

Review

# Justiciability of the Right to Water in the SADC Region: A Critical Appraisal

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**Abstract:** Weak justiciability of socio-economic rights almost circumscribes the trajectory of socio-economic development over time as individuals whose rights are violated cannot easily get a remedy through courts, which negatively affects the latter's ability to meaningfully realize their development potential. The available literature on this issue is scant and disorganised and hence necessitating a critical appraisal. This review focuses on the justiciability of the right to water in the Southern Africa Development Community (SADC) focusing particularly on South Africa and Malawi. This is because socio-economic rights are clearly justiciable under South African law as opposed to the other SADC countries where national constitutions do not enshrine the right to water, and at best, the right to water can only be inferred from the right to life and to development. Deriving the right to water from other rights, and especially those that impose a negative obligation on the state, masks its importance and the likelihood that it can be justly adjudicated on. It is argued herein that for most of the other SADC countries to realize the right to water, the law should be crafted to expressly protect the right to water and this must be obvious in the respective constitutions, as well as other related water laws. This will enable courts to adjudicate disputes concerning water and possibly evolve jurisprudence that is responsive to the water needs of people according to their circumstances.

**Keywords:** water rights; justiciability; socio-economic development; SADC

## 1. Introduction

At least 40 percent of the people in the Southern African Development Community (SADC) have no access to safe water, leaving them vulnerable to water-borne diseases and rendering the realization of their other socio-economic goals precarious. Several universal and African regional human rights treaties provide for the right to access water. SADC countries have ratified almost all these treaties and have an obligation to implement and realize the right to water articulated in them. Considering that water is almost a *sine qua non* for everyday life, the ability of the judicial system to give effect to the rights to water is extremely important and as population growth across the SADC region balloons and water becomes scarcer, justiciability of the right to water (that is, the susceptibility of an issue to be adjudicated upon in judicial or quasi-judicial fora) will become even more relevant. Literature on whether rights such as food, education, health and others, are justiciable is commonplace, although there is an obvious variation between countries. However, there is limited and disorganised literature on how courts have advanced the realization of the right to water and this dearth of literature is more conspicuous in respect of Africa and the Southern Africa region in particular. There also does not appear to be an effort by many law scholars to engage in a vigorous discussion on the right to water, which may limit the elucidation of the right.

The SADC recently developed regional water strategies (SADC 2007) and regional agricultural policy frameworks (SADC 2013) almost at the same time that the continent was developing/implementing the Comprehensive African Agriculture Development Program (CAADP) and the Malabo Declaration. The African Union Assembly of Heads of State and Government adopted the Declaration on Accelerated Agricultural Growth and Transformation (Doc. Assembly/AU/2(XXIII)) in June 2014 in Malabo, Equatorial Guinea, after a decade of implementing the Comprehensive Africa Agricultural Development Programme (CAADP) (African Union Commission 2014). The Maputo Declaration on CAADP was the Flagship Programme of the African Union for agriculture and food security, which is remembered, among other reasons, for its commitment to allocating at least ten percent of national budgetary resources to agriculture, and to achieving at least six percent growth of agriculture output annually (African Union Commission 2003). The CAADP became instrumental in raising the profile of agriculture to the center of development agenda and discourse at national, regional, continental and global levels.

The aspirations of the region as elaborated in those documents may not be realized more readily, or more equitably if governments are unable to develop systems of governance with the capability to bring about enforceability of socio-economic rights. If the rights that the policy documents want to advance are not justiciable because either they are not recognized in the legal systems of the countries concerned or because they are poorly articulated, realizing the aspirations in question will likely be illusory than a reality.

The purpose of this article is to review the implementation of the right to water within the SADC region focusing on South Africa, and Malawi. In so doing this article seeks to firstly add to the sparse pool of literature on the subject as it applies to the Southern Africa region, and further hopes that this may stimulate further work from legal scholars, with the effect that the right to water will become readily justiciable in future across many jurisdictions. The choice of South Africa is justified because it has a transformative constitution which expressly recognizes socio-economic rights and a progressive judiciary that has rendered ground breaking jurisprudence in this area. Many of the decisions from South African Courts have stirred debate across the region and are widely considered good practice. Malawi, on the other hand, is chosen because it represents other countries whose constitutions do not expressly enshrine the right to water. Table 1 shows the main legal systems in the Southern Africa Development Community and show which countries expressly provide rights to water in the constitutions.

Of the 15 countries in the SADC, only 3 countries have constitutions which expressly protect the right to water for drinking and these are, South Africa, Zimbabwe, and DRC (from the civil law tradition).

The rest of this paper is organised as follows: The next section presents the methodology for the review, which is followed by a discussion of fundamental rights and international rights to water. This is followed by a discussion on the water rights situation as it applies to the (SADC) region, before a section comparing South Africa and Malawi is presented. The paper ends by presenting conclusions and suggestions on how water rights justiciability may be facilitated in the SADC.

**Table 1.** Main Legal systems in the Southern Africa Development Community (SADC) and water rights. (Source: Authors' own construction).

Country	Whether Right to Water Is Express in the Constitution	Supremacy of the Constitution **	Dominant Legal System ***
Seychelles	No	Supreme	Civil law(Napoleonic code)
Mauritius	No	Supreme	Civil law (Napoleonic code)
South Africa	Yes	Supreme	Civil law (Roman-Dutch Law as modified by English common law)
Botswana	No	Supreme	Civil law/common law
Namibia	No	Supreme	Civil law/common law
Angola	No	Supreme	Civil law (Napoleonic code)
Swaziland	No	Absolute Monarch	Civil law
Zambia	No	Supreme	Common law
Lesotho	No	Supreme	Civil law
Tanzania	No	Supreme	Common law
Zimbabwe	Yes	Supreme	Civil law
Mozambique	No	-	Civil law
Madagascar	No	-	Civil law
DRC	Yes	-	Civil law
Malawi	No	Supreme	Common law

\*\* A constitution is supreme if all other laws derive from it, such that any law inconsistent with a constitution is invalid; \*\*\* Civil law systems are the Romano-Germanic family, while Common law systems are the Anglo-American systems.

## 2. Methodology for the Review

The approach taken herein is to conduct an in-depth examination of different international instruments, journals, books, and case law in order to understand the nature of issues around water rights that readily ensue within the SADC region as relevant to this review. The review then seeks to understand how the right to water is conceived, and adjudicated on where applicable how the right to water is interpreted in various depending on various legislative frameworks in the countries under study to draw preliminary conclusions regarding how water rights may be made more justiciable in the SADC region.

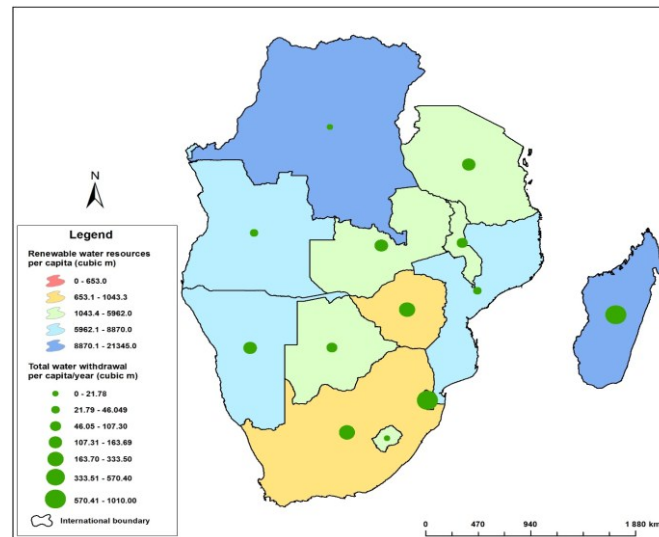
To ensure that the methods applied are solid we also conduct a comparative analysis to appreciate the spatial differences in justiciability of the right to water in the SADC region. The comparative analysis is based on Malawi and South Africa for the same reasons provided previously. The objective of the comparative analysis is to unravel the important and distinct features of the legal environment within which the right to water is adjudicated, in each of the two systems (South Africa characterized by Roman-Dutch law with English influence, and the English law dominated legal system in Malawi). Such a comparison would provide hints on what features are important for bringing about justiciability water rights.

## 3. Water Scarcity in the SADC Region

In the SADC region, water is a scarce yet vital resource, critical for achieving meaningful sustainable livelihoods (SADC 2005, 2006, 2011; Tarr and Tarr 2000). By definition, water scarcity describes the lack of sufficient water resources available for use, and this may be driven by the fact that water resources are physically absent or by the lack of funds to exploit available water resources (UN-Water 2013). Moreover, water resources in the SADC region are not evenly distributed nor exploited (African Union Commission 2014) (see Figure 1). The region's 15 countries often are facing constant water scarcity, and it is also worth noting that there is almost no country that does not share a water body or resources with another (SADC 2007). Such water scarcity brings into need a stronger regime of rights to water as access may become a contentious issue sooner or later.

Apart from Madagascar and DR Congo, almost all the countries in Figure 1 show a substantial scarcity of water with other countries registering per capita water resources of as low as under 653 cubic meters and yet withdrawals are increasing and have been reported to be as much as 1000 cubic meters

per capita in countries such as Swaziland, Mozambique and it is substantive in Zimbabwe and South Africa as well. Zimbabwe and South Africa also face the highest physical water scarcities in the SADC with per capita water availabilities of under 1000 cubic meters.



**Figure 1.** Map of water availability (scarcity) and water utilization. Source: Authors' computation based on AQUASTAT 2015 data (FAO 2015).

Thus, the future is likely going to be characterized by significant contestations around water and it is important, therefore, that a strong and justiciable water rights framework exists to ensure that the water rights of the vulnerable are protected.

It would be important at this point to state that access is one of the many challenges around water and livelihoods. The right to water however has not been fully incorporated in many national laws at the level of the constitution and primary legislation within the SADC region countries, which may be problematic, and this review focuses on this question. The discussion on fundamental rights classification below seeks to place the water right within a broader context.

#### 4. Fundamental Rights and Their Protection

In this section we discuss the concept of fundamental rights and attempt to highlight differences between socio-economic and civil liberties as a stepping stone towards understanding what is expected of governments in ensuring that socio-economic rights (of which water is one), are given effect. The concept of fundamental rights is important not only to maintain order and ensure that the government does not abuse its power and suppress the people it is supposed to govern, but also because fundamental rights have far reaching consequences in many other fields including economics, development and business in general. In the law of contracts for example, rights are an integral part of contracts, whereas in economics, rights catalyze incentives for performance, *inter alia*. Without a proper protection of human rights, it is unlikely that society can have order, and that businesses can sustainably function and that minority interests can be protected, for example. Spelling out such rights explicitly in deals, businesses or in terms of demarcating what governments can and cannot do to and for their citizens is a critical factor that determines that the rights are not only on paper but can be exercised in practice.

The concept provides that, every human being has certain inalienable rights which may not be encroached upon by the state or its institutions, except to the extent that such encroachments are authorized by law (Currie and Waal 2005; De Vos et al. 2014). Sometimes fundamental rights are categorized at three levels.

The first set, concerns what are called First-generation rights, which are sometimes called “blue rights”. These are civil rights, procedural rights and political rights, which protect the individuals from the abuse of state power. Examples of such rights are the right to equality, the right to human dignity, the right to life, the right to freedom of expression and the right to freedom and security of the person<sup>1</sup>. Second-generation rights on the other hand (“red rights”) became important during the socialist revolutions and relate to socio-economic issues. Examples of these rights are the right to education and the right to access to health care services and to sufficient food and water (Currie and Waal 2005). On the other hand, Third-generation rights, are sometimes called “green rights”, an example of which is the right to clean or unpolluted air<sup>2</sup>. In practice, the first-generation rights generally impose a negative obligation on the state, not to take away rights from their people, whereas the second generation (socio-economic) rights impose a positive obligation on governments to behave in a certain way to ensure that the governed can realize their rights. Below, follows a discussion on past attempts to provide protection to the right to water through treaties, covenants and other such instruments.

## 5. The International Human Right to Water: An Overview

The right to water has a solid basis in international human rights law. It is provided for expressly or implicitly in both universal and regional human rights documents. Universal treaties that expressly provide for the right to water include the Convention on the Rights of the Child,<sup>3</sup> Convention on the Elimination of All Forms of Discrimination Against Women,<sup>4</sup> and the Convention on the Rights of Persons with Disabilities.<sup>5</sup> Implicitly, the right to water is recognized in the Covenant on Economic, Social and Cultural Rights (CESCR)<sup>6</sup> and the Covenant on Civil and Political Rights.<sup>7</sup> For example, Article 11 of the CESCR provides for the right to an adequate standard of living while Article 12 provides for the right to the enjoyment of the highest attainable standard of physical and mental health. It is self-evident that without water the rights to an adequate standard of living and the highest attainable standard of living would be impossible to attain. The right to water is, therefore, recognized as a human right “that is essential for the full enjoyment of life and all human rights”.<sup>8</sup>

General Comment No. 15 defines the right to water as entitling everyone to “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use”.<sup>9</sup> The definition indicates that although there are several uses for water such as growth of crops and use in industry, the right to water gives priority to the availability of water for domestic and personal use. As General Comment No. 15 states, a sufficient amount of water is a prerequisite for the prevention of death from dehydration, reduction of water-related diseases, and for consumption, cooking and domestic hygiene.<sup>10</sup>

The adequacy required for the enjoyment of the right to water has three elements, which are specified in General Comment No. 15. These are availability, quality and accessibility.<sup>11</sup> Availability means that the supply of water to each person should be sufficient and continuous for personal and domestic use (which includes drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene).<sup>12</sup> The requirement as to quality implies that water must be safe, that is, it must be free from micro-organisms, chemical substances and radiological hazards that

<sup>1</sup> See Currie and Waal (2005), *Supra*.

<sup>2</sup> See Currie and Waal (2005), *Supra*.

<sup>3</sup> Article 24(2)(c).

<sup>4</sup> Article 14(2)(h).

<sup>5</sup> Article 28(2)(a).

<sup>6</sup> See Articles 11 and 12, for example.

<sup>7</sup> Article 6.

<sup>8</sup> Para. 1 Resolution 64/292 Adopted by the General Assembly on 28 July 2010.

<sup>9</sup> *Ibid.*, para. 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 12.

<sup>12</sup> *Ibid.*, para. 12(a).

constitute a threat to a person's health.<sup>13</sup> Finally, the requirement as to accessibility entails that water and water facilities and services should be accessible to everyone without discrimination. Accessibility encompasses physical reach, economic accessibility (water must be affordable to all), non-discrimination (water must be available to all, including the vulnerable and marginalized), and information accessibility (which means the right to seek, receive and impart information concerning water issues).<sup>14</sup>

Under the African regional human rights framework, the right to water is expressly provided for under the African Charter on the Rights and Welfare of the Child<sup>15</sup> and the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>16</sup> The right to water is also implicitly provided for under the African Charter on Human and Peoples' Rights.<sup>17</sup> For example, in the case of *Sudan Human Rights Organisation and Center on Housing Rights and Evictions (COHRE) V Sudan*<sup>18</sup>, where the Sudanese government was complicit in the destruction of wells and poisoning of water sources in the Darfur region, the African Commission on Human and Peoples' Rights ruled that this exposed the victims to serious health risks and therefore was a violation of their right to the highest attainable mental and physical health as provided for under Article 16 of the African Charter on Human and Peoples' Rights.<sup>19</sup> Despite these treaties, it has not escaped the notice of various authors that the enforcement of these treaties at national level may not per se be straight forward. For example, Dennis and Stewart argue whether the treaty obligations assumed by states parties under the ICESCR can in fact be measured, quantified, and applied in a meaningful way (Dennis and Stewart 2004).

The foregoing human rights treaties are widely ratified or acceded to by the 15 SADC member states. There are only a few exceptions for some individual treaties. Botswana and Mozambique are not states parties to the International Covenant on Economic, Social and Cultural Rights.<sup>20</sup> Botswana is further not a state party to the Convention on the Rights of Persons with Disabilities.<sup>21</sup> At the African regional level, Botswana and Madagascar have not yet ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, while the Democratic Republic of Congo has not yet ratified the African Charter on the Rights and Welfare of the Child.<sup>22</sup> Within the SADC region, Botswana has only ratified five of the eight human rights treaties reviewed above providing for the international right to water, making it the SADC state with the least ratifications. Overall, the SADC states are bound by several international treaties to which they are states parties and have, therefore, the duty to respect, protect and fulfil the right to water as articulated in international law.

## 6. Realizing the Right to Water in the SADC Region

In this discussion, it is important to always remember that water is life. Without water human life cannot be sustained. In the SADC region, many people have no access to clean water. Out of the regional population of about 280 million, 40 percent do not have access to safe drinking water to enable them meet their basic needs and sanitation. (SADC 2016) Lack of access to water has a deleterious consequence on the health and socio-economic status of the affected people. It naturally increases the community's disease burden from water-borne illnesses such as cholera, increases mortality, reduces the productiveness of the people as a lot of time is spent fetching water, and predisposes children

<sup>13</sup> Ibid., para. 12(b).

<sup>14</sup> Ibid., para. 12(c).

<sup>15</sup> Article 14(2)(c).

<sup>16</sup> Article 15 (a).

<sup>17</sup> See for example Article 16(1) guaranteeing the right to the highest attainable mental and physical health.

<sup>18</sup> Sudan Human Rights Organisation and Center on Housing Rights and Evictions (COHRE) V Sudan 279/03-296/05.

<sup>19</sup> Ibid., para. 211 and 212.

<sup>20</sup> Multilateral Treaties Deposited with the Secretary-General. [https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=\\_en](https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en) (date of access: 26 September 2016).

<sup>21</sup> Ibid.

<sup>22</sup> OAU/AU Treaties, Conventions, Protocols & Charters. Available online: <http://www.au.int/en/treaties> (accessed on 26 September 2016).



to missing school as they struggle with poor sanitation, hygiene and disease.<sup>23</sup> The SADC region acknowledges the clean water deficit in the region and considers it to be “directly contributing to the extreme poverty experienced by the majority of the people in the region”.<sup>24</sup> The inability to provide safe water, especially to poor communities, leads to unnecessary but yet completely preventable human suffering. The rest of this section discusses how the right to water is realized or implemented at normative framework level in the SADC region.

The SADC was established in 1992<sup>25</sup> to, among other things, achieve economic development and growth, alleviate poverty, improve standards of living and the quality of the life of people of member states.<sup>26</sup> It is made up of 15 member states, that is, Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.<sup>27</sup> The SADC treaty has no express reference to the right to water. In fact the SADC region does not have a human rights normative framework or treaty of its own. However, the SADC treaty commits member states, inter alia, to the principle of “human rights”.<sup>28</sup>

This provision on “human rights” in the SADC treaty is clear in conferring jurisdiction in the SADC Tribunal to interpret and apply the SADC Treaty, subsequent Protocols and other agreements to be concluded by member states. In 2007, a controversy arose as to whether or not the provision conferred the Tribunal with competence to hear and determine human rights violation cases. The issue arose in the *Campbell*<sup>29</sup> case where the applicants had their farms expropriated by the Zimbabwean government without compensation and under a law that ousted the jurisdiction of national courts to review the actions of the government.<sup>30</sup> The applicants challenged the Zimbabwean government’s action on grounds that it, *among others*, was a violation of their rights of access to justice and was discriminatory. It was argued for the Zimbabwean government that the Tribunal lacked jurisdiction to hear the matter because it lacked jurisdiction over human rights issues as SADC had not elaborated and adopted a specific human rights treaty enumerating applicable human rights.<sup>31</sup> The Court held that it did not “consider that there should be a Protocol on human rights in order to give effect to the principles set out in the Treaty”.<sup>32</sup> The fact that the SADC Treaty required member states to adhere to principles of “human rights, democracy and rule of law” was sufficient foundation for the Tribunal to adjudicate on human rights and develop its own jurisprudence.<sup>33</sup>

This approach, however, means that the rights recognized at the sub-regional level are not known in advance until they are established by the regional judicial body through litigation and adjudication. It also means the right to water is not specifically articulated taking into account the regional context. Considering that the SADC Tribunal has been dismantled, there is, therefore, no opportunity for the rights to be articulated and developed further through adjudication.

Although the SADC region has a water related treaty, the Revised Protocol on Shared Watercourses in the Southern African Development Community,<sup>34</sup> it does not specifically provide for the right to water. Instead, it is mainly concerned about fostering “closer cooperation for judicious, sustainable and coordinated management, protection and utilization of shared watercourses”.<sup>35</sup> The closest the Protocol comes to providing for the right to water appears in the requirement that the utilization of

<sup>23</sup> SADC Regional Water Strategy (31 June 2006).

<sup>24</sup> Ibid.

<sup>25</sup> Article 2(1) Treaty of the Southern African Development Community 1992.

<sup>26</sup> Ibid., Article 5(1)(a).

<sup>27</sup> SADC Facts & Figures. <http://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (Date of access: 26 September 2016).

<sup>28</sup> Ibid., Article 4(a).

<sup>29</sup> Mike Campbell (Pvt) Ltd and Others vs. The Republic of Zimbabwe SADC (T) Case No. 2/2007.

<sup>30</sup> Ibid., p. 23.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid., p. 24.

<sup>33</sup> Ibid., pp. 23 and 25.

<sup>34</sup> Adopted by the SADC heads of state and government in Windhoek on 7 April 2000.

<sup>35</sup> Article 2 revised Protocol on Shared Watercourses in the Southern African Development Community 2000.

resources of watercourses shall, among other things, include domestic use<sup>36</sup> and that this utilization should take into account the needs of the population dependent on the shared watercourse.<sup>37</sup> But even these considerations are limited to persons affected by shared watercourses, which are defined as “a water course passing through or forming the border between two or more watercourse states”.<sup>38</sup> This makes it clear that the Protocol is not primarily about guaranteeing the right to water but about managing shared watercourses. The SADC region, therefore, lacks a well-articulated human rights framework that guarantees the right to water.

#### *6.1. The SADC Member State Laws and International Law*

To see how the SADC region honors the right to water, there is need to turn to specific laws of SADC member states. The national constitutions, subordinate legislation and case law are informative in this regard. The rest of this section, therefore, reviews the extent to which the national laws of SADC member states provide for the right to water.

The starting point is how national constitutions provide for reception or application of international law in the domestic sphere.

For countries without express provisions for international law, it means international law does not make part of domestic law unless it is specifically enacted into law through the process of domestication or passing of enabling legislation. In such countries the right to water as elaborated under international human rights law does not amount to a justiciable claim until elaborated into an enforceable domestic statute. On the other hand, the jurisdictions that allow for direct application of international law to which they are bound, the international human right to water applies directly as long as they have acceded to or ratified the relevant international treaties.

Beyond the general provisions on reception of international law, some countries within the SADC region have gone a step further to expressly provide for the right to water (Table 2). Of the 15 SADC member countries, however, only three have these express provisions recognizing the right to water. These are the Democratic Republic of Congo, South Africa and Zimbabwe. The Congolese constitution guarantees “the right of access to drinking water”,<sup>39</sup> the South African constitution grants everyone the right to have access to sufficient water,<sup>40</sup> and the Zimbabwean one entitles everyone to “safe, clean and potable water”.<sup>41</sup> Having the right to water expressly provided for in the constitution not only elevates it into a superior norm worth of constitutional protection, but also makes it easy for nationals to know of its existence and vindicate it when aggrieved.

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<sup>36</sup> Ibid., Article 3(2).

<sup>37</sup> Ibid., Article 3(8)(a)(ii).

<sup>38</sup> Ibid., Article 1(1).

<sup>39</sup> Article 48 Constitution of the Democratic Republic of Congo 2005.

<sup>40</sup> Article 27(1)(b) Constitution of the Republic of South Africa 1996.

<sup>41</sup> Article 77(a) Constitution of the Republic of Zimbabwe 2013.



**Table 2.** Recognition of international law in Constitutions of SADC Member States. (Source: Authors' own construction).

Country	Expressly Recognize International Law?	Comments
Seychelles	Yes <sup>42</sup>	Requires that the constitution should be interpreted in a manner consistent with its international obligations
Mauritius	No	International law does not make part of domestic law unless it is specifically enacted into law through the process of domestication or passing of enabling legislation
South Africa	Yes <sup>43</sup>	Requires that the interpretation of the Bill of Rights must consider international law, that when interpreting any legislation, a court must prefer any reasonable interpretation that is consistent with international law
Botswana	No	International law does not make part of domestic law unless it is specifically enacted into law through the process of domestication or passing of enabling legislation
Namibia	Yes <sup>44</sup>	Obliges the state to foster respect for international law and treaty obligations
Angola	Yes <sup>45</sup>	Allow for direct application of international law to which they are bound
Swaziland	Yes <sup>46</sup>	International treaties only become part of domestic law when specifically domesticated by parliament
Zambia	Yes <sup>47</sup>	Although recognizes it, excludes international law from major sources of law applicable domestically
Lesotho	No	International law does not make part of domestic law unless it is specifically enacted into law through the process of domestication or passing of enabling legislation
Tanzania	No	International law does not make part of domestic law unless it is specifically enacted into law through the process of domestication or passing of enabling legislation
Zimbabwe	Yes <sup>48</sup>	Enjoins the state to ensure that international conventions, treaties and agreements to which Zimbabwe is a party state are incorporated into domestic law
Mozambique	Yes <sup>49</sup>	Allow for direct application of international law to which they are bound
Madagascar	Yes <sup>50</sup>	Treaties and agreements, once ratified, have authority superior to other subordinate national laws
DRC	Yes <sup>51</sup>	Allow for direct application of international law to which they are bound
Malawi	Yes <sup>52</sup>	International treaties that were in force before the commencement of the constitution are binding and form part of the law of the republic, while subsequent treaties only become part of domestic law when specifically domesticated

Apart from enshrining the right to water in national constitutions, several countries have specific subordinate legislation relating to the regulation and management of water, where they may provide specifically for the right to water as well. Subordinate legislation in Namibia, for example, grants all people “equitable access to safe drinking water”<sup>53</sup> while the South African statute gives everyone the “right of access to basic water supply” and enjoins every water services institution to take reasonable measures to realize this right.<sup>54</sup> The law in Botswana allows any owner or occupier of land to sink or deepen any well in order to abstract water for domestic use.<sup>55</sup> Other countries such as Tanzania,<sup>56</sup>

<sup>52</sup> Article 211 Constitution of the Republic of Malawi 1998.  
<sup>51</sup> Article 215 Constitution of the Democratic Republic of Congo 2005.  
<sup>50</sup> Article 137 Constitution of the Republic of Madagascar 2010.  
<sup>49</sup> Article 18 Constitution of the Republic of Mozambique 1990.  
<sup>48</sup> Article 12 of the Constitution of the Republic of Zimbabwe 2013.  
<sup>47</sup> Article 7 Constitution of the Republic of Zambia 2016.  
<sup>46</sup> Article 238 Constitution of the Kingdom of Swaziland 2005.  
<sup>45</sup> Article 13 Constitution of the republic of Angola 2010.  
<sup>44</sup> Article 96(d) Constitution of the Republic of Namibia.  
<sup>43</sup> Article 39(1)(b) Constitution of the Republic of South Africa 1996.  
<sup>42</sup> Article 48 Constitution of the Republic of Seychelles 2011.  
<sup>53</sup> Section 3(a) Water Resources Management Act No. 11 of 2013.  
<sup>54</sup> Section 3(1)(2) Water Services Act 1997.  
<sup>55</sup> Section 6(1)(a) Water Act Chapter 34 of the Laws of Botswana.  
<sup>56</sup> The Water utilization (Control and Regulation) Act 1974.

Swaziland,<sup>57</sup> Malawi,<sup>58</sup> Zambia<sup>59</sup> and Zimbabwe<sup>60</sup> have specific legislation on water that either does not include a specific right to water or the right is couched in an ambivalent manner that establishes no or unclear obligations on the state. The Zambian statute, for example, simply states that “any person shall have a right to the primary use of public water which is found in its natural channel or bed at such places to which access may be lawfully had”.<sup>61</sup> The provision simply allows those who have legal access to natural water bodies to abstract water for their use. It does not create a general duty of the state to ensure that its citizens have access to safe drinking water. The Tanzanian statute, like the Zambian one, provides that any person having lawful access to “any water may abstract and use some for domestic purposes”.<sup>62</sup> Like Tanzania and Zambia, the Swazi legislation provides that it “shall not be necessary for any person or community to obtain a permit for use of water for primary purposes”.<sup>63</sup> Others such as Malawi<sup>64</sup> and Zimbabwe<sup>65</sup> are silent on a specific right to water.

## 6.2. The Right to Water and Case Law in the SADC Region

This section provides highlights of litigation relevant to water rights in the SADC region. The choice of the cases which are discussed in detail below is motivated by the availability of litigation literature more directly related to water, although there are various cases that deal with justiciability of other second generation rights. The choice of cases from, Malawi and South Africa is also predicated on the need to ensure that a representative picture is provided for the SADC, with its diverse legal systems.

Even where national constitutions and subordinate laws provide for the right to water, case law from around the SADC region shows that that may not be enough to assure access to safe water to the people, especially the poor. Three scenarios are discussed and illustrated using case law here. The first is where interests of water service institutions or providers are at variance with the right to access water by some people; the second is where the government policies or programs are in conflict with the right to water of a particular group or population; and the third one is where multinational corporations violate the right to access safe water by the community as a result of massive pollution.

The first scenario can be demonstrated by case law from South Africa. Two cases are illustrative of the challenge. The first case is that of *Mazibuko*<sup>66</sup>, determined by the Constitutional Court. The applicants were five people aggrieved by the decision of the water provider to abandon the consumption flat rate charge. The service provider instead established three alternative levels of water provision whereby under level 1 a tap could be provided within 200 m of each dwelling house; level two was the provision of a tap in the yard of a household with a restricted water flow so that only 6 kL of water were available monthly; and level 3 was a pre-paid metered connection. The applicants had to choose between level 2 and 3. The first applicant refused to have a pre-paid meter installed and was not informed of the option of a yard tap. As a result supply of water to her was cut off.<sup>67</sup> The water provider, on its part, undertook the change of in water supply in order to reduce water wastage and to improve the rate of payment.<sup>68</sup> The court held that the changes to the water usage as introduced by the provider were within the bounds of reasonableness and, therefore, not in violation of the constitutional provision

<sup>57</sup> Water Act 2003.

<sup>58</sup> Water Resources Act No. 2 of 2013.

<sup>59</sup> Water Act 1948.

<sup>60</sup> Water Act 1998.

<sup>61</sup> Section 8 Water Act 1948.

<sup>62</sup> Section 10 Water Utilisation (Control and Regulation) Act 1974.

<sup>63</sup> Section 34(4) Water Act 2003.

<sup>64</sup> Water Resources Act No. 2 of 2013.

<sup>65</sup> Water Act 1998.

<sup>66</sup> *Lindiwe Mazibuko and others v City of Johannesburg and others* Constitutional Court of South Africa CCT 39/09[2009] ZACC28.

<sup>67</sup> *Ibid.*, para. 14.

<sup>68</sup> *Ibid.*, para. 13.

guaranteeing access to water.<sup>69</sup> The importance of the Mazibuko case in this discussion is not that the Constitutional Court did not find against the water provider, but rather, that it is important because it offered the judiciary an opportunity to consider the right to water. The fact that the right to water is provided for in the constitution of the country expressly makes it more probable that those who feel disadvantaged by actions of service providers can seek court opinion.

The second case, *City of Cape Town*,<sup>70</sup> was determined by the Supreme Court of Appeal of South Africa and reached a different outcome from that of *Mazibuko*. In this case water supply was disconnected from the property of the respondent for outstanding water bills, which the respondent disputed. The service provider argued that the right to supply water was simply a personal right founded in contract.<sup>71</sup> And since the contract was not honored by defaulting in paying bills, the water supply was lawfully terminated. The court held that to expect the respondent to pay while he disputed the bill was unfair and that the right to water was not just a personal or contractual one but it flowed from the constitutional right to water.<sup>72</sup> The court granted a spoliation order to restore the status quo.

The second scenario is that of government programs that may be in conflict with the right to water of some members of society. The case of *Mosetlhanyane*<sup>73</sup>, decided by the Court of Appeal of Botswana is a good illustration. The appellants were married and members of a community living in a game reserve area, which was created in 1961 to conserve wildlife of the area and to provide a home to the San people who were already living in the area before the creation of the game reserve.<sup>74</sup> In 1986, De Beers, a mining company agreed to let a prospecting borehole it had sunk in the area to be used to provide water to the residents of the game area where it was located.<sup>75</sup> In 2002 government implemented a zoning policy whereby the game reserve was to be used solely for the conservation of wildlife and human beings were to be resettled outside the game area.<sup>76</sup> As a consequence, a pump and water tank that had been installed for purposes of using the borehole were dismantled and removed. This was intended to compel the residents to relocate by making it difficult for them to continue living in the game area.<sup>77</sup> Therefore, the borehole remained unused while the people suffered despicable hardships due to lack of water and had to rely on wild roots and watermelons to extract drops of drinking water to survive. The absence of water rendered them to diseases.<sup>78</sup> The appellants were now seeking the use of the same borehole, which was lying idle, to alleviate their water problems. The government held the view that the hardships the people underwent were self-inflicted as they had freely chosen to go and live in an area where there is no water.

The court largely based its decision on Section 6 of the Water Act which entitles owners or occupiers of land to sink or deepen a well or borehole in order to abstract water for domestic use. Since the appellants were lawful occupiers of the land, and only sought to use the water from the discarded borehole, the Court decided that they must be allowed to get water from the borehole, otherwise their occupation of the land would be rendered nugatory.<sup>79</sup> The court went further to hold that the suffering the appellants endured due to lack of water amounted to degrading treatment contrary to Article 7 of the Botswana constitution which prohibits torture, inhuman or degrading punishment or treatment.<sup>80</sup>

<sup>69</sup> Ibid., para. 9, 47, 50, 67, 157 and 158.

<sup>70</sup> *City of Cape Town v Strumpher* (104/2011)[2012] ZASCA 54 (30 March 2012).

<sup>71</sup> Ibid., para. 6.

<sup>72</sup> Ibid., para. 9, 11 and 15.

<sup>73</sup> *Matsipane Mosetlhanyane and another v Attorney General* Court of Appeal Civil Appeal No. CACLB-074-10 (2011).

<sup>74</sup> Ibid., para. 4.

<sup>75</sup> Ibid., para. 5.

<sup>76</sup> Ibid., para. 6.

<sup>77</sup> Ibid., para. 7.

<sup>78</sup> Ibid., para. 8.

<sup>79</sup> Ibid., para. 11, 12, 16 and 18.

<sup>80</sup> Ibid., para. 22.

Another interesting case on socio-economic rights litigation that brought the right to basic needs including water to the fore in Botswana is that of *Sesana & Others v The Attorney General*<sup>81</sup>. The case concerned an application on notice of motion lodged on 19 February 2002 Mr. R Sesana and Keiwa Setlhobogwa, on their own behalf and on behalf of 241 other applicants. Among others, they sought orders, including an order to the effect that the termination by the government of the provision of certain basic and essential services including water in the Central Kalahari Game Reserve (CKGR) was unlawful and unconstitutional; and that the forcible removal of them from their settlements in the CKGR, after termination of the provision of the basic and essential services amounted to unlawful despoliation or dispossession of their land. It was noted in the course of this case that the absence of the basic rights to water and others services from the Constitution meant that it was difficult for citizens to demand realization of such rights, and even where the government provided for such rights, it could withdraw their provision at will knowing fully well that legal consequences wouldn't be unlikely.

The final scenario is that of powerful multinationals violating the right to water of usually poor communities within their extractive areas. The illustrative case here is from Zambia, specifically from the Copperbelt province where several mining giants engage in large scale copper mining. For many years the mining companies have been discharging toxic waste in rivers and streams from which local communities draw their domestic water. However, due to a poor legal framework and lack of political will, the mining companies have been getting away with minor fines.

In the instant case of *Konkola Copper Mines Plc*<sup>82</sup> the respondents were a community whose water source was a stream in which the appellants, Konkola Copper Mines (KCM)<sup>83</sup>, in disregard of environmental regulations, discharged highly toxic effluent in the stream. This resulted in water becoming harmful to infrastructure (such as boats), agriculture and human consumption. The people who consumed the water suffered various illnesses.<sup>84</sup> Lacking specific provisions protecting the right to safe drinking water, the respondents sought redress mainly under the common law tort of negligence. At first instance the High Court found for them and awarded each of the 2001 respondents K4000 (about USD 400) as general damages and K1000 (about USD 100) as punitive damages for the injury suffered.<sup>85</sup> On appeal, however, the Supreme Court held that it was a serious misdirection for the trial judge to award damages on the basis of only 12 medical reports, which were not identical in the nature of injuries suffered. It sent back the case for assessment of damages, a decision which had the consequence of significantly reducing the amount of damages.<sup>86</sup> Although the decision may have been correct in tort, it demonstrates how an inadequate legal framework can leave vulnerable members of the community at the mercy of giant multinationals who have to part with only small tokens for poisoning water sources of large populations, while government stands aloof. The available remedies as demonstrated in this case are likely to have very little effect on a multinational that is intent on saving on cost operations by reduced adherence to environmental regulations in order to maximize profit (BBC News 2015).

As already highlighted, whereas in SA the right to water is recognized, in many other places such a right and socio-economic rights in general, are not recognized expressly in law. Outside Africa for example, in India, the Constitution does not recognize a fundamental right to water. However, the right

<sup>81</sup> *Sesana and Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006).

<sup>82</sup> Konkola Copper mines Plc v James Nyasulu and 2000 others Supreme Court for Zambia Appeal No. 1/2012.

<sup>83</sup> KCM is a subsidiary of Vedanta Resources Plc (Vedanta), a London listed diversified metals and resources group with operations in India, Australia, South Africa, Namibia, Zambia and Ireland—See more at: <http://kcm.co.zm/corporate-profile/#sthash.3qcs3m0o.dpuf> (Date of access: 26 September 2016).

<sup>84</sup> Konkola Copper Mines Plc v James Nyasulu and 2000 others Supreme Court of Zambia No. 1/2012, pages 3, 11 and 12.

<sup>85</sup> Ibid., p. 2.

<sup>86</sup> Ibid., pp. 20 and 22.

to water has been derived from the fundamental right to life under Article 21 of the Constitution<sup>87</sup>. It is likely that even in the Indian case, some citizens are unable to realize their right to water owing to the absence of express provision of the right in Indian supreme law. In all these cases it would appear that pushing for justiciability of the rights to water would enable citizens to take legal steps to get relief in case their water needs are not met, subject to the limitation clauses entrenched in laws of respective countries.

In Zimbabwe, the constitution<sup>88</sup> of the republic of Zimbabwe is supreme so that Section 2 provides that:

This 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.

And the right to water is provided for by Section 77 (a) which declares that everyone has a right to safe, clean and potable water. Mozambique on the other hand is in a similar situation as Malawi and does not expressly mention the right to water in the constitution, but this may be derived from article 96 which provides that individual rights and freedoms are guaranteed by the state. Mozambique's constitution does not mention supremacy of the constitution<sup>89</sup> either. Mozambique does not have any record of higher court cases dealing with enforcement of socio-economic rights.

Again, in the Constitution of the United Republic of Tanzania of 1977 and its amendments do not expressly protect the right to water but this may be derived from the right life provided for by Section 14 of the Constitution<sup>90</sup>. On the other hand, the constitution of the Democratic Republic of Congo<sup>91</sup> expressly protects the rights to access to drinking water by Article 48 which provides that

The right to decent housing, the right of access to drinking water and to electric energy are guaranteed. The law establishes the conditions for the exercise of these rights.

At the border of the DRC, Angola Constitution<sup>92</sup> of 2010 provides within article 2 and article 6 that the country is democratic based on the rule of law and that the Constitution of Angola is supreme such that no law is above it. The right to life is protected by article 30 whereas article 77 protects the right to health and it would appear that the right to water may be derived from those rights. Angola does not have prominent cases dealing with the enforcement of socio-economic rights. Seychelles Constitution<sup>93</sup> is supreme and provides for the right to life at Section 15. The right to clean drinking water may be derived from the right to life and water rights therefore are not expressly protected. Just as Seychelles and a number of the other SADC member states Constitutions, Mauritius Constitution<sup>94</sup> is supreme (article 2), it recognizes and protects the right to life by article 4 from which it may be argued that the right to clean water derives. The Constitution of the Republic of Madagascar of the Republic of Madagascar<sup>95</sup> does not expressly proclaim its supremacy but states at article 9 and article 17 that law protects individual rights and freedoms, which may be sources from which the right to water, which is not expressly protected, may derive.

Within the rest of the Southern Africa Law Association countries (South Africa, Zimbabwe, Lesotho, Botswana, Swaziland), Lesotho's Constitution<sup>96</sup> is supreme (Section 2), and protects the right

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<sup>87</sup> INDIA CONST. art. 21 ("Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.").

<sup>88</sup> Constitution of Zimbabwe Amendment (No.20) Act, 2013.

<sup>89</sup> Constitution of Mozambique of 2004.

<sup>90</sup> Constitution of the United Republic of Tanzania of 1977.

<sup>91</sup> Constitution of the Democratic Republic of Congo of 2005.

<sup>92</sup> Angola Constitution of 2010.

<sup>93</sup> Constitution of the Republic of Seychelles of 1993.

<sup>94</sup> Constitution of Mauritius of 1968.

<sup>95</sup> The Constitution of the Republic of Madagascar of 1992.

<sup>96</sup> Constitution of Lesotho of 1993.

to life at Section 4(1)(a) and Section 5(1) from which the right to water may derive from as it is not directly protected in the constitution. On the other hand, the Botswana constitution<sup>97</sup> protects life at Section 4(1) but it does not declare its supremacy. The right to water is not expressly protected which then means it may be derived from the right to life. The constitution of the Kingdom of Swaziland<sup>98</sup> protects the right to life at Section 15, it does not mention whether it is supreme and water rights are subject to state control for example Section 215 states that “There shall be no private right of property in any water found naturally in Swaziland”. The right to access to water may hence be derived from right to life. There has however been an important case where the court ordered in *Swaziland National Ex-workers Association and others v Ministry of Education and Others*<sup>99</sup>, that the government of Swaziland had the positive obligation to provide free schooling for primary school children. But there hasn’t been active adjudication following this case to advance socio-economic rights in the same direction, and litigation specific to water is scant, a sign that such rights are not being advanced.

Namibia’s Constitution<sup>100</sup> protects life by way of article 6 and it is a supreme constitution as per article 1(6), but water is not expressly protected except in terms of the right to life. The high courts in Namibia have dealt with the rights to bulk water following the case of *Namibia Water Corporation Limited v Aussenkehr Farms (Pty) Ltd.*<sup>101</sup> among others, where basically among other things the state took the Aussenker Farms Ltd. to court for violation of a water supply contract. It should be stated that this case was important because it brought an issue related to water to the courts but it deviates from what would be common socio-economic litigation. Thus, socio-economic litigation where the state’s positive obligation to facilitate the achievements of second generation rights was not at issue in a direct way. Some of the Namibian water cases relate to the horizontal application of rights in which breaches of contract were at issue between private persons. For example in *Kamanja v Smith*<sup>102</sup> the plaintiff sued the defendant for breach of a water supply contract in terms of which Mr. Smith was supposed to give back the deposit he obtained from Mr. Kamanja as the former had failed to supply water for Mr. Kamanja’s animals. The court decided in the plaintiff’s favor. But again it this case does not represent a vertical application of the rights to water between citizens and their government, so it does not say much about the justiciability of fundamental rights to water in the Namibian context.

While Uganda, a Common Law jurisdiction, is not a SADC Member State, it has interesting cases and are included only for purposes of enriching the discussion. Although the rights to water and other socio-economic rights are directly incorporated in the constitution of Uganda of 1995 ([Mubangizi 2006](#)), the paucity of socio-economic rights litigation and the inconsistency in some of the prominent judgements there, stand as testimony that such rights are not fully justiciable within the Uganda legal system. For example, whereas in *Joseph Eryau v Environmental Action Network*<sup>103</sup> appeared to confirm enforceability of the right to a third generation rights related to clean air in respect of non-smokers, the court surprisingly demanded that before the rights to a totally health environment were to be enforced in Uganda, the National environmental management authority needed to establish environmental standards first in *Byabazaire Grace v Mukwano Industries*<sup>104</sup>. The case in which the rights to religious freedom and education were at stake in the case *Dimanche Sharon v Makerere University*<sup>105</sup>. The plaintiff sued the University for disrespecting the Sabbath in the education system. The court sided with the respondent but never took advantage of the case to develop the law in such a way that

<sup>97</sup> Constitution of Botswana of 1966.

<sup>98</sup> *The Constitution of the Kingdom of Swaziland Act 2005.*

<sup>99</sup> *Swaziland National Ex-workers Association and others v Ministry of Education and Others*, Civil Case No. 335/2009.

<sup>100</sup> *Namibian Constitution First Amendment Act, 1998.*

<sup>101</sup> *Namibia Water Corporation Limited v Aussenkehr Farms (Pty) Ltd* (Case No.: I 1286/2005) [2009] NAHC 1 (9 January 2009).

<sup>102</sup> *Kamanja v Smith t/a W.A.S Smith Drilling ((P) I 467/2008)* [2009] NAHC 91 (26 November 2009).

<sup>103</sup> *Miscellaneous Application No 39 of 2001.*

<sup>104</sup> *Miscellaneous Application No 909 of 2000.*

<sup>105</sup> *Constitutional Cause No 01 of 2003.*



the content of the fuzzily defined right to education could become clearer. That's the courts appear not as proactive in ensuring the justiciability of socio-economic rights there.

## 7. Rights to Water in the Context of the South African and Malawian Legal Setting

This section conducts a comparative analysis of the legal framework governing the justiciability of rights to water in Malawi and South Africa. The rationale for the comparative analysis is to highlight the characteristic features of the legal environment in which the right to water has been adjudicated on to obtain hints on what features are important for bringing about justiciability of rights to water. As highlighted previously, the choice of South Africa and Malawi is motivated, among other reasons by the fact that the Southern Africa region is dominated by two legal systems namely the Common Law tradition (where Malawi is an example), and the Civil Law tradition (for which South Africa is an example, even though it also has elements of the English law). In South Africa, the right to water is provided for under S 27 of the Constitution (which is also supreme as declared at s (2) in explicit terms whereas in the Malawi legal framework, the constitution of the Republic of Malawi does not mention water access at all, but the right may be implied from the provision at S 30 of the Malawi Constitution of 1994, or perhaps the right to life provided by s 16. It is submitted that the fact the constitution of the Republic of Malawi does not expressly protect the rights to water, does little to enhance justiciability of the right, even if this right may be provided for in other pieces of legislation. This is also likely to be the case because the constitution of the Republic of Malawi is supreme<sup>106</sup> (at least on paper) which holds that any other law has to be interpreted with the constitution as reference point and not vice versa, with the effect that any law that is inconsistent with the Constitution of the Republic of Malawi is invalid. Interestingly too, while the constitution of the Republic of Malawi falls short of expressly recognizing the right to clean water, Zimbabwe, Uganda<sup>107</sup>, DRC, and South Africa among others recognize this right expressly. Perhaps this is something the legislature in Malawi may need to consider in future constitutional amendment.

The Water Services Act 108 of 1997 is the legislative framework relating to water services it states the objectives of basic sanitation as follows. In other words, both the constitution and the Water Act in South Africa have express provision of the rights to water, which as is discussed later, in our view, should be the minimum of what a country ought to do to ensure that the rights to water are justiciable.

In the South African case, in *Republic of South Africa v. Grootboom*<sup>108</sup> the Constitutional Court held that socio-economic rights were not just on paper, but that they were justiciable and the government needed to take steps to ensure the realization of such rights. This case concerned Mrs. Grootboom and others where Mrs. Grootboom applied to the high court to force the municipality in Cape Town to give them temporary shelter to survive the harsh rain that were approaching and the municipality was not positively responsive, and the matter went all the way to the Constitutional Court. The Constitutional Court held that:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the State "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.

The effect of this case was that people whose water rights were violated would now be allowed to approach the court to seek remedies against government.

<sup>106</sup> S 5 of the Constitution of the Republic of Malawi of 1994.

<sup>107</sup> UGANDA CONST., Nat'l Objectives and Directive Principles of State Policy XIV.

<sup>108</sup> 2000 (11) BCLR 1169 (CC) (S. Afr.).

Again in *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*<sup>109</sup> the plaintiffs, a group of people in one of the flats in Hillbrow-Johannesburg had their water disconnected based on non-payment of water bills, but the Court ordered that the respondent (a local municipality) as an arm of government had a duty to provide water to everyone as per s 27(1) of the constitution and while this may not be possible at all times, it was also expected of them to take necessary steps to enact legislation that would eventually bring the realization of universal access to clean water, in line with s27 (2) of the South African Constitution, as such the court ordered a reconnection of the water supply.

There are two ways for justiciability of water rights ([Harvard Law Review Association 2007](#)): one of these include the one followed in South Africa where the legal system explicitly confers a justiciable, affirmative right of access to adequate water in their constitution<sup>110</sup> and also confirmed by the constitutional court in *Mazibuko v City of Johannesburg* ([Mazibuko 2009](#)). As a consequence of S 27(1)(b), in order to ensure the full protection of the access rights to water, a positive obligation is imposed on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights<sup>111</sup>. The second approach uses an indirect method to arrive on the justiciability of the right water by linking it to the right to life as evident in India, but the former appears more persuasive than the second one which implies the right to water from the right to life. In the *Mazibuko* case the Constitutional Court considered the lawfulness of one of the projects that was piloted by the city of Johannesburg in Phiri, Soweto in 2004 to address severe water problems and non-payment for water services. Mrs. Mazibuko challenged that the free basic water policy of only 6 kL that the city had put in place was unlawful, unreasonable and violated their right to sufficient water. The Constitutional Court held that the obligation placed on government by Section 27, was to take reasonable legislative and other measures to seek the progressive realization of the rights to water and it could not be said whether the steps they had taken were unreasonable. As highlighted previously, the importance of this case is that it contributes to the development of the law governing the right to water. This case also seeks to highlight that there is need for a distinction between a justiciable right to a good and a free good. To have a justiciable right does not imply that the good whose right is justiciable should be provided for free, nor does it imply all complainants against the state should win cases. Rather, justiciability permits that where such a right is violated in an illegal manner, those affected should get court redress and bring into effect that right. Thus the fact that a plaintiff loses an action around a justiciable right, does not weaken the importance of making rights justiciable. It is easy to assert one's rights if provisions for adjudication are available than if those rights are in essence non justiciable. This is also an important difference between the first-generation rights and the second-generation rights. The latter, for which water is an example, impose a positive obligation on the government to take reasonable steps to give effect to the rights but within its means.

Indeed as Bates argues, although some may view the judgement in *Mzibuko* as a step backwards, in the evolution of the right to water, it should be viewed as an affirmation of the right as it confirms the "obligation on governments to take steps to address water shortage and the needs of underserved communities progressively" ([Bates 2010](#)).

The Constitutional court also considered whether Mr. Soobramoney<sup>112</sup> who was at the time suffering from chronic illness that required dialysis could invoke Section 27 of the Constitution of the Republic of South Africa to demand emergency medical care. The court held that chronic illnesses did not qualify as emergency medical conditions and consequently could not be given priority as required by Section 27. A similar decision was also made in *Minister of Health and Others v Treatment Action*

<sup>109</sup> 2002 (6) BCLR 625 (W) (S. Afr.).

<sup>110</sup> S 27(1)(b) of the Republic of South Africa Constitution of 1996.

<sup>111</sup> S 27(2).

<sup>112</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC).

*Campaign and others*<sup>113</sup>. This case also showed that courts in South Africa were willing to adjudicate on socio-economic matters and were prepared to develop the law to give effect to such rights.

In Malawi the Constitution of the Republic of Malawi of 1994 is the supreme law of the land. While international law is recognized though, Section 211(1) of the Constitution provides that any international agreements need to be ratified by domestic legislation before they become national law. In *Kalinda v Limbe Leaf Limited*, Mwaungulu J, held that the implication of this is that those international agreements that came into being prior to 1994 (the year the new Constitution came into being), were automatically binding, whereas the those international agreements that come after 1994 become law only upon being domestication through a specific act of parliament<sup>114</sup>. In our view, while this approach is not problematic on its own, the problem lies in that fact that unless further steps are taken to make the past agreements prominent in national laws, the common person may not be aware of the rights they confer and this may limit justiciability.

In *State v Ministry of Finance and Another, Ex parte Bazuka Mhango and Others*<sup>115</sup>, Members of Parliament in Malawi had passed the so called Appropriation Act in 2008 (*Appropriation Act of 2008*)<sup>116</sup> in which they authorized motor fuel benefits for themselves albeit without written authorization of the executive (the Minister of Finance). Following this, Members of Parliament moved to challenge the Minister, arguing that such a decision was unlawful.

The Ministry of Finance argued that such a matter was unjusticiable because it concerned matters of policy implementation which were beyond the competence of the courts. This position appeared to have support draw motivation from an earlier decision in *Ministry of Finance ex-parte SGS Malawi Limited* in which the court was of the view that matters involving implementation of socioeconomic policy were clearly not justiciable<sup>117</sup>. Nonetheless, Chikopa J, held that the failure to fund and pay the fuel allowance amounted to a breach of such legitimate expectations because the fuel allowance was expressly stated and authorized by law. The court further held that the issue was justiciable because it was law and while the court would not prescribe for the executive which decisions to take, once bills are passed, they become are law, and they cannot be arbitrarily departed from. In the context of the rights to water, one would argue that this decision is in favor of express provision of the rights to water for justiciability.

Gloppen and Kanyongolo (2007) focusing on litigation for socio-economic rights by poor people in Malawi, found that costs of litigation, high barriers to access as well as the nature of Malawi's legal structure ranked among the importance factors that stood on the path for socio-economic rights litigation. In the process, Gloppen and Kanyongolo also note the scarcity of pro-poor jurisprudence in Malawi, which in terms of the subject of this study implies socio-economic rights in Malawi are almost not justiciable. This is likely the case with the water right, which is not even expressly protected in the constitution. Kapindu also discusses the paucity of socio-economic rights adjudication in the courts since 1994 and argues that even the little work that the judiciary has done on socio-economic rights litigation has been limited to property, work, economic activity and to a lesser degree, education (Kapindu 2013).

Others hold the view that despite that the right to water is unenumerated, we should seek solace in that it exists within the UN human rights regime that states have committed to (Mbano-Mweso 2015). Our view is that for the rights to become the centre of litigation (as a sign that they are justiciable), it is not enough to note that those rights are protected by international agreements. The paucity of litigation around water rights as echoed by Gloppen and Kanyongolo is likely partly a result of the

<sup>113</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).

<sup>114</sup> *Kalinda v Limbe Tobacco Limited* Civil Cause No 542 of 1995.

<sup>115</sup> *Ex Parte Mhango and Others; In Re: S v Minister of Finance and Another* (163 of 2008) [2009] MWHC 2 (05 March 2009).

<sup>116</sup> *Appropriation Act of 2008, Malawi Parliament*.

<sup>117</sup> *Ministry of Finance ex-parte SGS Malawi Limited Miscellaneous Civil Cause Number 40 of 2003*.

water right not being express in the main legislative frameworks of Malawi. The state should consider doing more to reach that legislative stage.

Even where the state privatizes water, it must still ensure that it has a role to play in ensuring that people can realize the right to water. Privatization of water services does not absolve the state of its obligations to protect rights concerned (Chirwa 1998). In fact many have argued that as one way of ensuring that the rights to water are not eroded during privatization, the latter must take a human right approach because water should be taken as a legal entitlement, rather than a commodity or service provided on a charitable basis (Petrova 2006)

The elaboration of rights to water and their popularization is important but of course not a sufficient alone especially for countries with pervasive weak systems for policy implementation. As Kamchedzera and Banda observes, in Malawi, the culture of accountability is weak, and evidence points to the fact that effectiveness of legislation as a strategy to realize the right to development may not be guaranteed (Kamchedzera and Banda 2009). However, this does not of course invalidate the importance of express provision of rights within the important national/international legal frameworks. The Malawi Water Resources Act 50 of 2013 also does not do much to resolve the lack of express water rights provision to Malawians to the extent that it basically vests all water in the state<sup>118</sup>.

In *Mchima Tea and Tung Estates Co. Ltd. v. Concerned Persons*<sup>119</sup> the plaintiff who had inherited illegally acquired land, successfully applied for an eviction order from squatters. The order was given by the high court most likely in fear of further repercussions which would bring the court into negative limelight. Had the laws of the republic of Malawi been explicit on the legality of illegally acquired land in the past, such miscarriage of justice and the subsequent violation of socio-economic rights would not have taken place. If the law is mum or poorly stated, transformation delays and the poor suffer. A sure step toward making water rights justiciable in Malawi is to expressly provide for their protection in the constitution and with clauses that direct the judiciary to actively adjudicate on matters that concern such rights. The courts must also take an activist approach and must hence endeavor to develop the common law to give effect to the socio-economic rights protected expressly or implicitly in Malawi law.

Again, even the case of *Masangano*<sup>120</sup> which dealt with socio-economic rights, the issues of water rights was not expressly dealt with. In the *Masangano case*, socio-economics rights related to health, sanitation, *inter alia* were implicated in the class action brought before the court by a prisoner who complained about violation of a wide range of civil and political rights. The court departed from an earlier judgement given by Mwaungulu J in *Ministry of Finance ex parte SGS Malawi Limited*<sup>121</sup> where it was held that socio-economic rights were not justiciable in Malawi because such matters were better dealt with by the executive, and instead went further to state that socio-economic rights were justiciable. Although the Masangano case arrived at this conclusion, the courts have almost ignored it and there is still limited adjudication of such rights. Part of the problem relates to these rights not being decisively and expressly elaborated in the Malawi constitution.

In other words, it would be useful for the legislature and the judicial system in Malawi to endeavor to reach a point similar to the South African stance which has brought the right to water and other socio economic rights to the fore and facilitates their justiciability.

## 8. Conclusions and Recommendations

At least 40 percent of the SADC population have no access to safe water. That affects the people's quality of life and impacts negatively on other human rights including the right to life. SADC member states have overwhelmingly ratified both universal and regional international treaties enjoining them

<sup>118</sup> Malawi Water Resources Act No 50 of 2013.

<sup>119</sup> Civil Cause 1665 of 1994 (HCM).

<sup>120</sup> *Masangano v Attorney General & Others* ((15 of 2007)) [2009] MWHC 31 (09 November 2009).

<sup>121</sup> *Ministry of Finance ex parte SGS Malawi Limited Misc Civil Application No 40 of 2003*.

to implement the right to life. At the sub-regional level, although SADC has a water-related treaty, the Revised Protocol on Shared Watercourses in the Southern African Development Community, it does not have any specific provisions articulating the right to water. It is recommended that considering the enormity of the water problem in the region and the need to come up with common standards and solutions in the sub-region, SADC should consider amending this treaty so as to elaborate further the right to water for individuals and communities.

Although some SADC member countries have constitutions as well as primary and subordinate legislation with express provisions on the right to water, many others do not. From the cases reviewed at least for South Africa, it would appear that countries with express provisions present a better chance that citizens are aware of the rights to water, which may be one of the reasons they head to courts for redress when they feel that such rights are infringed upon. The fact that some of the cases seeking to assert water rights are found against the applicants does not detract from the fact that the express provision may have facilitated the incidence of the litigation. It is hence recommended that countries without express provisions in their constitutions or other legislation should consider making appropriate amendments in order to make the right to water an express provision.

## **9. How to Improve Justiciability**

Pushing for justiciability of the rights to water would enable citizens to take legal steps to get relief in case their water needs are not unjustifiably or unfairly met. For Malawi, deriving a justiciable right to water from the broad right to, or the right to development potentially greatly limits the extent of its justiciability. For example, although one may opine that the Malawian judiciary has broader constitutional latitude such that it has the exclusive constitutional power to determine the scope of matters that are justiciable<sup>122</sup>, the absence of explicit protection of the right in the constitution limits its justiciability. The fact that the courts have more latitude imply that other judicial officers may as well choose to be less activist in their approach and may choose simply but anti-socio-economic rights decisions in the process.

Imposing a positive obligation on the state to do something is a better way of achieving development than to rely on for example the Indian model which relies on the right to life which is a negative right in that it prohibits the state from refusing their people such rights. Considering the right to water as a negative right (i.e., a civil right) is a relatively ineffective approach and may do less to compel government to endeavor towards its provision.

Although it could be argued that the judicial system in Malawi may always adopt a wider approach to the interpretation of development as provided for S 30 of the Malawi Constitution to include water and hence there is no need to worry about this, it is submitted here that such an approach puts citizens at the mercy of judicial officers and although we may want to embrace the assumption that the courts will often be reasonable, such an approach is counterproductive. The best approach is to entrench the rights to water expressly in the constitution as has been the case in the neighboring countries, notably South Africa.

Finally the case law that has been reviewed shows that water service providers, government policies and multinational corporations can be a danger to realizing the right to water. It is recommended that collectively at SADC regional level and individually at national level, frameworks should be developed that can clearly both spell out but also limit the interference of service providers and government programs with the right to water and better regulation of activities of multinationals, especially in the extractive industries, so that they contribute to the welfare of the communities in which they operate instead of poisoning their water sources and endangering their lives.

Expressly elaborated rights are more preferable to those relying on broader interpretations because those could facilitate holding the government accountable and could also ensure that even the

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<sup>122</sup> See (Gloppen and Kanyongolo 2007), *supra*.



judicial officers easily adjudicate such issues predictably. It would appear that there is need for some ‘reading-in’ remedies into a number of Southern African constitutions to ensure that water rights are expressly protected, thereby enhancing their justiciability. In general, justiciability of socio-economic rights and the rule of law go hand in hand. If a country chooses to ignore the rule of law, even if the right is protected by the bill of rights in the country, justiciability will remain illusory, however, if a country has no rule of law and the rights are not expressly spelt out, it will be almost next to impossible that the right will ever be justiciable. Again, it has not escaped our notice that the ability of countries to enforce such rights may be related to their stance of economic development, but we also submit that such correlation may as well be bidirectional in which case, there are gains to be realized from an active drive to make socio-economic rights justiciable in the SADC member states.

Moreover clear and express provisions of rights in major sources of law gives effect to the requirement of legality, predictability and certainty in respect of the right.

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