right as an auxiliary right that attracts protection as a component of other more explicit rights. See IA Cahill, I, A. ‘Protecting rights in the face of scarcity: The right to water’ in Gibney, M. & Skogly, S. eds *Universal human rights and extraterritorial obligations*, University of Pennsylvania Press, 2010.194-216.

<sup>419</sup> Bulto (n 44 above)347.

victims of the right's violation sought remedies before it.<sup>420</sup> It is suggested that the Commission grounded the human right to water on a kaleidoscopic legal basis, ignoring the prolific normative sources of the right in related African Union (AU) treaties.<sup>421</sup> The implications of the human right to water for the duty of States becomes problematic in this regard. Governmental obligations, therefore, tend to differ and depend on whether the right is subsumed under human rights or is recognized as a stand-alone right.<sup>422</sup> The legal status of the right to water is therefore precarious, where it is neither fully acknowledged nor altogether excluded from the ambit of the protection of the African Charter's guarantees.<sup>423</sup> The African Commission failed to realize that the right to water can be violated or realized independent of the parent rights. For example, "a State's provision of water may fall below the amount or quality needed to realize the right holders' basic access to drinking water. The result is a violation of the human right to water, although the impact of such a scenario on the right to dignity, health, or food of the right holders might not be visible in the short term."<sup>424</sup>

#### **4.1.2 African Charter on Human and People's Rights & the Right to Water**

The African Charter reflects that all human rights are indivisible, interdependent, and interrelated, and cannot be enjoyed in isolation from each other. It is established that one of the necessary guarantees to have eluded the African Charter socio-economic rights list is the right to potable water.<sup>425</sup> The right to water can only be implied since all rights are indivisible. The Charter states that, "all peoples shall have the right to a generally satisfactory environment favourable to their development." To this extent, the right to a decent environment is comparable to rights such as self-determination or economic and social rights, whose implementation is subject to political supervision by various UN organs rather than by courts.<sup>426</sup> The African

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<sup>420</sup> Bulto (n 44 above)343.

<sup>421</sup> Bulto (n 44 above)343.

<sup>422</sup> Bulto (n 44 above)348.

<sup>423</sup> Bulto (n 44 above).

<sup>424</sup> Bulto (n 44 above)348.

<sup>425</sup> Bulto (n 44 above)342. The draft guidelines devoted paragraphs 71-75 to the analysis of the legal basis and normative content of the right to water and sanitation. In 2010 the principles were made public, and the right to water and sanitation espoused in articles 4,5,15,16, 22 and 24.

<sup>426</sup> Birnie and Boyle (n 26 above)254.

Charter has been attacked for giving recognition only to a select list of socio-economic rights and omitting to provide for a few crucial socio-economic guarantees explicitly.<sup>427</sup>

#### **4.1.3 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa**

Article 15 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa stipulates that State parties shall take appropriate measures to provide women with access to clean drinking water. The protocol is silent regarding the quantity of water to be provided by States to beneficiaries of the right. Therefore, a lacuna and ambiguity in the normative content and legal basis of a free-standing and comprehensive right to water are reflected.<sup>428</sup> The scope of the right varies depending on which right it is assumed to be part of, and its legal basis remains diffuse.<sup>429</sup> It is comforting that member states to the African Charter, including Zimbabwe and South Africa, have already enshrined the right to water in their domestic legislation or recognized the right through their judicial decisions.

#### **4.1.4 African Charter on the Rights and Welfare of the Child**

The Children's Charter requires states to take measures to ensure the provision of adequate nutrition and safe drinking water in sharp contrast to the African Charter, which has a total absence of any mention of the right to water.<sup>430</sup> Whilst the African Children's Charter requires that State parties take measures to 'ensure the provision of adequate nutrition and safe drinking water,'<sup>431</sup> this provision could be short-sighted in that it merely regulates the quality of the available water (safety) and applies only to children.<sup>432</sup> Section 77 of the Constitution of Zimbabwean speaks of potable water, which is safe drinking water. The African Children's Charter ignores the aspect of adequacy of water that countries have to provide to the children.

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<sup>427</sup> C Heynes, "The African regional human rights system. The African Charter," 2004. *Penn State Law Review*, 679-690.

<sup>428</sup> Bulto (n 44 above) 345.

<sup>429</sup> Bulto (n 44 above) 348.

<sup>430</sup> African Children's Charter 401 above).

<sup>431</sup> African Children's Charter Article 14(2) c.

<sup>432</sup> Bulto (n 44 above) 344.

## 4.2 South Africa and the Human Right to Water

The right to water is extensively recognised and protected under the South African jurisdiction, resulting in South Africa being epitomised as an example of respecting, protecting and fulfilling the human right to water. Although South Africa is a relatively new democracy, it is way ahead in implementing the right to water. Principal sources of national water legislation in South Africa are the Constitution of South Africa, the National Water Act 36 of 1998, and the Water Services Act of 1997. The National Environmental Management Act 107 of 1998 as well as the Promotion of Access to Information Act 2 of 2000, customary law principles of various legal reviews and interdicts also regulate water issues in South Africa. The local government wields the executive power to deliver water and sanitation in South Africa. Zimbabwe's sources of law were discussed in the preceding chapter.<sup>433</sup>

A general overview of literature, reveals that South Africa has been labelled a 'frontrunner' when it comes to the right to water and sanitation,<sup>434</sup> as it preceded the United Nations by fourteen years in proclaiming everyone's right to sufficient water. South Africa has been applauded as a model for international replication for its protection of the right to water and directly referring to the minimum core of the right in both jurisprudence and case law.<sup>435</sup>

After liberation from apartheid in 1996, South Africa's radical Constitution proclaimed that, "everyone has the right to have access to sufficient food and water."<sup>436</sup> In 2006, the United Nations Development Programme (UNDP), while recommending that States recognise the right to water, pointed to South Africa as the best model (if not practice).<sup>437</sup> The South African experience grounded two decisive United Nations resolutions in 2010 that removed any doubts over the legal status of water and sanitation rights.<sup>438</sup> Unlike Zimbabwe, South Africa has one of the most cutting-edge constitutions on the human right to water, which commands both natural and juristic persons to respect the right to water. The promise to the right to water was not just

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<sup>433</sup> T Murombo & E Algotsoon, Water supply and sanitation in South Africa, Environmental rights and municipal accountability, LHR Publication Series 1/2009.1.

<sup>434</sup> Woolman & Bishop (n 121 above) 56B-1.

<sup>435</sup> McGraw (n 127 above)191.

<sup>436</sup> Section 27 (1) (b) of the Constitution of the Republic of South Africa, 1996.

<sup>437</sup> See UNDP Beyond Security (n31 above).

<sup>438</sup> Woolman & Bishop (n 121 above) 56B-1.

‘empty words’ but is underpinned through statutes that stipulate that right, the policies to establish the right, activism to realise and expand the right, and court decisions to delineate the contours of the right.<sup>439</sup>

It is established that the law on water has developed inappropriately for the situation of water scarcity in South Africa.<sup>440</sup> According to the National Water Resources Strategy,<sup>441</sup> South Africa’s water resources are in global terms ‘scarce and extremely limited.’<sup>442</sup> South Africa relies primarily on surface water resources for most urban, industrial, and irrigation requirements.<sup>443</sup> The country has 320 major dams with a total capacity of more than 32 400 million cubic meters, equivalent to 66% of the total mean annual runoff.<sup>444</sup>

In South Africa, it is argued that 37% of drinking water is lost through leaks, drips, and other faults of aging infrastructure. It is estimated that the equivalent of 600,000 Olympic sized swimming pools are lost annually through waste.<sup>445</sup> Furthermore, it is stated that “access to water rights has been skewed heavily to the detriment of the majority of the population. The population is regarded as mismatched with a large proportion living near mines or other industries where they worked and or were segregated in distant former ‘homelands’ apart from white population centres.”<sup>446</sup>

Because South Africa had a head start on not only proclaiming that clean water is a basic right but also delivering on that right, and because it has an active judiciary, what happens in South Africa creates international legal and policy precedent regarding the human right to water.<sup>447</sup> Water provision in South Africa is rooted in the winning goals of serving the needs of the most

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<sup>439</sup> Takacs (n 36 above) 58.

<sup>440</sup> M Kidd, *Environmental Law* 2<sup>nd</sup> Ed Juta and Company, 2011. 69.

<sup>441</sup> Department of Water Affairs and Forestry (DWAF) National Water Resources Strategy (NWRS) September 2004. 15. Accessed 20 June 2020. [www.preventionweb.net](http://www.preventionweb.net).

<sup>442</sup> In *Mazibuko supra* at para 2, the Constitutional Court introduced the problem of water in South Africa. It stated that “although rain falls everywhere, access to water has long been grossly unequal. While piped water is plentifully available to mines, industries and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools, and distant taps.”

<sup>443</sup> Kidd (n 441 above).

<sup>444</sup> *Ibid*.

<sup>445</sup> David (n 108 above) 91.

<sup>446</sup> David (n 108 above) 91

<sup>447</sup> McGraw (n 127 above).

indigent while sustaining a ‘reserve’ explicitly intended to sustain adequate water supplies for present and future generations of humans and non-humans.<sup>448</sup> In comparison, Zimbabwe has not had such a celebrated account of respecting the right to water. Although the Constitution of Zimbabwe does explicitly provide for the right to water, the existing legislation such as the Water Act and the EMA do not directly acknowledge this right.

On the other hand, though one of the continent’s wealthiest nations, South Africa, still suffers from staggering inequality and large numbers of impoverished people, which the South African Human Rights Commission calls ‘an enduring apartheid spatial geography.’<sup>449</sup> South Africa faces overwhelming social problems that exacerbate the difficulties surrounding the right to water. It is submitted that local government agencies, just like in Zimbabwe, are poorly equipped to provide water services as they face inadequate budgets, insufficient technical expertise, a dire shortage of water engineers, and inadequate supervision of external contractors meant to deliver water or install water technology.<sup>450</sup> Power shedding has been recorded, and it is feared that a coming era of ‘*water-shedding*’<sup>451</sup> will make life even more difficult. It is observed that both power shedding and water shedding are synonymous with the lives of urban dwellers in Zimbabwe.

Notwithstanding the constitutional provisions, it can be confirmed that Zimbabwe and South Africa share a similar background in terms of the environmental and socio-economic challenges. Zimbabwe and South also share a history of colonisation, and experience of racially inclined laws, which negatively affected the black majority access to water. The common struggles shared by the two democracies include screeching poverty, rich and poor incongruences, government inefficiency, pitiable service delivery to the poor and gross environmental insecurity in respect of water and access to water.<sup>452</sup> In the mining industry, acid mine drainage pollution has created a negative legacy in the two constitutional democracies.<sup>453</sup>

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<sup>448</sup> David (n 108 above) 73.

<sup>449</sup> David (n 108 above) 106.

<sup>450</sup> David (n 108 above).

<sup>451</sup> David (n 108 above).

<sup>452</sup> Soyaphi (n 2 above) 14.

<sup>453</sup> Kidd (n 441 above) 69.

Post-apartheid for South Africa and the Ian Smith regime for Zimbabwe, progressive constitutionalism has resulted in the respect of fundamental human rights, albeit differently. The two countries promulgated water legislations in an attempt to correct injustices of a colonial past and trigger development towards effective, equitable, and efficient integrated water resources management influenced by policy decisions and the need to respect human rights.<sup>454</sup> In South Africa, the legacy of apartheid meant that water rights were linked to land ownership, which was formerly largely linked to whites. In 2010, South Africa embarked on an Integrated Water Resource Planning for South Africa, which sought to address the water resource situation in each of the 26 priority economic growth areas identified in the National Spatial Development Plan of 2006.<sup>455</sup>

#### **4.2.1 Constitutional Right to Water in South Africa**

The right to water is explicitly provided in section 27(1) (b) of the Constitution of South Africa<sup>456</sup> which states that, “everyone has the right to have access to sufficient food and water.”<sup>457</sup> On the other hand, section 24 of the Bill of Rights in the Constitution grants specific rights to an environment not harmful to health and well-being, and protection of the environment from degradation. Section 27 of the Constitution ought to be read together with section 7(2) as to define the scope of the positive rights that everyone has, and the corresponding obligations of the State to ‘respect, protect, promote and fulfil such rights.’<sup>458</sup>

The State is enjoined to ensure that water and water facilities are accessible to everyone without discrimination. All spheres of government, national, provincial, and local have the responsibility to provide, respect, and protect the right to water.<sup>459</sup> Section 155 of the South African

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<sup>454</sup> FG Jaspers, The new water legislation of Zimbabwe and South Africa-Comparison of Legal and Institutional Reform, July 2001, Vol.1 Issue 3 PP 305-325. Accessed on 6 February 2020.

[link.springer.com](http://link.springer.com).

<sup>455</sup> Department of Water Affairs (DWA) Integrated Water Resource Planning for South Africa, 2010. 20.

<sup>456</sup> Section 2 of the Constitution of South Africa, Act No.108 of 1996. Accessed 1 February 2020.

[www.bril.com](http://www.bril.com).

<sup>457</sup> Section 27(2) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right. (my emphasis added).

<sup>458</sup> *Mandla Bushula v Ukhahlamba District Municipality* High Court (2012) (Eastern Cape Division) 2200/09 ZAECGHC. Accessed 1 February 2020 para 16.

<http://saflii.org.za>.

<sup>459</sup> D Chirwa, ‘Water Rights’ in Khoza, S (ed) Socio-economic Rights in South Africa: A Resource Book, University of Western Cape, 2007.351.



Constitution requires the national government to adopt legislation concerning the establishment of municipalities that considers ‘the need to provide municipal services [including water services] in an adequate and sustainable manner. Further, the government promulgated regulations setting standards of water quality, outlining water management principles, service delivery, and establishing tariff structures.’<sup>460</sup> Section 8(1) of the Constitution of South Africa states that all organs of the State are bound by the Bill of Rights. Section 152(1) of the South African Constitution states that one of the objectives of the local government is providing services to communities in a sustainable manner. Accordingly, section 21(1)(b) of the Water Services Act requires every municipality to ‘make bylaws containing conditions for the provision of water services.’

On the other hand, Zimbabwe’s Constitution in Chapter 14 equally provides for provincial and local government and specifically that government is desirous to ensure, “the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas.” Provincial and metropolitan councils are responsible for the planning and implementation of social and economic development activities in its province.<sup>461</sup> Local authorities are conferred with functions including, “a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities.”<sup>462</sup> However, the difference with South Africa is that in Zimbabwe, devolution has not yet been wholly implemented to the extent of realising its contribution regarding the right to water.

Like Zimbabwe, the South African constitutional right to water emanates indirectly from other rights. The international and regional instruments emphasised mostly the link between food, water, environment, housing, and health. The independence of the right to water, therefore, becomes controversial. Other constitutional provisions indirectly acknowledge and support the substance of water to humankind and accentuate the interrelatedness of water and other rights. For example, the right to food is mentioned together with the right to water in section 27(1) (b)

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<sup>460</sup> For example, regulations relating to Compulsory National Standards and Measures to Conserve Water, Government Gazette 22355, GN R509 of 2001 8 June 2001, which deals with water quality, water and sanitation services and disposal of effluent.

<sup>461</sup> Section 270 of the Constitution of Zimbabwe.

<sup>462</sup> Section 276 of the Constitution of Zimbabwe.

of the Constitution of South Africa. Water and food are closely associated in practice and theory hence their mention together. In *Government of the Republic of South Africa & Others v Grootboom & Others*,<sup>463</sup> the criticality of water to housing could not be disaffirmed. The Court held that the definition of adequate housing requires available land, and appropriate services such as the provision of water and the removal of sewage.<sup>464</sup> It was avowed that access to water (and sanitation) were part of the right to housing and that the State had positive obligations to ensure its progressive realization. While the *Grootboom supra* judgment protected the applicants water rights, it rejected the international basis of those rights.<sup>465</sup>

In the case of *Residents of the Joe Slovo Community, Western Cape v Thubelisha Home & Others*,<sup>466</sup> the Constitutional Court found that water and sanitation were critical elements of the basic standards for alternative accommodation in the case of eviction. A meaningful connection is also available to the right to land and the right to the environment stated in section 24 of the Constitution South African Constitution, which entitles everyone to “an environment that is not harmful to their health or well-being.” It imposes an obligation on the State to protect the environment by inter –alia preventing pollution and promoting conservation through reasonable legislative and other measures.

The Constitution of Zimbabwe, on the other hand, provides that “[e]very person has the right to safe, clean and potable water.”<sup>467</sup> There is an apparent difference between the Zimbabwean Constitution and the South African Constitution, as the latter provides for the right to have access to *sufficient* food, and water.<sup>468</sup> The gap in the Zimbabwean content of the right is the absence of ‘sufficiency’ of water and its blinkered approach to providing the right to water only for purposes of drinking.

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<sup>463</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* 2001(1) SA 46(CC); Section 26 of the South African Constitution provides for the right to ‘housing.’

<sup>464</sup> Woolman & Bishop (n 121 above) 56B-22.

<sup>465</sup> McGraw (n 127 above) 194.

<sup>466</sup> *Joe Slovo Community, Western Cape v Thubelisha Home & others* 2010 (3) SA(CC).

<sup>467</sup> Section 77 of the Zimbabwe Constitution.

<sup>468</sup> E Couzens, *Avoiding Mazibuko: Water security and Constitutional Rights in Southern African Case Law*, 2015, Vol 18 no. 4, 1181. Accessed 31 January 2020.

<http://dx.doi.org/10.4314/perj.v18i4.12>

Zimbabwe fails to set a quantitative minimum amount of water for each person. In South Africa, the question of sufficient water was addressed in the case of *Mazibuko v City of Johannesburg*,<sup>469</sup> where the City of Johannesburg's policy of providing six kilolitres of water per month, free of charge, to every account holder was challenged. Applicants argued that the free basic water policy conflicted with section 27(1) (b) of the Constitution. The six kilolitres were an amount derived from the prescribed minimum standards as provided in the Regulations relating to compulsory national standards and measures to conserve water.<sup>470</sup> The applicants invited the court to quantify the amount of water that would be 'sufficient' within the meaning of section 27(1)(b). Unfortunately, the Constitutional Court side-stepped the question of 'sufficient water' and held that sufficiency is determined by factors which include the manner of delivery of water and the uses to which water is put.<sup>471</sup>

The UN Development Programme urges a survival minimum of twenty litres per person per day, while the World Health Organisation and the UN General Assembly's resolution specify that the right is fulfilled when everyone has access to fifty to one hundred litres per day within one kilometre of a residence and which costs less than three percent of a household income.<sup>472</sup> For Zimbabwe, in the case of *Hopcik Investments (Pvt) Ltd v Minister, Environment, Water, and Climate Change supra*, adequate or sufficient water was measured as sufficient and continuous to cover personal and domestic uses and meet basic needs. To this extent, it is exhibited that South Africa went a step further in stating quantities of water deemed sufficient, which is better than the ESCR and the Zimbabwean definition which is devoid of quantities thereof.

The South African provision is not as restrictive in focus regarding beneficiaries to the right to water. South Africa does not confine the purpose of water to drinking only. The South African approach appears to cater fully not only for natural persons but also opens the possibility of juristic persons to be considered as claimants of the right in its use of the word 'sufficient water for everyone. Section 8(4) of the South African Constitution stipulates that juristic persons can

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<sup>469</sup> *Mazibuko v City of Johannesburg* 2010(4) SA 1 (CC).

<sup>470</sup> Government Gazette No 22355, Notice 509 of 2001 8 June 2001 (Regulations were made in terms of section 9 of the Water Services Act which empowers the Minister to prescribe compulsory national standards relating to the provision of water services, the effective and sustainable use of water resources.)

<sup>471</sup> In Argentina, for example, courts have regularly ordered 100 to 250 litres of water per person per day provided for situations of emergency relief. See Woolman and Bishop (n 121 above)56B-33.

<sup>472</sup> Takacs (n 36 above) 65.

be holders of rights to the extent required by the nature of the rights and the nature of the juristic person. The justification of the right to water to persons other than natural persons stems from the many uses of water, which may include domestic use, cultural practices, personal hygiene, environmental protection, agricultural production, and industrial use.<sup>473</sup>

Woolman and Bishop postulate that juristic persons such as corporations and commercial farmers may, therefore, also be entitled to the right to water.<sup>474</sup> It is, however established that priority ought to be given to basic human needs in preference to commercial needs. This argument is supported in CESCR's General Comment 15 which advocates for personal and domestic uses to be prioritised and "to water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights."<sup>475</sup> Although the constitution is the supreme law of both South Africa and Zimbabwe, it has been postulated that constitutionalising the right to water will not necessarily guarantee that water security will be achieved. However, in constitutional democracies, constitutionally entrenched rights could offer more protection for vulnerable people, because governments can be held responsible for the realisation of constitutional guarantees and values."<sup>476</sup>

#### **4.2.2 Content of the right to water**

It is argued that South Africa applied legally questionable policies, vis-à-vis the right to water. For example, it considered the equivalent of two toilet flushes per person per day as an adequate supply of water.<sup>477</sup> These policies were upheld in the globally influential case of *Mazibuko supra*, which arguably undermined the human right to water. It is submitted that the court failed to respect constitutional prescriptions to advance equity. Zimbabwean law does not prescribe quantities as far adequate supply of water is concerned. The fact that the right to water is codified in Zimbabwe and South Africa means that it represents a robust countermeasure to both the State and private violation of the right. Citizens can directly rely on constitutional provisions to claim

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<sup>473</sup> Woolman & Bishop (n 121 above) 56B-27.

<sup>474</sup> Woolman & Bishop (n 121 above) 56B-27

<sup>475</sup> General Comment Number 15 paragraph 6 (n107 above).

<sup>476</sup> Woolman & Bishop (n121 above).

<sup>477</sup> David (n 108 above) 70.

compensation in the event of violations.<sup>478</sup> It has been reasoned that “while a constitutional right to water will not always prevent violations, it may galvanise and inform public debate, shape legal rights and responsibilities, and put the onus on the government to ensure adequate access to clean water for all.”<sup>479</sup>

The Constitutional Court of South Africa noted in *Mazibuko supra* that the constitutional entrenchment of water rights in South Africa stem from the fact that water is life. *Mazibuko supra* is the first landmark equity decision on the right to water. In *Mazibuko*, the case concerned the constitutionality of Johannesburg’s Free Basic Water Policy and the installation of pre-paid meters in poorer sections of the municipality. It was held that within the context of former colonial states, “constitutionalising water rights could be a formidable tool for addressing colonial legacies.”<sup>480</sup> Reasonable steps could have included making equity fixes, funding municipalities to which water management was devolved, and taking legally required measures to protect ecological infrastructure upon which water provision relies.<sup>481</sup> Indeed, while positive developments regarding the human right to water and sanitation have been noted in South African case law, the Constitutional Court’s decision in *Mazibuko supra* put in jeopardy the practical protection of the human right to water.

In *Mazibuko supra*, the Constitutional Court appeared to have narrowed the promise of its earlier socio-economics rights jurisprudence concluding that prepaid water meters did not constitute a form of disconnection or limitation’ or indirect discrimination, and that policy to provide an average of twenty-five litres per person per day in Johannesburg was reasonable,<sup>482</sup> and deferred to the legislature and executive in setting disbursements amounts. This finding was criticised by the renowned Human Rights lawyer, Jackie Dugard, who referred to this reasoning as “insane” and “the most utterly outrageous and unacceptable of all the components of the judgment.”<sup>483</sup> In *Mazibuko*, it is argued that the court abdicated its responsibility to define what the right itself meant. Scholars have thus blamed the *Mazibuko supra* debacle on the fun of having beautifully

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<sup>478</sup> Soyaphi (n2 above) 5.

<sup>479</sup> Daly (n 3above) 177.

<sup>480</sup> *Mazibuko supra* para 59.

<sup>481</sup> David (n 108 above) 91.

<sup>482</sup> *Mazibuko supra case* para 9

<sup>483</sup> David (n 108 above) 87.

worded progressive laws on paper that are never enforced, as courts are failing to enforce the law as it is written.<sup>484</sup>

Though the High Court is subordinate to the Constitutional Court, and his judgment repealed, Justice Tsoka made impressive remarks in the *Mazibuko*,<sup>485</sup> trial where he observed that, “installing prepaid metres in poor Black areas, and not wealthy white areas, constituted discrimination: it is ‘not only unreasonable, unfair, and inequitable, it is also discriminatory solely based on colour.’” Judge Tsoka went on to opine that because women and girls do the bulk water collection, Johannesburg Water policies constitute gender discrimination. The judge forcefully held that the government had to do more to fulfil the right to water and to fulfil it without discrimination based on race, class, or gender. Unfortunately, the decision was not upheld. Had it been upheld it would have served as a model for governments and courts everywhere on what governments must do to implement the right to water, and what courts must do to evaluate the government’s efforts.<sup>486</sup>

#### **4.2.3 Progressive realisation of the right to water**

Unlike other SADC countries where national constitutions do not enshrine the right to water, South African law makes socio-economic rights justiciable.<sup>487</sup> Section 24 of the South African Constitution is a replica of the Zimbabwean Constitution section 73, which provides for the justiciability of environmental rights. Both Zimbabwe, and South Africa’s Constitutions<sup>488</sup> provide a large margin of canniness on the right to water, as found in ICESCR.<sup>489</sup> Both countries are observing article 2(1) of ICESCR, which enumerates that countries may realise rights within the resources available to them. The degree of freedom given to States is problematic as the

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<sup>484</sup> David (n 108 above) 90.

<sup>485</sup> *Mazibuko v City of Johannesburg* 2008 (4) All. SA 471(Wit.Local Div.)

<sup>486</sup> David (n 108 above) 86.

<sup>487</sup> Matchaya et-al (n 7 above) 1 state that twelve SADC countries’ Constitutions do not express the right to water, and these include inter-alia Seychelles, Mauritius, Botswana, Namibia, Zambia, Malawi.

<sup>488</sup> South Africa signed the ICESCR in 1994 but ratified it in January 2015. Section 39(1) b of the South African Constitution requires the consideration of international law when interpreting the Bill of Rights.

<sup>489</sup> ICESCR (n 107 above) Article 2(1) provides that ‘each party to the ICESCR undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to a maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

implementation of rights becomes subjective, and Conventions and Constitutional protections become effectively nullified.<sup>490</sup>

Section 27(2) of the Constitution of South Africa obligates the State to take reasonable legislative and other measures, ‘within its available resources,’ to achieve the progressive realisation of each of these rights. While General Comment 15 required action to the ‘maximum available resources,’ the South African Constitution speaks to action, ‘within available resources.’ Reasonableness suggests that there is an attempt to evade the minimum core standards. The aspect of progressive realisation is similarly espoused in section 77(b) and 73(2) of the Zimbabwean Constitution. Both governments, therefore, have latitude on how, when, where, and why they provide certain services, and this gives the court similar leeway in judging whether or not governments are making adequate progress toward fulfilling a given right.<sup>491</sup> Progressive realisation, therefore, speaks to the development of laws and policies that would result in the realisation of the right.<sup>492</sup>

It is opined that the requirement for progressive realisation introduces a constitutional lacuna in both jurisdictions, for which the realisation of the right to water would take a secondary place in government's priorities. Both Constitutions, therefore, are not progressive in that respect. In the *Mazibuko* case, the court gave the government-wide berth and held that government was making satisfactory progress in providing basic water to citizens of Soweto.<sup>493</sup> There has been an outcry from legal scholars that the problem with requiring ‘reasonable progress to realise the right to water “provides an almost impermeable shield through which the government’s shortfalls are recast as successes and progress in the right direction.”<sup>494</sup> The autonomy of the State is, however, limited given that the ESCR points out that, “the burden is on the State to demonstrate that it is making measurable progress toward the full realisation of the rights in question. In *Mazibuko*, it was held that ‘progressive realisation’ meant that the State is not required to immediately confer

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<sup>490</sup> A Chapman and S Russell, Introduction in Core Obligations: Building a Framework for Economic, Social and Cultural Rights 1, 5(2002) cited in McGraw (n 127 above)153.

<sup>491</sup> In *Manyame Park Residents supra*, the High Court accepted Chitungwiza Municipality’s arguments that it had no resources to remedy the sewage problems. The court considered that the country facing a serious economic crisis at the time, which raises the question of what the asking price of the right to water is.

<sup>492</sup> *Mazibuko supra* para 70.

<sup>493</sup> David (n 108 above) 86.

<sup>494</sup>David (n 108 above) 85.

a claim for sufficient water.<sup>495</sup> The Constitutional Court in *Mazibuko supra* proved to be not all that progressive when discussing progressive realisation.

#### **4.2.4 Limitation of Constitutional Rights**

Both South African and Zimbabwean Constitutions' do not provide for an absolute right to water. While both countries align to specific legal obligations of General Comment 15, namely the duty to protect, fulfil and respect the right to water, their practical observation of the same is different due arguably to resource constraints. The right to water may be limited in terms of a law of general application and has to be balanced with other rights entrenched in the Constitution. Section 38 of the South African Constitution is drafted similarly to section 85 of the Constitution of Zimbabwe. Both jurisdictions confer upon citizens the right to participate in environmental democracy. Citizens may approach a court alleging that a fundamental right or freedom enshrined in the constitution has been, is being or is likely to be infringed.

Both sections 38 and 85 of the South African and Zimbabwean constitutions empower the courts to grant appropriate relief in the event of an infringement of a constitutional right, including a declaration of rights. The only point of departure is that section 85 of the Zimbabwean Constitution unambiguously allows courts to make an award for compensation for contravention of constitutional rights. The public has been given a say-so in both jurisdictions in that they can defend their rights to participate in environmental democracy.

Section 32 of the South African Constitution provides for the right to information. Similarly, Zimbabwe also includes the right to information, in its Bill of Rights and in particular, section 62 of the Constitution. This settles to international provisions, in particular, the EC Council Directive, which states that each individual shall access information concerning the environment. Such information includes information on citizens' right to water. What is dissimilar between the two jurisdictions is that although the right to information is subject to limitations in both

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<sup>495</sup> *Mazibuko v City of Johannesburg* 2010(4) SA 1 (CC) para 56.



countries, South African citizens appear to be factually more vibrant when it comes to approaching the courts as claimants to the rights to which they are entitled.<sup>496</sup>

Section 36 of the South African Constitution contains provisions that are similar to section 86 of the Constitution of Zimbabwe on the limitation of rights. Section 36 requires limitation of fundamental rights to be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. The leading case on this point was the *S v Makwanyane*,<sup>497</sup> in which the court held that section 36 limitation clause requires the limitation of constitutional rights to be for a purpose that is reasonable and necessary in a democratic society based on human dignity, equality, and freedom. The court also held that an evaluation of whether a limitation complies with this general limitation clause is essentially an assessment based on proportionality wherein the court weighs competing values. There is a distinction from the Zimbabwean approach, in that section 86 of the Constitution requires the limitation to be fair and necessary in addition to being reasonable and justifiable.

### **4.3 Legislative comparison**

#### **4.3.1 Water Services Acts compared**

Apart from enshrining the right to water in its national constitution, South Africa put specific legislation relating to the regulation and management of water, which also explicitly provides for the right to water. The Water Services Act,<sup>498</sup> is the primary legal instrument relating to the accessibility and provision of water services. It recognises that water is the fundamental component of a healthy environment and an essential natural resource.<sup>499</sup> A major difference between Zimbabwean and South African legal systems is that the latter has not only entrenched access to water as a human right in the Constitution but also provided for robust legislation to ensure full enjoyment of the right. In the South African context, citizens enjoy greater ability to claim their rights, give the government greater responsibility to safeguard them, and give courts

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<sup>496</sup> David (n 108 above) 67.

<sup>497</sup> *S v Makwanyane* CCT3/94 [1995] ZACC 3; 1995(6) para 104.

<sup>498</sup> The Water Services Act 108 of 1997 hereinafter named the Water Services Act.

<sup>499</sup> The Water Services Act is in sync with section 24 of the Constitution regarding the legislative obligations to protect the environment.

greater latitude to police government conduct.<sup>500</sup> The Water Services Act of 1997 was promulgated to deal with the provision of safe drinking water to all levels of society. The Water Services Act<sup>501</sup> gives everyone the ‘right of access to basic water supply’ and enjoins every water services institution to take reasonable measures to realise this right. Whilst the Water Services Act is aligned to the Constitution regarding the right to water, the Zimbabwean Water Act is not explicit and appears silent on a specific right to water.

The recognition of the right to water in section 27 of the South African Constitution, together with the right to sanitation in the Water Services Act,<sup>502</sup> has played a significant role in shaping the law and policy developments in South Africa.<sup>503</sup> The Water Services Act provides the institutional framework for the delivery of water supply and sanitation. It recognises the right of access to basic water supply and sanitation necessary to secure sufficient water and an environment not harmful to health and well-being.<sup>504</sup> This provision is consistent with the CESCR’s General Comment 15, which provides that ‘priority in the allocation of water must be given to the right to water for personal and domestic uses’ and to the water for resources required to prevent starvation and disease. In Zimbabwe, the Water Act is silent on the right to access wholesome and ‘sufficient’ water save for primary purposes. Only the Public Health Act enjoins local authorities to supply sufficient and wholesome water for drinking.<sup>505</sup>

Section 4(3)(a) of the Water Services Act states that service providers have an obligation to adopt procedures for the limitation or discontinuance of water services that are fair and equitable. These procedures are required to be provided for reasonable notice to limit or discontinue water services and also not to result in a person being denied access to basic water services for non-payment. The consumer has the burden to prove that s/he is unable to pay for essential services. Section 4(3) (c) of the Water Services Act requires that State policy must not result in a person being deprived access to basic water services for non-payment when an inability to pay can be demonstrated. This section appears to have been designed to protect the water rights of the

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<sup>500</sup> David (n 108 above)76.

<sup>501</sup> See section 3 (1) (2) of the Water Services Act.

<sup>502</sup> Water Act 108 of 1997.

<sup>503</sup> Woolman & Bishop (n 121 above) 56B-1.

<sup>504</sup> Water Services Act (n499 above).

<sup>505</sup> Section 86 & 88 Public Health Act-Zimbabwe.

abjectly poor people. No such statutory right to receive free basic water services is provided in the Zimbabwean context neither for people connected to water supply nor those without accommodation, whose water needs are urgent and desperate.

In *Manqele v Durban Transitional Metropolitan Council*,<sup>506</sup> the court ruled against the applicant in a disconnection case, on the basis that the loss of access was legally justified by her refusal to stop extracting water beyond her six-kilolitre allowance despite her inability to pay. The applicant asserted their rights in the Water Services Act, but the court found the Act's protection incomplete and lacking legislative guidance for enforcement.<sup>507</sup> The court considered water provision a policy matter linked to the availability of resources and failed to extend Constitutional protection, as the applicant had not considered those rights in their argument.<sup>508</sup> The judgment in *Manqele supra* holds that disconnections for non-payment are acceptable where consumers use more water than the relevant water services provider has undertaken to supply free of charge. Water users are allowed a certain amount of water for free per month. After utilising their free water, they remain responsible for the payment of the remainder.<sup>509</sup> The intention being that disconnection for repayment of the remainder ought not to result in the denial of their monthly free allotments. The Constitutional Court in *Mazibuko* approved this approach.<sup>510</sup> Unfortunately, this legal understanding is not yet applied in Zimbabwe. The government of South Africa still provides free water, even when there is no constitutional obligation.<sup>511</sup>

The Water Services Act stipulates that the duty to provide water service is subject to an obligation on the water user to pay reasonable charges. In *City of Cape Town v Strumpher*,<sup>512</sup> the

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<sup>506</sup> *Manqele v Durban Transitional Metropolitan Council*, 2002 (92) SA 39 (D).

<sup>507</sup> *Ibid* at 43-44

<sup>508</sup> *Ibid*

<sup>509</sup> Woolman & Bishop (n 121 above) 56B-49.

<sup>510</sup> At paras 119-124 in *Mazibuko supra*, it was held that the automatic disconnection of water supplied from a prepaid metered system or a yard standpipe after 6 kilolitres per month was beyond constitutional reproach. The Court concluded that where the water supply has been cut off because the basic free quantity of 6 kilolitres has been exhausted, but will be reconnected at the beginning of the following month, it cannot be said that a 'limitation or discontinuation of water services' in terms of s 4(3) of the Water Services Act has occurred. It is a temporary suspension in supply to which section 4(3) does not apply. In sum, people who are unable to pay for water are entitled to than six kilolitres per month per household.

<sup>511</sup> *Mazibuko supra* para 85.

<sup>512</sup> *City of Cape Town v Strumpher* (104/2011) (2012) ZASCA 54.

court found that although water users had a contractual obligation to pay for water use, that did not relegate the consumer's right to a 'mere personal right flowing from that contractual relationship.'<sup>513</sup> Therefore, the respondent's right to water was not solely based on a contract with the City but was underpinned by his constitutional and statutory rights.<sup>514</sup> In contrast, a different conclusion was reached in *Bothwell Property supra* where the court viewed arbitrary disconnections as a necessary evil if the City of Harare was to have resources required to continue to provide clean, safe, and potable water. Section 5(c) of the ZINWA Act stipulates that adequate water must be provided at a cost-reflective basis. Whereas section 4(3) of the Water Services Act requires that the limitation of discontinuation of water services must be fair and equitable, the Water Act of Zimbabwe is deafeningly silent on aspects of fairness.

In the South African case of *Strumpher*, the City's attitude to immediately disconnect water services was considered 'contemptuous,' and the court referred to the City as being 'armed' with 'arsenal of statutory provisions' in reaching its conclusion that it could proceed with immediate disconnection.<sup>515</sup> The *Mushoriwa supra* case is on all fours, similar to the *Strumpher* case. The difference between the two cases, however, is that the *Strumpher* case judgment was made at the highest level; however, the *Mushoriwa* case judgment was based not only based on common law but also constitutional and human rights considerations.<sup>516</sup> Judicial activism was noted where in *Mushoriwa supra*, the Court noted that; "those in the corridors of power must not abuse their authority by usurping the courts' functions to the detriment of innocent members of society."<sup>517</sup> The City of Harare was ordered to restore water to the applicant's premises, and was interdicted from interfering with or terminating water supply.<sup>518</sup> In this case, the City of Harare had 'unilaterally and arbitrarily' disconnected the applicant's water supply leading to a spoliation order application.<sup>519</sup> The court ordered immediate restoration of the water services to avert a

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<sup>513</sup> *Ibid* para 9.

<sup>514</sup> Couzens (n 469 above)1172.

<sup>515</sup> *Strumpher* para 14-15, the court view was "to expect the respondent to payR182 000.00 while he is disputing the very amount erodes the principles of fairness contemplated in the Water Services Act and the dispute resolution procedures."

<sup>516</sup> Couzens (n 469 above) 1180.

<sup>517</sup> *Mushoriwa supra*.7.

<sup>518</sup> *Mushoriwa supra*.

<sup>519</sup> *Mushoriwa supra*.2.

cataclysm as one cannot survive without water. The role of the judiciary in interpreting and enforcing the law when citizens complain of human rights violations was pronounced.

However, despite the court ruling, in *Mushoriwa supra*, the City of Harare went on to disconnect, arguing that it had the full mandate to disconnect water supplies to a citizen without recourse to the courts of law.<sup>520</sup> The City relied on an outdated authority that stemmed from colonial times in defiance of the Constitutional provisions on the right to water.<sup>521</sup> The court lambasted the City and iterated in orbiter<sup>522</sup> that the right to water “is a fundamental right enshrined in section 77 of the Constitution of Zimbabwe” and that section 44 of the Constitution, “imposes a duty on the State and all its institutions to respect fundamental human rights and freedoms.”

Section 8 of the City of Harare By Law Statutory instrument 164 of 1913 authorised the City to unilaterally deprive citizens of their fundamental right to water without compensation.<sup>523</sup> The court highlighted that section 8 of the Zimbabwean Water bylaw was an illegal instrument drafted by municipal authorities contrary to section 77 of the Constitution of Zimbabwe, which classifies water and food as basic rights. The court held that council as a public body could not deny citizens water without a justifiable reason cause. The statute allows the City to be the sole arbiter in its own case, going against the basic principle of public policy that ‘law should serve the public interest.’ Arbitrary water disconnections are retrogressive and threaten the right to water based on the case law above from both jurisdictions.

#### **4.3.2 Environmental legislation compared**

The National Environmental Management Act of South Africa (NEMA) provides an overarching framework for the regulation and sustainable use of natural resources in South Africa. It was founded on section 24 of the Constitution and the principles of environmental management

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<sup>520</sup> *Mushoriwa supra*.3

<sup>521</sup> Couzens (n 469 above) 1176.

<sup>522</sup> The court found for dispossession eventually, however, its ruling that there was unlawfulness on the part of the City makes it clear that there was a breach of rights in respect of water.

<sup>523</sup> This is contrary to section 85 of the Constitution, which entitles an aggrieved person appropriate compensation whenever his fundamental human rights have been violated.” *Mushoriwa supra* p.6.

provided in Chapter 1 of NEMA. One such principle is the ‘polluter pays principle’ which underlies the common law general duty of care in section 28 of NEMA. NEMA thereby shields threats to the human right to water by speaking to any pollution or degradation that affects the quality of water resources. In conjunction with the National Water Act 36 of 1998, the NEMA provides an avenue to regulate and control water pollution and promote the fulfilment of the right to an environment not harmful to health or well-being. NEMA, most importantly creates a specialised enforcement unit or environmental inspectors charged specifically with the enforcement of environmental management legislation.<sup>524</sup>

While NEMA is aligned to the Constitution and speaks clearly of the quality of water resources, in Zimbabwe, the Environmental Management Act (EMA) is not sufficiently aligned. EMA’s preamble does not refer to environmental rights. However, in section 4(1)(b)(i), EMA speaks of the prevention of pollution. Whereas the human right to water is not directly addressed in EMA, NEMA Section 28(1) of NEMA creates a strict liability and, in some cases, absolute liability for failure to adhere to its rules. Section 28 of the NEMA deals with the duty of care and remediation of environmental damages. It states that the Director General may give directives necessary for the protection of the environment. Section 28(1) states that “every person who causes, has caused or may cause significant pollution...must take reasonable measures to prevent such pollution.” Reasonable measures may include eliminating the source of pollution and remedying the effects of pollution. The Director General may approach a competent court for appropriate relief if a person fails to comply or comply inadequately with a directive. It is an offense to refuse to comply with a directive issued under section 28 of NEMA. The penalties for this offense include a fine not exceeding R1 million or imprisonment for a period not exceeding 1 year or both. Therefore, section 28 of NEMA places a common law duty of care and remediation for environmental damage, which is read to include damage to water rights. The directive is implemented together with a criminal sanction.

On the other hand, it has been argued that the rights and principles in section 4(3) of the EMA were never meant to be justiciable or enforceable. They were only meant to be guiding principles

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<sup>524</sup> Murombo & Algotssoon (n 434 above) 2.

to serve as a general framework within which plans for the management of the environment shall be formulated. They were also meant to serve as guidelines for the exercise of any function concerning the protection or management of the environment.<sup>525</sup> Moreover, EMA fails to provide adequate rules and deterrent penalties for those that violate environmental rights and laws.<sup>526</sup> Section 57 of EMA provides that any person who contravenes the law is liable to a fine not exceeding level 14 or imprisonment for a period not exceeding five years or both such fine or imprisonment. In 2014, it was reported that a level 14 fine, which was the highest possible for corporate offenders, was only USD5,000 whereas the lowest fine was a penny-pinching USD5.<sup>527</sup> Environmental offenders in Zimbabwe need a tough hand to keep them constantly in check. In 2020, level 14 fine has been pegged at ZWL\$120,000 only while level 1 fine was ZWL\$200.<sup>528</sup> The Act is also handicapped in that it does not provide for the protection of whistle-blowers whereas section 31 of the National Environmental Act of South Africa that provides for such.

#### **4.4 Measures to ensure compliance and enforcement of the right to water**

The word ‘compliance’ implies obedience to rules, whereas ‘enforcement’ commonly refers to ensuring that rules are obeyed. Compliance, however, is the ultimate objective of enforcement. Adherence to rules may include voluntary mechanisms<sup>529</sup>; incentive-based mechanisms<sup>530</sup> or command and control mechanisms.<sup>531</sup> Most frequently used command and control<sup>532</sup> mechanisms employed in South Africa and Zimbabwe include criminal, administrative, and civil measures. According to Marobwe, civil litigation is an underutilised enforcement tool in

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<sup>525</sup> Murombo & Algotssoon (n 434 above)

<sup>526</sup> Ibid.

<sup>527</sup> J Gogo, ‘Stiffer penalties will curb water pollution’ *The Herald*, 13 August 2014.

<sup>528</sup> Statutory instrument 57 of 2000 Chapter 9:23 Criminal Law Codification and Reform (Standard Scale of Fines Notice 2020)

<sup>529</sup> This includes self-regulation and co-regulation.

<sup>530</sup> These include regulatory, fiscal, or economic measures and information-based instruments.

<sup>531</sup> Environmental law, Only study guide for LCP4805, University of South Africa, 2012. 172.

<sup>532</sup> Criminal sanctions are meant to punish and deter water rights violators. Enforcement of environmental law in Zimbabwe is best understood as a ‘command and control’ approach to environmental protection. *See* T Marobwe, Carving out a more significant role for civil litigation as an environmental law enforcement tool in Zimbabwe’s 2013 Constitution, Law, 2015, Vol 11/2 *Environment and Development Journal*, 109. Accessed 20 June 2020.

[www.lead-journal.org](http://www.lead-journal.org)

Zimbabwe. State regulators are viewed as being ‘captured’<sup>533</sup> by the regulated parties hence the turn to civil litigation.<sup>534</sup> Enforcement in Zimbabwe is seen as compromised by competing political interests.<sup>535</sup> There is an apparent dearth of environmental cases being brought to the courts.<sup>536</sup> Invigoration of civil litigation’s role in Zimbabwe is in theory promised through section 73 on the right to environment, section 77 on the right to water, section 62 on the right to information with section 85 playing a complementary role on the access to justice where any of these rights should be infringed or be under threat of infringement. South Africa’s legislation provides for administrative measures, which include directives compliance notices,<sup>537</sup> abatement notices, suspensions, and withdrawal of authorisations.

For example, directives empower officials to direct a person or entity to do or to refrain from doing something with a view to secure compliance with a legal provision. In South Africa, the National Water Act 36 of 1998 also contains a number of directives, whereas, in Zimbabwe, EMA provides for such. In Zimbabwe, environmental officers are appointed in terms of the EMA Act section 35; however, their scope of work does not directly involve the enforcement of the human right to water. The Environmental Agency Officers in Zimbabwe’s enforcement techniques and procedures include but are not limited to extensive inspection powers and penalties rooted in the polluter pays approach.<sup>538</sup> The environmental officers have been equipped and empowered to ensure that organisations or persons failing to comply with environmental laws or regulations are brought or returned to compliance or punished for non-compliance through administrative or criminal action.<sup>539</sup> An inspection of the Water Act does not provide for the enforcement officers. A violation of environmental rights provides citizens with the option to institute civil litigation as an enforcement tool against the perpetrator of the harm.<sup>540</sup> Marobwe states that despite the provision of civil litigation as an enforcement tool in Zimbabwe, citizens were not utilising it.

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<sup>533</sup> Marobwe defines capture as by way of EMA regulators exercising their responsibilities while encountered by the conflict of interest which affects their desire to enforce the law effectively, Marobwe (n 539 above) 111.

<sup>534</sup> DJ Fiorino, *The New Environmental Regulation*, MIT Press, 2007. 3-38

<sup>535</sup> T Dube, ‘EMA under the spotlight’ *The Zimbabwean*, (Harare) October 3 2012. Accessed 12 June 2020. [www.thezimbabwean.co/life/environment](http://www.thezimbabwean.co/life/environment).

<sup>536</sup> *ibid*

<sup>537</sup> Regarding compliance notices, these seek to ensure legal compliance by defaulting parties.

<sup>538</sup> See section 37 and 137 of EMA.

<sup>539</sup> Fiorino (n 535 above).

<sup>540</sup> Section 4(1) of EMA provides for the right to an environment that is not harmful to health.



In South Africa, the National Water Act section 19 directive makes provision for the prevention of and remedying of effects of pollution. It requires that certain persons must take all reasonable steps to prevent pollution. These measures include ceasing of pollution, compliance with any waste standard, eliminating pollution sources, and remedying the effects of pollution. Where the person fails to take reasonable action, the catchment management agency may issue a directive to commence taking specific measures before a given date. Failure to comply with a directive under section 19 of the National Water Act constitutes an offense. The penalties include, a fine not exceeding R100,000 on first conviction or imprisonment for a period not exceeding five years or both. A subsequent offense attracts R200, 000 or imprisonment not exceeding ten years or both.<sup>541</sup> The Water Act of Zimbabwe appears to be silent on Officers to enforce the right to water. The Zimbabwean fines and penalties for environmental offenses have not been high irrespective of the extent of the harm occasioned upon the environment. Accordingly, civil litigation in theory made sense in allowing the courts' flexibility to levy heavier punitive damages against perpetrators of environmental harm than fines prescribed in the EMA.

Both Zimbabwe and South Africa have express constitutional provisions on the right to water. Both constitutions confer justiciable, affirmative water rights.<sup>542</sup> Therefore, citizens have better chance to be aware of their rights to water, which may be the motivator for heading to the courts for redress when such rights are infringed.<sup>543</sup> There is however a glaring difference between the two jurisdictions in that South Africa has since established environmental courts<sup>544</sup> since 2003. The widespread adoption of environmental courts has been viewed as one of the most dramatic changes in environmental law and institutions in the 21<sup>st</sup> century.<sup>545</sup> As of February 2019, South Africa had two environment courts, whilst Zimbabwe still has none.<sup>546</sup> It appears that the linkage

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<sup>541</sup> Section 151 of the National Water Act as read with section 1 of the Adjustment of fines Act 101 of 1991

<sup>542</sup> Section 27(1) of the South African Constitution and section 77 of the Zimbabwean Constitution

<sup>543</sup> Matchaya et-al (n 7 above) 19.

<sup>544</sup> "Environmental courts range from fully developed, independent judicial branch of bodies with highly trained staffs and large budgets all the way to simple, underfunded village Environmental Courts that handle environmental cases one day a month with rotating judges." See DC Smith, 'Environmental Courts and tribunals: Changing environmental and natural resources law around the globe' 2018, *Journal of Energy & Natural Resources Law*. Accessed 6 April 2020.

<https://doi.org/10.1080>

<sup>545</sup> It is established that there are over 1500 environmental courts the world over, and these are changing how environmental disputes are resolved. See Smith (n 545 above) 137-147.

<sup>546</sup> In *ZELA and others v Anjin Inv (Pvt) Ltd and Others* (HC 9451/12) (2015), the plaintiffs argued that Zimbabwe has no environmental court in the same manner that the Labour Act, for instance, established the Labour Court and

between human rights and environmental protection is not as fully embraced in Zimbabwe as it is in South Africa. Afro News reported that ever since the establishment of the courts, South Africa registered a 70% increase in prosecution of cases against a 10% prosecution rate in the past.<sup>547</sup> Having specialized courts is reported to have resulted in quicker disposal of cases, more convictions, and stringent sentences. Zimbabwe's public dissatisfaction with the judicial forums is still in its infancy.

In South Africa, a constitutional challenge to the right to water has been noted. The Constitutional Court confirmed the justiciability of the right to water in the case of *Soobramoney v Minister of Health (KwaZulu Natal)*.<sup>548</sup> The court held that people whose rights were violated are allowed to approach the court to seek remedies against the government. In *Soobramoney*, the Constitutional Court held that socio-economic rights were not just on paper, but they were justiciable.<sup>549</sup> The Constitutional court held that since socio-economic rights are expressly included in the Bill of Rights, the issue was not their justiciability but enforcement in the given case.

Government decisions related to water provision based on a fundamental right to water are permissible in South Africa. In the case of *City of Cape-town and Marcel Mouzakis Strumpher*,<sup>550</sup> the court interpreted section 27(1) (b) of their Constitution, which is similar to the Zimbabwean section 77 of the Constitution. The court had this to say:

“It follows from the above statutory and constitutional provisions that the right to water, claimed by the respondent when he applied for a spoliation order, ...was underpinned by the constitutional and statutory provisions.”

In the *Strumpher supra*, the respondent had successfully been granted relief by the Magistrate's court and also by the Western Cape High Court. The court ordered the City of Cape Town to restore water connections it had summarily disconnected in line with its by-laws and debt

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gave it jurisdiction over employment matters (section 89(6) of the Labour Act. See also *Tuso v City of Harare* HH 1/2004.

<sup>547</sup> [www.afronews.com](http://www.afronews.com). Accessed 6 April 2020

<sup>548</sup> *Soobramoney v Minister of Health (KwaZulu Natal)* 1998(1) SA 765(CC).

<sup>549</sup> *Mavedzenge & Coltart* (n 243 above) 27.

<sup>550</sup> *Strumpher* case para 54.

collection laws. The City of Cape Town argued that it was providing water in terms of a contractual agreement; hence a *mandamus van spolie* was not available to the respondent. In spite of a dispute in calculating water rates, the applicant insisted on disconnecting water supplies to users. In its judgment, the court noted that the City had a “constitutional and statutory obligation to supply water to users.”<sup>551</sup> Moreover, the respondent’s rights were not merely personal rights but were also underpinned by constitutional and statutory provisions. The court ruled that the case warranted a *mandamus van spolie* as the City interference was ‘akin to deprivation of property’ and the respondent use of water as ‘an incident of possession of the property.’<sup>552</sup>

In *Impala Water Users Association v Lourens*,<sup>553</sup> the court held that the water user’s right to the water supply could not be classified as purely contractual. It was held that the Water Services Act imposes a duty on the authority ‘to ensure access to water to consumers.’<sup>554</sup> The legal effort was aimed at delivery obligations. In *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others*,<sup>555</sup> a *mandamus* relief was sought when the municipality provided inadequate water supply to residents following contamination of their water source by ‘acid mine water.’ The applicants alleged that lack of access to an effective and reliable supply of potable water constituted a breach of their right to water as guaranteed under section 27(1) of the South African Constitution<sup>556</sup> and that allocation of 25 litres of water per household was not sufficient.<sup>557</sup> The Federation requested the court to declare the failure by respondents to provide residents of the Carolina area with a reliable supply of drinking water for more than 7 days as unlawful. The court ordered the respondents to supply ‘temporary potable water’ to residents of Silobela and Carolina within 72hours.<sup>558</sup>

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<sup>551</sup> *Strumpher supra* para 9.

<sup>552</sup> *Ibid* para 19.

<sup>553</sup> *Impala Water Users Association v Lourens* (2008) 2 SA 495 (SCA).

<sup>554</sup> *Ibid* para 11.

<sup>555</sup> *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* 2012 High Court (North Gauteng) Pretoria 35672/12/2012 available on <http://www.saflii.org> accessed 31 January 2020. (Federation case).

<sup>556</sup> *Ibid* para 6.

<sup>557</sup> *Federation* case para 23.

<sup>558</sup> *Ibid* para 26(1)

## 4.5 Conclusion

This chapter's dispatch was to highlight the African frameworks on the right to water and to navigate on a comparative basis the South African and Zimbabwean water rights laws. On the African plane, it was shown that the African Commission, to a more considerable extent, embraces the human right to water as well as the Women's Protocol and the Children's Convention. This chapter showed that the protection of the right to water had met varying degrees of success in Zimbabwe and South Africa. Both countries' constitutions provide for the right to water, and this right can be inferred from other rights such as the right to life, environment, and dignity. However, South Africa ahead of the curve on proclaiming, implementing, and enforcing the human right to water. South Africa is a notable example of judicial enforcement of the right to water. It has a transformative Constitution with clear guarantees on the right to water and other environmental rights, the right history of compelling equity, the appropriate statutes implementing the right, and the excellent mapping and technological expertise to prioritize protections.<sup>559</sup> In South Africa, the right to sufficient water is available not only to individuals but also to juristic persons.

Although both Zimbabwe and South Africa have entrenched the rights to water expressly in their Constitutions, Zimbabwe remains behind from a comparative perspective. Zimbabwe's Constitution is so far the only one which explicitly provides for the right to water hence its trailing behind South Africa. Zimbabwe's subsidiary legislation is silent and, in some cases, outdated. In South Africa, both the Constitution and other legislation, such as the Water Services Act, have express provisions on the right to water.<sup>560</sup> However, case law has revealed the challenges in the realization of water rights as water services providers, government, and the consumers can be a danger to this realization of the right to water.<sup>561</sup> Case law has shown that the right to water is an inalienable right which marginalized groups are can enforce and protect. The next Chapter is the climax of this thesis and seeks to recapitulate the research findings, make conclusions as well as recommendations, and suggest future research opportunities.

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<sup>559</sup> David (n 108 above) 97.

<sup>560</sup> Matchaya et al (n 7 above) 15.

<sup>561</sup> Matchaya et-al (n 7 above) 19.

## CHAPTER 5

### FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

#### 5.0 Introduction

The preceding chapter evaluated the extent to which the water right is protected, promoted, and fulfilled within Zimbabwe and South Africa. Although generally there could be similarities at law, South Africa has an impressive range of legislation that governs the right to water. Previous chapters have shown that even though the human right to water is justiciable, and while Zimbabwe can be applauded for ensuring that the right is recognised in its 2013 Constitution, significant alignment strides are expected in its subsidiary legislation. Gaps in the existing legislation were discussed, and opportunities for development of jurisprudence on the right to water were highlighted. This chapter addresses the research questions highlighted in Chapter 1. The extent to which the objectives have been realised is ascertained in this episode. The various findings, conclusions, and recommendations are provided in this final chapter. Areas for furthering jurisprudence in the field of human rights to water are proposed.

#### 5.1 Research Findings

This study aimed to generally find the degree to which the current legal frameworks provide for the human right to water in Zimbabwe. The research showed that section 77 of the Constitution of Zimbabwe guarantees the right to water and brings out valid principles such as the principle of inclusivity, quality and security as well the principle of duty in the administration of the right. The Constitution also generally provides other fundamental human rights associated with the right to water. The vulnerability of the constitution regarding Bill of Rights amendments was noted. Broadly, the research established that human rights are correspondingly vital, and one cannot deal with the right to water in isolation to the whole range of interrelated rights such as the right to life, dignity, health, housing, and environment.<sup>562</sup> The environment and human rights agenda must be addressed in conjunction in pursuit of the recognition of the right to water.

The following are the research findings emanating from this study:

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<sup>562</sup> EF Wilson, 'The human rights-based approach to development: The right to water', (June 2005) Vol. 23 No 2 *Netherlands Quarterly of Human Rights*. Accessed 2 December 2019.  
[uir.unisa.ac.za](http://uir.unisa.ac.za).

- **Water is a justiciable socio-economic right**

This research has shown that internationally, water is a pragmatic socio-economic right. In Zimbabwe, this right is provided for in terms of section 77 of the Constitution. International provisions and the Constitution have shown that water is a resource requiring progressive realisation in line with available resources. This thesis found that the question of progressive realisation introduces a constitutional lacuna in Zimbabwe. It has been noted that progressive realisation of the right to water takes a tributary domicile in government primacies. In Zimbabwe, this premise has been a source of excuses for local authorities not to attend to the protection, fulfilment, and respect of the people's right to water. In that respect, the Constitution of Zimbabwe is found not to be progressive. Limiting the right to water, on the pretext of resource availability, may be fatal as it impacts on the right to life.

- **Satisfactory international and regional comparator**

The study sought to juxtapose the water rights laws to the international human rights instruments and the South African legal system. Zimbabwe water rights laws compare favourably with international and regional benchmarks, although a lot can still be done to make the rights more practicable. Like South Africa, Zimbabwe has embraced the right to water in its Constitution, which bears testimony to the importance of the right as a fundamental human right. The comparison also showed that both Constitutions do not provide for an out-and-out right to water. The right may be limited according to the law of general limitation. The thesis also exhibited that international human rights instruments such as the UDHR do not speak directly to the human right to water. Instead, indirect propositions are found in the rights such as the right to life and human dignity. It is in the General Comment number 15 that the right to water is addressed. It is found that international human rights instruments enjoin states to protect, fulfil, and respect the human right to water, albeit to the extent of available resources.

From the case law examined, citizens of Zimbabwe appear not to be at the centre of advancing their rights, which could be attributed to negligible awareness and education from institutions such as the Zimbabwe Environmental Lawyers Association; Community Awareness Trust and the Zimbabwe Human Rights lawyers. The reach to the indigent in society is limited. Citizens' awareness and education on the law are critical success factors in ensuring that people are

empowered to participate directly and evocatively in the enforcement of their water rights. The people must be able to defend their rights significantly and contribute to the realisation and monitoring of the water quality. Unlike South Africa, Zimbabwe is yet to set a standard the minimum amount of free water. This research has further noted that citizens in Zimbabwe are not as active in pursuit of their right to water as their South African counterparts. Generally, it has been noted that citizens must have rights and expectations and be aware of their responsibilities.

- **Legislative lacunae**

The research sought to unearth gaps, if any, in the legislation regarding the right to water. Zimbabwe's subsidiary legislation, such as the Water Act and EMA are outdated and not in sync with Zimbabwe's 2013 Constitution. The Water Act still has retrogressive measures against citizens, in particular regarding aspects of water disconnections. The Water Act is silent on critical issues of water like availability and accessibility. It has been observed that although the Constitution of Zimbabwe provides for the right to water, the subsidiary legislation like the Water Act and the EMA are not explicit regarding the right. The various legislative provisions are not only aged but also are managed by different Ministers, which potentially breeds noise, lack of focus, and duplications. South Africa has an entirely different picture, with the Constitution and the subsidiary legislation directly providing for the right to water. In Zimbabwe, the right to water is poorly standing as an independent right. The right is indirectly read into such rights as the right to environment, food, dignity, and health. It has been noted that although the right to water may exist on paper, this existence is not enough in practice to address the concerns of the citizens. For citizens to fully enjoy the fundamental right to water provided for in section 77 of the Constitution, environmental justice needs to be practical.

- **No specialized courts**

Zimbabwe has so far, no known specialised or dedicated court to deal with water and environmental issues. Although legal instruments provide sanctions against environmental crimes, there is a deficiency of appreciation and sentience of the rudiments of environmental crimes by officers of the court, including magistrates, prosecutors, police officers, and even quality inspectors. It has been noted that "a court with special expertise in environmental matters is best placed to interpret, explain, and enforce environmental laws and regulations in the

achievement of ecologically sustainable development.”<sup>563</sup> Being staffed with knowledgeable personnel means that such a court would have been vested to levy damages or retribution weighty of the harm caused.<sup>564</sup>

- **Weak penalties**

In Zimbabwe, the notorious violators of environmental rights favour paying fines than take remedial action with diminutive or negative moral probation.<sup>565</sup> The attitude is that it is cheaper to pay a fine than to invest in environmental protection equipment. Chiketo argues that the relevant laws are also to blame for not generally requiring the clean-up of the environment nor provide the guidance as to the magnitude of clean up required. Section 4(2)(g) of EMA provides for polluters to pay for the harm they cause, yet it is not clear if ‘anyone’ could cause civil litigation with a determination to make polluters pay. There is a lack of clarity in the law on this aspect. The low to absent penalties for water quality-related crimes could explain the low number of water users pursuing access to justice. The *Dora case supra* is an example of weak penalties wherein the City of Mutare was ordered to pay, “a paltry fine of Z\$1,500,000”. Polluting corporates beg for forbearance on the grounds of pecuniary exertions. Violation of others' right to water continues because punitive penalties are weak or absent.

- **Limited access to courts**

Citizens have been dissuaded from pursuing litigation as an enforcement tool premised on courts’ attitudes on environmental cases. There has been a dearth of civil litigation based environmental cases and water rights specific cases in particular.<sup>566</sup> On the other hand, it has been found that Zimbabwean authorities’ efforts to publicise the various litigation options available to citizens on their right to water are limited. Marobwe argues that this is so, “because traditionally environmentally deleterious activities have been largely regarded as *malum prohibitum* as opposed to *malum in se*.”<sup>567</sup> Women, children, the old and the physically disabled are equally entitled to ‘sufficient, safe, acceptable, physically accessible, and

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<sup>563</sup> Smith (n 551 above) 7

<sup>564</sup> Dube (n 536 above).

<sup>565</sup> B Chiketo, Zimbabwe’s troubled waters: Chemical pollution in Marange District, 2012. Accessed 14 June 2020. <http://allafrica.com/stories>.

<sup>566</sup> Dube (n 536 above).

<sup>567</sup> A crime is *malum in se* if it is intrinsically bad, evil, or morally wrong. A crime is alternatively *malum prohibitum* because society has labeled it so via statutory law. See Marobwe (n 539 above).



affordable' water for personal and domestic uses, yet the Zimbabwean law fails to safeguard them openly. The State must be seen to respect, protect, and fulfil the right to water.

- **Violation of the right to water**

Acts of commission or omission do contribute to the breach of the right to water. Retrogressive measures and adoption of legislation discordant with pre-existing domestic and international legal obligations are examples of acts of commission. Omissions include the inability to take appropriate steps toward complete realisation of every person's right to water and the failure to enforce laws. Zimbabwe has witnessed a violation of the right to water in both fronts described herein. Arbitrary water disconnections, discrimination, and pollution of water resources upsetting human health are examples of the breach of the obligation to respect the right to water. From an international humanitarian law perspective, it has been found that the desecration of the right to water has transformed into prosecutable war crimes and crimes against humanity. The findings indicate that Zimbabwe is not that lagging on the legal recognition of the right to water. Legislative alignment, and an absence of stiffer penalties are the missing links in the main.

## **5.2 Conclusions**

The right to water is as part of the fundamental human rights, and this fact is respected in different international instruments, regional instruments as well as the Constitution of Zimbabwe. The inclusion of the human right to water in the 2013 Constitution holds a significant promise for enhancing the enforcement of the rights. Courts have been watchdogs of principles enshrined in the Constitution. The overarching issue is that although there is a plethora of legal frameworks for water, only a few speak explicitly and directly to that right. It appears that there is little prosecution of the human right to water in Zimbabwe. The various pieces of legislation need review so that they align with section 77 of the 2013 Constitution.

Although South Africa's democracy is younger than Zimbabwe's, guidance may still be taken from South Africa regarding respecting, promoting, and protecting the right. For South Africa, it is not only the supreme law but also subsidiary legislation that explicitly provides for the right to water. South Africa has documented success cases towards the comprehension of the right to water. The Zimbabwe government needs to effectively utilise its devolution program to ensure

that the vulnerable have access to clean drinking water. The outbreak of diseases should be a factor that should not be repeated on the government's watch. Attention should be paid to infrastructure development for safe water supply with the goal to fulfil the citizens' right to potable water.

Regional treaties, including the African Children's Charter and the African Women's protocol, provide the legal basis for the declaration of the human right to water. The treaties have shown that the human right to water has the same standing as other vital human rights such as the right to life, human dignity, and other rights, also listed under the Zimbabwean Constitution's fundamental rights section. The subject of the human right to water has been shown to have its tentacles stretched to the broader social, political, and economic issues in Zimbabwe. Accordingly, concrete reforms are mandatory in all spheres.

### **5.3 Recommendations**

- **The explicit legal content of the right to water**

There is a need for environmental law reforms as some of the existing ones are old and no longer serving the population adequately. Both natural and juristic persons ought to benefit from the right to water. Therefore, the extent of the right in the Constitution needs not to focus on drinking water only but also other purposes. There is need to harmonise subsidiary legislation such as the EMA and the Water Ac to the Constitution. The legal frameworks need to complement each other and have similar objectives. For the achievement of the right to water to be simpler, the legislative frameworks need not contradict each other. Requirements of all vulnerable groups would be better respected and managed where there is no legislative chaos. The Water Act should expand the powers of the Minister so that they echo the Constitution's devolution clause so that there is good governance on water service delivery.<sup>568</sup> The Water Act needs to be rid of retrogressive measures against citizens. The Act must speak to critical issues of water like accessibility, affordability, and availability. Zimbabwe needs to develop emerging international principles in greater detail as legal provisions. Like the South African example, legal reforms must include the explicit provision for a quantum of free water to citizens in line with the World Health Organisation recommendations. All persons, regardless of class can

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<sup>568</sup> Rwambiwa (n 11 above)16.

therefore enjoy this right regardless of their status. The legal framework must reform to the extent that the unemployed, the vulnerable, the people who live in abject poverty, the homeless must have access to basic water free of charge.

- **Establish Water or Environmental Court**

Dedicated water or environment courts that will deal with related breaches must be established. The courts in Zimbabwe generally have the jurisdiction to hear cases on the violation of fundamental rights that include environmental rights.<sup>569</sup> Courts and tribunals ought to be seen to be custodians and defenders of human rights. Specialised courts need to be founded and populated by officers with expertise. Zimbabwe must emulate South Africa, which launched its first Environmental Court in 2003, which functions as a regional court but with higher penalties.<sup>570</sup>

Tied to this development would be the capacity building for law enforcers, including the judiciary on environmental laws. Judicial officers need to be trained for them to understand environmental rights, including water rights. Judges, in particular, need to appreciate the centrality of water to all other rights. Section 165(7) of the Constitution of Zimbabwe enjoins the members of the judiciary “to take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular to keep themselves abreast of developments in domestic and international law.” Knowledge of the right to water by officers of the court must equally be taken seriously. The police and environmental agents should be trained on monitoring and investigation of infringements of the right to water. It is beneficial to promote environmental rights from an informed position. Judicial activism, citizen participation and political will would go a long way in ensuring a robust redress to breaches of the right to water. Officers of the court need to remain independent and free from undue influence in their pursuit of enforcing the law as it is and as it ought to be.

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<sup>569</sup> Ibid.

<sup>570</sup> South Africa launches the first Environmental Court available at [www.iol.co.za](http://www.iol.co.za) accessed 8 March 2020 (the first court aimed to end poaching and address marine challenges. However, this serves as a gateway to the prioritization of environmental issues.

- **Review of penalties**

Criminal sanctions are the default enforcement mechanisms. There is a need to review the criminal penalties for breach of available legislative instruments. The monetary penalties need to be deterrent enough to discourage individuals, corporates, and industries from polluting water or discharging pollutants into water bodies. Penalties must be heavy enough to repel offenders. Lengthy mandatory minimum jail terms should be considered. Responsible authorities must be held accountable to citizens. Zimbabwe needs adequate punitive measures so that all sufferers of violations are titled to restitution and satisfaction or guarantees of non-repetition. Law enforcement agencies should be robust and efficient enough to arrest any would-be offenders. Zimbabwe must emulate South Africa in having efficient and effective water rights related to directives and compliance notices.

- **Citizens access to information**

Legislation like the Water Act, must define principles of stakeholder participation. When citizens are well-informed of their water rights, they are better able to comply with general laws and to develop a culture of enforcing their rights. Awareness of water rights and other constitutional rights need not be the preserve of the sophisticated and the privileged but for everyone. Citizens need empowerment in-order for them to demand justice as a right. Citizens would need to be educated on the procedures to bring civil litigation as a complementary enforcement tool should they suffer harm.<sup>571</sup> Awareness campaigns on citizens' duties and obligations concerning the right to water should be done by both officers of the court like the police and non-judicial activists through various mediums such as the community radio stations, print, digital and electronic media. Citizens need to be treated as partners in the management of water resources. This partnership should be inclusive of the grassroots in the rural areas for success to be realised against water sources vandalism and water pollution.

- **Support Community Activists**

The Water Act must co-opt environmental activists as environmental inspectors to deter would-be offenders from taking advantage of community ignorance, especially regarding hazardous substances caused by mining and other harmful practices. The role of communities in the

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<sup>571</sup> Dube (n 536 above)

safeguarding of water amenities must be fortified through Community Watchdogs, which should include para-legal, legal and health workers who can educate citizens on the benefits of clean water. These could work closely with village leadership in ensuring that safe water points are built close to households or better within homesteads. The communities through self-regulation may voluntarily comply with state regulations on the right to water. Where compliance is not forthcoming, measures may be taken to persuade or force the regulated community to comply with the rule of law. Community activists like Zimbabwe Human Rights Lawyers Association and Zimbabwe Environmental Lawyers Association (ZELA) need capacitation and funding to continue with public interest cases on behalf of the poor communities whose water rights continue to be ignored and affected daily. The activists could get legal representation for the people whose fundamental rights to water have been infringed.

- **Empower legislators**

Members of parliament, political leaders, law enforcement agents, and relevant ministries should actively play a part in defending the interests of every person. The legislators need to be utilised in ensuring that they are effective in parliament by raising relevant water rights-related issues. Parliamentarians have a crucial role in fostering the development of their constituencies and should be at the forefront of advocating for the realisation of the human right to water. To a considerable extent, their activism would influence the promulgation of laws that advance the right to water. The fiscus will then be forced to finance and ensure that water quality and quantity requirements are met. By doing so, when every stakeholder is involved, Zimbabwe is better able to promote and observe the right to water thoroughly.

- **Clarity of accessibility, acceptability, and affordability**

The law must ensure that issues around ‘accessibility, affordability, and acceptability’ of water services and facilities are spelt out in programs that are meant to address the water situation in the country. The Constitution may need a review to ensure that the right to water spelt out in section 77 also covers juristic persons. The Water Act must specify what constitutes sufficiency of water supplies, the safety of potable water, affordability of potable water, and the minimum distance to be travelled for one to access potable water.<sup>572</sup> Gender-sensitive water facilities must

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<sup>572</sup> Rwambiwa (n 11 above) 17.

be introduced in areas that are prone to water cuts and shortages. The law must be sensitive to economically deprived areas and, like South Africa, set minimum free water deliveries to households of such neighbourhoods. The law must ensure that the government takes further steps towards realising the need for potable water. Moreover, it must ensure that arbitrary water disconnections on account of failing to pay the rates are abolished. The Water Act must provide transparent, and fair legal procedures, grounds, limitations and processes for water disconnections.

- **Devolution made tangible**

The law must enjoin the government to fund programs that address the needs of every citizen in order to redress injustices that characterise differentiated developments within the city centres and rural areas. Public-Private Partnerships (PPPs) to ensure adequate water resources, especially for the poor, are recommended. Devolution programs must be practical and not just exist on paper or be a far-fetched idea that will only be realised by 2030. A harmonised and coordinated approach is required from national, provincial, and local authorities to properly operate water rights. Through devolution, any chaos that destabilised the right to water should be corrected especially on the new land settlements. The government ought to ensure that new settlements have access to safe drinking water facilities and sanitation.

Deliberate and conscious action by the government to invest in the equitable realisation of the right to water is needed. Such investments must be enforceable through specific and mandatory legal provisions. Adequate funding should result in the replacement of ageing infrastructure throughout the water resources systems, including storage facilities, treatment works, pumps, and pipes. Water wastage through leakages needs to be expunged. Maintenance and overhauls of rural water supply systems must be prioritised. Village water committees need to be put in place. The argument of progressive realisation needs not to be a position of excuse from funding infrastructure development, rehabilitation of water sources, and cleaning of polluted reservoirs. It is a serious call to invest sufficient resources towards the realisation of the right. There is a need to finance community education campaigns on water rights, governance, and development.

#### **5.4 Areas for future study**

This thesis recommends that since the right to water is expansive and could not be wholesomely addressed in the thesis, future study areas could include but not to be limited to:

1. A study of the right to water from the perspective of marginalised groups, including women, children, the disabled, and the poor. These are groups that are generally excluded from accessing their human rights, and it would be imperative to investigate the extent to which the law protects their water rights.
2. A comparative evaluation of the efficacy of establishing a water court. The academia could benefit from an extensive comparative basis and progressive discourse could be birthed.

#### **5.5 Conclusion**

This concluding chapter provided the thesis findings, conclusions, and recommendations. Reforms appropriate to guarantee the human right to water were expansively proffered. Areas for further study were proposed given the enormity of legal and socio-legal issues surrounding the human right to water.

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