

Water Security and the Right to Water in Southern Africa: An Overview

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Abstract

The Southern African region's water-related problems are quite diverse. From the struggles of indigenous communities in Botswana to the cholera outbreaks in Zimbabwe; from the difficulties of poor communities in accessing basic water services to the disputes between municipal councils and individual well-to-do water users, it is abundantly evident that water security is a goal/vision that needs to be pursued by governments. Yet, much of the holistic scholarly focus on water security within the region has been on transboundary water management, to the exclusion of local/national water constitutional frameworks. Through four cases from Botswana, South Africa, Zambia and Zimbabwe the paper addresses selected aspects of the varied water issues, in particular the constitutional right to water and how that impacts on water security within the region. The literature and case law reviewed in the paper indicate that while there are benefits to constitutionalising the right to water as a fundamental right, courts are still able to read the right to water into existing rights, especially the right to life. However, reading in has its own limitations, including that courts sometimes leave hanging/unpronounced government duties/responsibilities where the right to water is not provided for. Accordingly, the paper attempts to show that while the right to water could be read into other existing rights like the right to life, water security could be better achieved through an independent constitutional human right to water, which creates constitutional duties on the state.

Keywords

Water security; human right to water; *Mazibuko* case; *Mosethanyane* case; *Nyasulu* case; *Strümpher* case; *Mushoriwa* case

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1 Introduction

The Southern African region's water-related problems are quite diverse. From the struggles of indigenous communities in Botswana to the cholera outbreaks in Zimbabwe; from the difficulties of poor communities in accessing basic water services to the disputes between municipal councils and individual well-to-do water users, it is abundantly evident that water security is a goal/vision that needs to be pursued by governments. Much of the holistic scholarly focus on water security within the region has been on transboundary water management, to the exclusion of local/national water constitutional frameworks.¹ This paper addresses selected aspects of the varied water issues, in particular the constitutional right to water and how that could impact on water security within the region. To date, no study has sought to analyse the worth of constitutionalising the right to water in southern Africa and the extent to which this could improve water security.

Structurally, the paper starts by providing a brief contextual overview of water security, which is discussed narrowly to include issues of access to water and the quality, sustainability and management of water resources. Thereafter a discussion of the human right to water and why it could be important to constitutionalise the right follows. The paper argues that while the right to water could be read into other existing rights, water security could be better achieved through providing an independent constitutional human right to water, which creates constitutional duties on the state. Two cases, one each from Botswana and Zambia, will be used to demonstrate how the right to water was read into other rights, and how the courts failed to elaborate on state duties in relation to the obligation to facilitate the right to water. Similarly, two cases from South Africa and Zimbabwe will be used to demonstrate how an independent constitutional human right to water was used by courts to explicitly elaborate on the nature and extent of state duties in relation to facilitating the right to water.

A few caveats to note: while the focus of the paper is broadly southern African, the paper's analysis is limited to four English-speaking countries that represent those countries with the constitutional right to water and those that do not: South Africa, Zimbabwe, Zambia and Botswana. The analysis is also limited to the constitutional protection or non-protection of the human

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¹ The biggest challenges related to water security are felt at the local level, as opposed to the transboundary. Funder *et al* 2012 *Water Alternatives* 21.

right to water and how courts interpret it. For purposes of convenience, the article uses the terms the human right to water and the right to water interchangeably.

2 Water security and the right to water

2.1 Introduction

The objective of this section is not to proffer any new meanings for the concepts of water security and the constitutional right to water. Rather, some common aspects of water security will be identified and an argument will be made for why constitutional water rights could provide better prospects for water security. In doing so, the section addresses the following broad questions: How do water security and the constitutional right to water relate? Can there be water security without a constitutional right to water?

2.2 Some aspects of water security

Water security has been the subject of various scholarly discussions.² The result is that a universally accepted definition is unlikely to emerge.³ However, there are a few common denominators that can be identified. First, water security relates to access to water for human needs like drinking and livelihood in acceptable quality and quantity.⁴ Striving for water security involves the provision of sufficient water that meets basic standards for human health and well-being.⁵ Adequacy in this case relates to water that is fit for human consumption and necessary to promote human dignity, life and health.⁶ The access issue includes the means to get water and the cost of getting the water.⁷ Statistically, the poor are more likely to suffer from access issues, which could then result in water insecurity.⁸ However, this

² See for instance Cook and Bakker 2012 *Global Environmental Change* 94; UN-Water 2013 <http://www.unwater.org/topics/water-security/en/>; Van Beek and Arriens *Water Security* 12; Grey and Sadoff 2007 *Water Policy* 548; Gerlak and Mukhtarov 2015 *Int'l Environ Agreem – Pol L Econ*; also Witter and Whiteford 1999 *Int'l Rev Comp Pub Pol'y* 2.

³ Cook and Bakker 2012 *Global Environmental Change* 94.

⁴ See Van Beek and Arriens *Water Security* 12; Grey and Sadoff 2007 *Water Policy* 548; Wouters, Vinogradov and Magsig 2009 *Yb Int'l Env L* 106.

⁵ Savenije and Aan der Zaag 2008 *Phys Chem Earth* 295; May and Daly *Global Environmental Constitutionalism* 177.

⁶ *CESCR General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003) para 11. Also see Gleick who argues that 50 l per day per person is sufficient for survival. Gleick 1999 *Water Policy*.

⁷ *CESCR General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003) para 12(c).

⁸ UN-Water *Water Security* 13.

does not mean that water is or should be entirely free for all. On the contrary, water users are usually expected to contribute economically so that access is guaranteed.⁹ In circumstances where people are unable to pay, Gleick is of the opinion that states must facilitate the provision of basic needs for its citizens.¹⁰

The human nexus to water security also includes water quality. Water must be free from pollutants, clean and safe for consumption.¹¹ Unfortunately, UNESCO statistics show that close to 800 million people do not have access to safe drinking water while 85% of industrial waste in developing countries is dumped untreated into water systems (which means that there is a likelihood of water pollution especially in places where governance is weak).¹² Zimbabwe's 2008-9 Cholera outbreak and its spread is perhaps the telling example of people suffering because of the lack of clean water. If water is not safe, no matter how plentiful it is in terms of accessibility, security is not achieved.¹³

Water security cannot be achieved without sustainability as a core principle which informs the use and protection of water: there should be "sustainable development thinking to water resources with the focus on the quantity and quality of water supply for societal and ecological needs".¹⁴ As Cook and

⁹ Lugaresi "Right to Water" 343; UN-Water 2014 http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf 7.

¹⁰ Gleick 1999 *Water Policy* 10.

¹¹ UN-Water *Water Security* 2. The available water must be fit for ordinary use, which includes drinking, sanitation, the washing of clothes and other domestic uses. See *CESCR General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003) para 12 (a); UN-Water 2014 http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf 2.

¹² *UNESCO International Hydrological Programme (IHP) Eighth Phase: "Water Security: Responses to Local, Regional, and Global Challenges" - Strategic Plan IHP-VIII (2014-2021)* UN Doc IHP/2012/IHP-VIII/1Rev (2012) 10. See for instance a study by the NGO Bread for All which found that a corporation involved in mineral production had caused serious water pollution which was visible to the naked eye in the Luilu River of the Democratic Republic of Congo. Peyer and Mercier *Glencore in the Democratic Republic of Congo* 23. This creates more problems because the cleaning up of such water for it to become fit for human consumption would require expensive waste water treatments (Global Water Partnership *Increasing Water Security* 5).

¹³ See Van Beek and Arriens *Water Security* 12, where it is stated that water security is about the "too little", "too much" and "too dirty" issues of water management.

¹⁴ Gerlak and Mukhtarov 2015 *Int'l Environ Agreem – Pol L Econ*. Also see Witter and Witter and Whiteford 1999 *Int'l Rev Comp Pub Pol'y* 2, as quoted in Gerlak and Mukhtarov 2015 *Int'l Environ Agreem – Pol L Econ*, where water security is viewed as a "condition where there is a sufficient quantity of water at a quality necessary, at an affordable price, to meet both the short-term and long-term needs to protect the health, safety, welfare and productive capacity of position (households, communities, neighbor-hoods [sic] or nation)"; Van Beek and Arriens *Water Security* 12.

Bakker argue, "water availability; human vulnerability to hazards; human needs (development related, with an emphasis on food security); and sustainability"¹⁵ are the four interrelated and overlapping themes that dominate current research on water security. Thus, because water is life,¹⁶ it is incumbent on those in positions of authority to be guided, always, by sustainability principles.

Lastly, water security requires the existence of an authority responsible for the day-to-day and long-term management and provision of the water. As May and Daly have aptly put it: "water requires management in a way that air and soil do not".¹⁷ The UNCESCR notes that the state must respect the right to water.¹⁸ Any unjustified and arbitrary disconnections to water are a violation of this right, since the state's duty is that of non-interference (directly or indirectly) in the enjoyment of the right.¹⁹ The state must further protect the right to water.²⁰ By doing so, the state is simultaneously facilitating water security for both the present and the future generations. The state is also required to fulfil the right to water.²¹ To do so, states must take positive steps (like promulgating sufficient legislation and facilitating good governance of water as a resource) within their available means to ensure that the right to water is realised.²² All these obligations require a strong legal framework.²³

2.3 The human right to water

The major human rights conventions, the *United Nations Declaration on Human Rights*,²⁴ the *International Covenant on Civil and Political Rights*

¹⁵ Cook and Bakker 2012 *Global Environmental Change* 97. Also see Pejan, Du Toit and Pollard "Using Progressive Realisation" 309. This paper does not include issues of human vulnerability to water-related hazards like flooding, as these are not as common problems to the region as are issues of droughts, which affect access and availability of water.

¹⁶ Lugaresi "Right to Water" 333.

¹⁷ May and Daly *Global Environmental Constitutionalism* 177.

¹⁸ CESCR *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003) para 20. Also see Lugaresi "Right to Water" 341; Derman and Hellum 2007 *Land Use Policy* 666.

¹⁹ See the comments below on judicial interpretation within the context of transnationality.

²⁰ CESCR *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003) para 22.

²¹ CESCR *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003) para 25-26.

²² This is in line with the principle of the progressive realisation of rights.

²³ See May and Daly 2 *Global Environmental Constitutionalism* 178, who note that water's regulation is interlaced in statutory and constitutional arenas.

²⁴ *United Nations Declaration on Human Rights* (1948).

(ICCPR);²⁵ and the *International Covenant on Economic Social and Cultural Rights* (ICESCR)²⁶ do not expressly provide for the right to water.²⁷ However, the *United Nations Committee on Economic, Social and Cultural Rights* (UNCESCR)²⁸ declared that the right to water can be read into articles 11 and 12 of the ICESCR. Furthermore, the United Nations General Assembly took a major step in affirming the right to water in 2010 when it recognised "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".²⁹ Evidently, this recent high-level recognition of the right to water has put water squarely back on the global governance agenda. How then should the right to water be handled/addressed within states? Does the right to water need to be constitutionalised or not?³⁰

As a starting point, constitutions are generally known to represent the highest form of law within a country, meaning that they supersede ordinary laws.³¹ On the other hand, rights are "typically held by individuals against the state", meaning that they create direct obligations for the state towards individuals.³² By implication, when rights are codified in a constitution they represent a strong counter measure to both state and private violation of such rights. Put differently, citizens are able to directly rely on constitutional provisions to claim redress when violations occur, which could be difficult to do when there is no explicit right or when there are no relevant state policies. As May and Daly argue, "while a constitutional right to water will not always

²⁵ *International Covenant on Civil and Political Rights* (1967).

²⁶ *International Covenant on Economic Social and Cultural Rights* (1967).

²⁷ The right to water is included in other treaties, however, as in art 14 para 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and also art 24 para 2 of the *Convention on the Rights of the Child* (1989). The fact that this right is mentioned only in conventions that apply to specific groups of people as opposed to all human beings could be used to criticise the worth of such provisions of the right.

²⁸ *CESCR General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (2003).

²⁹ *The Human Right to Water and Sanitation* GA Res 64/292, UN Doc A/RES/64/292 (2010).

³⁰ For a general critique of the content and limitations of the human right to water see Morinville and Rodina 2013 *Geoforum* 152.

³¹ Peters 2006 *LJIL* 584. This is why, unlike any other laws, written Constitutions normally require special procedures for modifications (countries like the UK are an exception).

³² Hayward 2000 *Political Studies* 560. Boyd *Environmental Rights Revolution* 8. Miller *Environmental Rights* 5. For Takacs, the meaning of rights is slippery (he distinguishes between rights, "rights" and *rights*; but he notes that "rights" have to do with "privileges that may be temporary or fungible" and that rights are fundamental guarantees). Takacs 2008 *NYU Envtl LJ* 721-722. Also see Nickel 1993 *Yale J Int'l L* 282-283, who cautions against the extreme use of the language of rights, which might lead to rigidity when used strictly, or metaphorical and rhetorical when used loosely.

prevent violence, it may galvanize and inform public debate, shape legal rights and responsibilities, and put the onus on government to ensure adequate access to clean water for all".³³ Further, the Constitutional Court of South Africa noted in *Mazibuko v City of Johannesburg*³⁴ (*Mazibuko case*) that the constitutional entrenchment and protection of water rights in South Africa stems from the fact that water is life.³⁵ Specifically, and within the context of former colonial developing states, constitutionalising water rights could thus be a powerful tool for transforming past injustices/addressing colonial legacies.³⁶

However, where states do not provide for the right to water, such rights could be read into existing rights like the right to life or the right to a healthy environment.³⁷ An example of the reading in of water rights within other existing human rights can be found in *Matsipane Mosetlhanyane v The Attorney General*³⁸ (*Mosetlhanyane case*), which was decided by the Botswana Appeal Court. In this case, the court found in part that "a value judgment" would dictate that the government's refusal to allow the Bushmen resident in the Central Kalahari Game Reserve to use the boreholes in the Reserve at their own cost amounted to degrading treatment as espoused in section 7(1) of the *Constitution of Botswana, 1966*.³⁹ Within the context of this reasoning, one could then argue that polluted water systems that disturb the drinking water of citizens violate the right to a healthy environment, the right to health or even the right to life itself.

Lugaresi argues that the right to water is not "rigidly autonomous" from other social rights. He argues that compartmentalization of the right could stifle the pursuit of comprehensive social justice.⁴⁰ The potential difficulty with assuming that the right to water is implicit in human rights is that the reading

³³ May and Daly *Global Environmental Constitutionalism* 177.

³⁴ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (the *Mazibuko case*).

³⁵ *Mazibuko case* para 1.

³⁶ *Mazibuko case* para 59.

³⁷ Lugaresi "Right to Water" 346. In particular and while discussing environmental rights, May and Daly argue that where environmental rights are read into existing constitutional human rights, the term of art is "derivative rights". May and Daly *Global Environmental Constitutionalism* 118. This applies when the right to water is read into other rights. In other words, the advancement of the right to water, as a derivative right, through reading in, would then amount to the judge's "seeking to expand the purview of existing rights relating to citizens and their natural surroundings". See Gellers' discussion of environmental rights. Gellers 2012 *Rev Policy Res* 530.

³⁸ *Mosetlhanyane v Attorney General of Botswana* (Court of Appeal) Civil Appeal No CACLB-074-10 of 27 January 2011 (*Mosetlhanyane case*).

³⁹ *Mosetlhanyane case* para 22

⁴⁰ Lugaresi "Right to Water" 346.

in of such rights is not always a certainty/guarantee.⁴¹ For instance, there could be difficulties in having the superior courts adjudicate and bring finality to issues, as was the case *Mosethanyane*. The case had initially been dismissed in the High Court, and the case went on appeal only after some donor funding was made available to the applicants.⁴² In instances where the means to take cases on appeal are unavailable, it could be difficult to have superior courts read the right to water into existing rights. For this reason, it should be reasonable to expect that an explicitly articulated right offers better protection than one assumed to be implicit in other rights. It could also be easier to balance rights that are on an equal footing. For example, when the right to development is constitutionalised and the right to water is not, it could be harder (if not impossible) to challenge developmental projects on the grounds that they are detrimental to the realization of water rights.⁴³ Ideally, other rights such as the right to dignity or equality should not enjoy better protection than the right to water, when the capacity to exercise all of these rights derives from one's being able to survive through having access to water.⁴⁴

2.4 The relationship between water security and the right to water

It should be evident at this point that the recognition of the right to water is a necessity for any state, developed or developing. However, as Lugaresi argues, the right to water in developing countries and the right to water in developed countries are not the same right: "In Botswana, the stakes are high: dignity, health, and, in the end, survival. In Italy the stakes are much lower: management and cost allocation of water services."⁴⁵ This inevitably affects water security. If water security has to do with issues of access to water, sufficient/adequate water, sustainability and water governance, then there is a direct relationship between water security and the right to water. The South African Constitution, for example, provides for everyone's right to have *access to sufficient* water. This access is facilitated by government departments and authorities, which invariably brings in the political

⁴¹ Arguably, the entrenchment of water rights does not imply that the rights are justiciable and will translate into direct water security, while the non-provision of such rights in constitutions does not imply that states will not facilitate access to water for citizens. In other words, it is a question of the effectiveness of the laws in place, not of whether they are constitutionalised or not. Boyd *Environmental Rights Revolution* 9; Gellers *Global Norms and Green Constitutions* 4.

⁴² Paterson "Endless Struggle of Indigenous Peoples" 368.

⁴³ Particularly in countries that have weak regulation.

⁴⁴ If water is an inherent right which ensures life itself, should it not deserve a place in constitutions which are known to represent the highest forms of law in some countries?

⁴⁵ Lugaresi "Right to Water" 338.

spectrum.⁴⁶ It is for this reason that constitutionalising water law could afford people the right to challenge decisions in relation to water, on the basis that such rights are constitutionally protected.⁴⁷

Arguably, constitutionalising the right to water will not necessarily guarantee that water security will be achieved, but 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. Ultimately, the continuous pursuit of water security will always be context specific, taking into account peculiar country and region specificities.⁴⁸

3 The human right to water, judicial pronouncements and related challenges in Southern Africa: a brief overview

3.1 Introduction

As a result of water's being central to the survival of human beings, it has inevitably become a source of conflict and tension in many societies.⁴⁹ Within the context of the region, some of the problems within countries amplify these tensions: "Southern Africa's states internally are politically divided, socially unequal, economically undiversified, and environmentally degraded. Social and physical water scarcity deepens these conditions".⁵⁰ Such tensions play out on different levels. They can be on a community level between competing users whose use of water comes through shared water outlets like a borehole, well or central tap; they could be between community users and responsible authorities; they could be between those with means (individuals and businesses) and city councils; and the conflict between all of these could play out in court. In view of this, the purpose of this section is to demonstrate how some countries' judiciaries vindicate the right to water where it is explicitly provided as a fundamental right, as well as how judiciaries in countries without explicit water rights read them into existing rights.⁵¹ The purpose of this will be to demonstrate some of the

⁴⁶ See May and Daly *Global Environmental Constitutionalism* 184, who note that water is capable of being exploited or abused and that it has political significance.

⁴⁷ Rodina 2016 *Geoforum* 59. If constitutionalism is a way of ensuring that government power is defined and controlled, and that sovereignty is guaranteed; and if constitutionalism spells out duties and obligations, by implication rights guaranteed in a constitution could benefit from such direct constitutional protection.

⁴⁸ Morinville and Rodina 2013 *Geoforum* 152.

⁴⁹ May and Daly *Global Environmental Constitutionalism* 175.

⁵⁰ Swatuk 2008 *Water Alternatives* 44.

⁵¹ It is noted in the literature that the innovative interpretation of environmental rights in the Indian courts led to the courts of other states like Argentina adopting such interpretations in their own environmental rights cases. See Yang and Percival 2009

challenges that are inherent in the region and which could/do impact on water security.⁵²

3.2 *Botswana*

The *Constitution of Botswana*, 1966 does not provide for the right to water. However, Botswana has been hailed as a success story in that despite the country's being partly surrounded by the Kalahari Desert and one of the most arid places on earth, the bulk of Botswana's population has access to safe water.⁵³ Research has shown that Botswana has consistently ranked second on the African continent in maintaining water coverage levels for its people.⁵⁴ However, as has been noted earlier, water security is not achieved when the vulnerable, poor and marginal members of the populace have difficulty in accessing water. The plight of the people living in the Central Kalahari Game Reserve epitomises some of the difficulties in connection with access to water.

The residents of the Central Kalahari Game Reserve are the San, also commonly known as the Bushmen. Historically a hunter-gatherer community of people, they were subject to displacements and also at the mercy of cattle herders who drilled boreholes in their living spaces.⁵⁵ While the government of Botswana had initially reserved the Central Kalahari as a conservation area with the dual purpose of protecting wildlife resources as well as reserving enough land for traditional livelihoods (the government provided services which included a borehole for the people), the government later, in 1986, changed the designation of the area to conservation status only.⁵⁶ Residence in the Central Kalahari Game Reserve was discouraged and people were required to move to service centres (between 1986 and 1997) where services could be provided for

Ecology LQ 627. For water security, judicial interpretation could provide more normative content to the human right to water.

⁵² While the state plays a vital role in facilitating water security through law and governance, the judiciary plays a different role that includes interpreting such laws. It is generally accepted that norms and rules acquire a wide and more acceptable meaning if they are the subject of interpretation and use by different courts within different jurisdictions (the overlap between different dispute resolution forums). See Kotzé and Du Plessis 2010 *J Ct Innovation* 168.

⁵³ Sjöstedt 2011 *Habitat International* 134.

⁵⁴ Sjöstedt 2011 *Habitat International* 134.

⁵⁵ Morinville and Rodina 2013 *Geoforum* 153; Winters 2014 *Consilience* 288.

⁵⁶ One of the reasons for this change in policy was the difficulty of providing water to remote areas and the incompatibility of wildlife and people staying together in the same place.

them.⁵⁷ To effect the relocation of the people the government sealed some boreholes, which effectively made living within the said spaces untenable. The people were not allowed to drill their own boreholes, neither could they use those boreholes maintained by mining companies.⁵⁸ A subsequent case before the High Court⁵⁹ ruled that the forced relocation of the San and the Bakgalagadi was unlawful and that their land and subsistence hunting rights should be restored. The court, however, did not find against the state in relation to the discontinuance of services like the sealing of boreholes. The court actually found that the state was not obliged to restore the services. Thus, while they had been allowed to return to their ancestral lands, such a return without access to water was constructively inhibited.⁶⁰ This prompted the *Mosetlhanyane* appeal referred to earlier.

The *Mosetlhanyane* case is peculiar in that it linked the right to water to the forced relocation of people, when the Constitution of the country does not have a substantive human right to water. The case was an appeal against the High Court decision that granted the San (the lawful occupiers of the lands in question) access to their lands but held that the government had no obligation to facilitate the people's access to water. It took ten years to have those allowed to stay in the CKGR to have access to water, at their own expense.⁶¹ It is quite remarkable that the court, while acknowledging that the sealing of the borehole by the state constituted degrading treatment⁶² (because of the struggles the people then had to suffer), found that the indigenous people had to foot the expenses for the borehole. Commentators have argued that even though the case ensured that the appellants could get access to water, the judgment missed an opportunity to refine a grey area in that it did not elaborate on the obligations of the government to facilitate access to water.⁶³

⁵⁷ Hitchcock, Sapignoli and Babchuk 2011 *IJHR* 68; Morinville and Rodina 2013 *Geoforum* 153.

⁵⁸ Morinville and Rodina 2013 *Geoforum* 153.

⁵⁹ *Sesana v The Attorney-General* 2002 1 BLR 452 (HC).

⁶⁰ The irony in this was that the government allowed mining companies to use water services within the same reserve as that in which the San were being denied. This was apparently based on the notion that a water use right was required to use water, which water use right had not been extended to the natives of the area. See generally Winters 2014 *Consilience* 293.

⁶¹ *Mosetlhanyane* case para 18.

⁶² *Mosetlhanyane* case para 22.

⁶³ Morinville and Rodina 2013 *Geoforum* 156; Dinokopila 2011 *AHRLJ* 294. It has even been argued that socio-economic rights in Botswana might not be justiciable. See Dinokopila 2011 *AHRLJ* 290.

3.3 Zambia

The Zambian High Court had the occasion to adjudicate on a water pollution case, *Nyasulu v Konkola Copper Mines Plc*⁶⁴ (*Nyasulu case*). In this case, 2000 residents of a town, Chingola, relied on a stream as their source of water. They suffered as a result of the pollution of the (drinking) water by a mining company through the discharge of effluents into the stream after a pipe operated by the mine burst.⁶⁵ The facts indicate that the plaintiffs' water was cut off in November 2006 for ten days. Before this, the water was foul smelling and would produce bubbles when boiled (the bubbles did not go away even after the water was cooled).⁶⁶ The fish in the stream were dying and the rocks around the area covered by water were changing colour as a result of the oxides in the water. The families who drank the water suffered from diarrhoea and stomach cramps and some developed skin diseases. Even when they went to the clinic the stomach pains continued, and many were not given medical reports, apparently because the clinic personnel told them they could be dismissed for doing so.⁶⁷ The third respondent (the Chingola Municipal Council) did not inform the people of the reason as to why the water had been cut, and the people resorted to drinking borehole water.

On the 6th of November 2006, when the water was cut, what was found by the environmental management authority was that the water was highly acidic and had a bluish to greenish colour, that the fish in the stream were dying, and that people were eating the fish. The mining company was found to have violated the *Environmental Protection and Pollution Act*,⁶⁸ which outlaws the discharge of effluents into an "aquatic environment in contravention of the water pollution control standards established by the council".⁶⁹ In making this finding against the mine, the court found that "[t]here was gross recklessness, whether human beings died or not. They deprived the community in Chingola the right to life, which is fundamental right in our constitution". The court further found that: "I agree with the plaintiffs' pleadings in paragraph eight of the statement of claim, that the first defendant was shielded from criminal prosecution by political connections and financial influence, which put them beyond the pale of criminal justice."

⁶⁴ *Nyasulu v Konkola Copper Mines Plc* [2011] ZMHC 86 (*Nyasulu case*).

⁶⁵ *Nyasulu case 2*.

⁶⁶ *Nyasulu case 4*.

⁶⁷ *Nyasulu case 5*.

⁶⁸ *Environmental Protection and Pollution Act*, Ch 204.

⁶⁹ Section 2 of the *Environmental Protection and Pollution Act*, Ch 204.

The Supreme Court of Zambia subsequently upheld the judgment of the High Court.

The court in this case acknowledged that water has to be of a quality that is suitable for human consumption. A reliance was also placed on the Zambian constitution's provision on the right to life, confirming that courts are willing to read into existing rights the right to water that is of a suitable quality to sustain human life. Arguably, while 99% of the total urban Zambian population has water services provided to them through commercial utilities,⁷⁰ the same cannot be said for rural communities, some of which rely on surface or stream water (as did some of the plaintiffs in the *Nyasulu* case). Some have to travel distances to access such water, particularly in dry seasons. Funder *et al* provide an illustration of the dire situation that poor communities have to endure as against those with means. Their study on the competing claims in a rural Zambian village, Muchila, demonstrates that in some cases the granting of access to borehole water for cattle is considered much more important than the human needs to such water.⁷¹ The result is that some poor families resort to using wetland and shallow-dug-out water for their subsistence.⁷²

In Zambia, most water services are run by private commercial utilities. They are governed by private company law rather than public law or statutes.⁷³ In his analysis of water sector reforms in Zambia, Chitonga notes that there has been a reluctance to extend water services to poor communities in low-income areas by these commercial utilities.⁷⁴ The main reason for this, Chitonga argues, is that the profits to be realised from extending services to such areas are meagre, the risks of vandalism high, and the usage low.⁷⁵ One could also argue that without a constitutional provision guaranteeing citizens the human right to water, the government does not have a direct obligation to facilitate access to water. Even in the knowledge of this state of affairs, Zambia has not included the right to water in its recent constitutional reform. Zambia's president signed the country's new constitution on 5 January 2016. A draft⁷⁶ contained a provision for the right to water, stating that "[a] person has the right ... to clean and safe water",⁷⁷

⁷⁰ Chitonge 2011 *Water Alternatives* 7.

⁷¹ Funder *et al* 2012 *Water Alternatives* 30.

⁷² Funder *et al* 2012 *Water Alternatives* 31.

⁷³ Chitonge 2011 *Water Alternatives* 3.

⁷⁴ Chitonge 2011 *Water Alternatives* 16.

⁷⁵ Chitonge 2011 *Water Alternatives* 16.

⁷⁶ The Zambian 2016 <http://thezambian.com/wp-content/uploads/2016/01/Zambian-Constitution.pdf>.

⁷⁷ See s 52(1)(d) of the draft *Constitution*.

but the new constitution does not contain this provision, despite estimates showing that 42% of the population does not have access to clean water.⁷⁸

3.4 South Africa

South Africa was one of the first countries in Southern Africa to constitutionally provide for the human right to water. Section 27 of the *Constitution of the Republic of South Africa*, 1996 provides that:

27(1) Everyone has the right to have access to –

...

(b) sufficient food and water; and

...

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights....

Despite this provision, South Africa struggles when it comes to water provision for a number of reasons. For Couzens, "grinding poverty, underdevelopment, governmental inefficiency, poor service delivery to the poor, and harsh environmental conditions – including gross environmental insecurity in respect of water and access to water"⁷⁹ are but some of the evident problems that have a direct effect on water provision and security. Rapid population growth and more demands from a growing urbanised population have resulted in pressures on the country's water systems.⁸⁰ Further, some industries have contributed to mineral pollution, particularly the mining industry, where acid mine drainage has created a lasting negative legacy.⁸¹ One needs to look no further than the famous water judgement, *Mazibuko v City of Johannesburg*,⁸² to grasp the fact that the provision of water in South Africa is a national problem that straddles rich

⁷⁸ Sjöstedt 2011 *Habitat International* 134.

⁷⁹ Couzens 2015 *PELJ* 1181.

⁸⁰ Kotzé 2010 *JHRE* 140.

⁸¹ See generally McCarthy 2011 *S Afr J Sci* and Expert Team of the Inter-Ministerial Committee *Mine Water Management*.

⁸² *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC). This was a class action initiated to challenge the amounts of water that the City of Johannesburg had allocated and the prepaid water meters it had set up for residents in Phiri, a township under the Johannesburg City Council. The Constitutional Court found that the decision to tax the extra amounts of water used after the free allocation had been exhausted and the installation of prepaid water meters were constitutional, as they did not violate the right to water as provided for in the Constitution.

and poor and crosses all racial boundaries.⁸³ For instance, one study by Rodina in Khayelitsha Township, a partially informal settlement in Cape Town, reveals that the material living conditions of those in cities and those in townships where communally owned water systems are prevalent are quite different. Rodina demonstrates that some people characterise the communal taps as being like drinking basins for cattle.⁸⁴

However, South Africa allows people to challenge government decisions related to the provision of water based on a fundamental right to water. A case in point is *City of Cape Town v Strümpher*⁸⁵ (*Strümpher case*). The respondent, Strümpher, had successfully been granted relief by the Magistrates' Court and also by the Western Cape High Court. The applicant, the City of Cape Town, had been ordered to restore water connections which it had summarily disconnected pursuant to its by-laws and debt collection laws. The applicant argued that it was providing water in terms of a contractual arrangement. The effect was that if the other party breached, it had the right to unilaterally cut off the water supplies with the result that a *mandamant van spolie* was not available to the respondent. The applicant's reason for disconnecting the water supply was that the respondent was in arrears of service fees, even though there was a dispute in relation to how the rates were calculated. The City further argued that it had the power to cut off supply of water even if there was a dispute.⁸⁶ In delivering its judgment, the Supreme Court of Appeal noted that the City had a "constitutional and statutory obligation to supply water to users"⁸⁷ and that the rights of the respondent were not merely personal rights but were underpinned by constitutional and statutory provisions. The court then equated the respondent's use of water to "an incident of possession of property" and the City's interference was "akin to deprivation of possession of property" which in the case warranted a *mandamant van spolie*.⁸⁸ The case demonstrates that the right to water is indeed justiciable, yet for the poor, those in rural places and those in informal settlement, access is not directly guaranteed and the means to enforce their constitutional right to water is hampered by a lack of money.

⁸³ The case demonstrated that the poor struggle to pay the rates for water use, while the rich have unlimited access. However, there is a realisation that a certain minimum is required for human survival, and this culminated in the Free Basic Water Policy.

⁸⁴ Rodina 2016 *Geoforum* 62. See the discussion above, where domesticated animals in one Zambian village were given priority over people.

⁸⁵ *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA) (*Strümpher case*).

⁸⁶ *Strümpher case* para 4.

⁸⁷ *Strümpher case* para 9.

⁸⁸ *Strümpher case* para 19.

3.5 Zimbabwe

As with South Africa, Zimbabwe has its own water problems, which impact on economic and health issues.⁸⁹ The situation is so bad that the government is mulling commercialising and privatising water services.⁹⁰ Idemudia, Williams and Wyatt undertook an empirical study of Zimbabweans in Polokwane and their results showed that a lack of basic resources like water and food was one of the biggest reasons why they had migrated to South Africa.⁹¹ Zimbabwe experienced one of the worst cholera crises in its history during the period 2008-2009. Poor management, infrastructure that has not been updated since independence, and the lack of funds for the purification of water caused the deaths of thousands of people⁹² and led to the disease spreading across the borders to South Africa, Zambia and Malawi.⁹³ Such migrations (coupled with other push factors) have led in South Africa to violence against foreigners (which violence has at times been described as strategic).⁹⁴

Zimbabwe adopted a new Constitution in 2013, which included water rights for the first time in the country's history. Section 77 of the *Constitution of Zimbabwe*⁹⁵ states:

- 77 Every person has the right to—
- a. safe, clean and potable water; and

⁸⁹ Idemudia, Williams and Wyatt 2013 *J Inj Violence Res* 21.

⁹⁰ The public body that was created to facilitate water access has been largely ineffective. See Ncube 2016 <http://www.newzimbabwe.com/opinion-27405-Ncube+the+tragedy+of+water+delivery+in+Zim/opinion.aspx>.

⁹¹ See Idemudia, Williams and Wyatt 2013 *J Inj Violence Res* 21. After the chaotic land redistribution program there was an increase in migration to South Africa and other southern African states because of the collapse of the economy. Recently, Zimbabwe has been facing some of the worst power cuts in the region as a result of issues related to the lower levels of water in the Kariba Dam. As a result, Zimbabwe is importing electricity from South Africa's Eskom (a power utility company). See ANA 2016 http://www.engineeringnews.co.za/article/eskom-in-secretive-deal-to-provide-power-to-zimbabwe-2016-01-04/rep_id:4136.

⁹² Fournier and Whittall 2009 *Humanitarian Exchange* 6. This crisis was caused among other reasons by the lack of access to clean water, burst and blocked sewage systems, and the uncollected refuse that overflowed into the streets.

⁹³ See generally Fournier and Whittall 2009 *Humanitarian Exchange* 4; Said *et al* 2011 *Water SA*; and Bateman 2009 *SAMJ*.

⁹⁴ "Strategic" here refers to an objective. It has been documented that some of the South Africans who have partook in xenophobic violence did so with the hope that it would force/persuade foreigners to leave the country. Idemudia, Williams and Wyatt 2013 *J Inj Violence Res* 17.

⁹⁵ *Constitution of Zimbabwe Amendment Act* 20 of 2013.

b. sufficient food; - and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.

There is no mention of "access" in this provision, yet there is a clear mandate that the state should progressively realise the right to water. There is also a requirement that the water be clean and potable, something not found in the South African provision. Despite all the woes mentioned earlier, jurisprudence relating to the right to water in Zimbabwe is scarce. The only case the author of this paper could find since the adoption of the new constitution is one for a spoliation order. The facts in *Mushoriwa v City of Harare*⁹⁶ (*Mushoriwa case*) were quite similar to those in *Strümpher*. The applicant, Mushoriwa, was seeking a final order to the effect that the City of Harare be interdicted from disconnecting water without a court order and that they restore the water supply. The City had sent the applicant a bill in relation to services rendered in the supply of water. The applicant disputed this and even attached proof to the effect that all bills had been paid on time.⁹⁷ The applicant then used its by-laws, which authorised unfettered discretion to disconnect water supplies to any citizen at will.⁹⁸ In reaching its judgment the High Court held that because the constitution of Zimbabwe considers the right to water a fundamental right, it would not be "in the public interest that a city council can deny its citizens water at will without recourse to the law and the courts".⁹⁹ The court then concluded by stating the following: "I take comfort in that the Supreme Court of South Africa in a related case of [*Strümpher*] came to the same conclusion on facts that are on all fours with this case".¹⁰⁰

4 Concluding remarks

The literature and case law reviewed in this paper indicate that while there are benefits to constitutionalising the right to water as a fundamental right, courts are still able to read the right to water into existing rights, especially the right to life. However, reading in has its own limitations, including that courts sometimes leave hanging/unpronounced government duties/responsibilities where the right to water is not provided for, as was the case in *Mosetlhanyane*. Further, where there is pollution that does not threaten human life, it could be difficult to rely on existing rights like the right to life. A concession was made that constitutionalising the right to water is not necessarily a guarantee that water security will be achieved. However,

⁹⁶ *Mushoriwa v City of Harare* HH 195-14/HC 4266/13 (*Mushoriwa case*) (a 2014 case).

⁹⁷ *Mushoriwa case 2*.

⁹⁸ *Mushoriwa case 3*.

⁹⁹ *Mushoriwa case 6*.

¹⁰⁰ *Mushoriwa case 7*.

it is evident that water security, so far as it relates to access and quality, is perhaps more certain for the well-to-do than it is for poorer communities. It is for such reasons that the constitutional right to water could be useful. The right could provide opportunities for the poor and vulnerable to challenge governmental actions and decisions in relation to water services. In other words, governments could be held accountable and responsibilities could be given to authorities based on constitutional rights. With terms like the progressive realisation of rights, there is the hope that some action, however minimal, could be asked of the state, and such actions could be measured judicially, as was the case in *Mazibuko*.

The case law reviewed also demonstrates the difficulties of water provision for both citizens and authorities.¹⁰¹ As with the San people in Botswana, the Chingola residents did not have the right to demand that the state facilitate the provision of water to them. Rural communities and indigenous peoples are at the receiving end of poor service delivery. Some of the literature reviewed demonstrates the issue of profits as indirectly hindering the provision of services to poorer communities. The example of communities in Zambia shows that water security for low-income communities is weak because of their localities and the difficulties inherent in realising profits from them. Yet the case law from the *Mushoriwa* and *Strümpher* cases demonstrates that if one has the means, it is possible to rely on the constitutional right to water in challenging municipal councils' decisions to cut off a water supply.

Recent studies have also shown that rural communities in the south will bear the brunt of climate change more than others.¹⁰² Further, recent world population estimates reveal that a large percentage of the population in the countries studied in this paper reside in rural areas: roughly 67% in Zimbabwe, 59% in Zambia, 38% in South Africa and 42% in Botswana.¹⁰³ A characteristic of rural places within most southern African countries is the open spaces that exist between households. The obvious challenge will be ensuring that there is access to water for such vastly populated groups of people. More studies should look to determining the extent to which the

¹⁰¹ South Africa leads the way with a national Free Basic Water Policy (even though the free limit is not enough for human needs) that recognises that everyone needs at least a certain amount of water for survival, which stems directly from the country's having a fundamental right to water. This did not exist during the apartheid era. Notably, none of the other countries discussed here has a similar policy.

¹⁰² Funder *et al* 2012 *Water Alternatives* 21.

¹⁰³ GEOHIVE 2015 http://www.geohive.com/earth/pop_urban.aspx.

state duty to facilitate access to water includes addressing the needs of rural communities and how the issue of funding such access could be addressed.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
ANA	African News Agency
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CKGR	Central Kalahari Game Reserve
Curr Opin Env Sust	Current Opinion in Environmental Sustainability
Ecology LQ	Ecology Law Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IJHR	International Journal of Human Rights
Int'l Environ Agreem – Pol L Econ	International Environmental Agreements: Politics, Law and Economics
Int'l Rev Comp Pub Pol'y	International Review of Comparative Public Policy
J Ct Innovation	Journal of Court Innovation
J Inj Violence Res	Journal of Injury and Violence Research
JHRE	Journal of Human Rights and the Environment
JSAS	Journal of Southern African Studies
LJIL	Leiden Journal of International Law
PELJ	Potchefstroom Electronic Law Journal

NYU Envtl LJ	New York University Environmental Law Journal
Phys Chem Earth	Physics and Chemistry of the Earth
Rev Policy Res	Review of Policy Research
SADC	Southern African Development Community
S Afr J Sci	South African Journal of Science
SAMJ	South African Medical Journal
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
Yale J Int'l L	Yale Journal of International Law
Yb Int'l Env L	Yearbook of International Environmental Law