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## One step forward, two steps back: A review of *Mushoriwa v City of Harare* in view of Zimbabwe's constitutional socio-economic rights

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**Summary:** *In 2013 Zimbabwe enacted a new Constitution, introducing a raft of new changes, among them, the introduction of constitutional*

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*socio-economic rights. Not soon thereafter socio-economic rights were tested in the case of Mushoriwa v City of Harare in 2014. The High Court made a finding in favour of the applicant, a decision which enforced the right to water in section 77 of the Constitution. The ruling offered the view that the water bylaws used were unconstitutional and contrary to the enabling statute. This judgment was welcomed as a 'first true test' of socio-economic rights under the 2013 Constitution. In Hove v City of Harare the High Court judge agreed with the reasoning of the Court in Mushoriwa v City of Harare that, in the event of a genuine dispute of a water bill, there should be a recourse to the courts for remedies. In 2018, however, the Supreme Court overturned the decision in the Mushoriwa case. It declared that water disconnections in terms of the water bylaw are above board. This raises questions as to the constitutional obligation to protect the right to water imposed upon all organs of the state. It is against this background that this article reviews the case of Mushoriwa and makes comments on the effects of this judgment, specifically about the enforcement of socio-economic rights in Zimbabwe.*

**Keywords:** *constitutionality; right to water; Mushoriwa; socio-economic rights*

## 1 Introduction

The right to water is entrenched in section 77 of the Zimbabwean Constitution.<sup>1</sup> The Bill of Rights in the Zimbabwean Constitution contains similar obligations to those contained in the South African Constitution.<sup>2</sup> Zimbabwe is one of only three countries in Southern Africa that expressly provide for the right to water (the other two being South Africa and the Democratic Republic of the Congo (DRC)).<sup>3</sup> Section 77 of the Zimbabwean Constitution provides that every person has the right to safe, clean and potable water.<sup>4</sup> Be that as it may, it is important to note that certain positive duties imposed by the right are not immediately enforceable.<sup>5</sup> This is

1 Constitution of Zimbabwe Amendment Act 20 of 2013.

2 T Chivuru 'Socio-economic rights in Zimbabwe's new Constitution' (2014) 36 *Strategic Review for Southern Africa* 127; A Moyo 'Basic tenets of Zimbabwe's new constitutional order' (2019) *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* 10.

3 G Matchaya et al 'Justiciability of the right to water in the SADC region: A critical appraisal' (2018) 7 *Open Access Journal* 1.

4 Sec 77(a) Constitution of Zimbabwe.

5 S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development Journal* 134; C Heyns & D Brand (eds) *Socio-economic rights in South Africa* (2005) 309.

because the enforcement of the right, as in the case of most – if not all – socio-economic rights is subject to the availability of resources and progressive realisation.<sup>6</sup> Furthermore, this right is subject to limitation ‘in terms of a law of general application and to the extent that such limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom’.<sup>7</sup>

Several pieces of legislation regulating the use of and access to water for domestic use were in operation before the enactment of the 2013 Constitution. These include (i) the Water Bylaws 164 of 1913 which in section 8 empower a municipality, with notice in writing, to without compensation and prejudice to its right to obtain payment for the supply of water to the consumer, discontinue supplies to the consumer; and (ii) section 69(2)(e)(i) of Schedule 3 of the Urban Councils Act [chapter 29:15] which expressly empowers the Council to make bylaws that allow it to cut off water supplies. As noted by Muremba J in *Hove v City of Harare*:<sup>8</sup>

Whilst our Constitution protects the right to water it also empowers local authorities to levy rates and taxes to raise revenue for service provision. This means that costs committed for the purpose of providing a safe water supply must be recovered. I take this to mean that the right to water does not prohibit disconnections of water services for non-payment.

Whether or not such interpretation accords with the Constitution remains disputed. The Community Water Alliance, for instance, argues that section 8 of Statutory Instrument (SI) 164 of 1913 is unconstitutional because of its implications on the right to water.<sup>9</sup> This article reviews the recent case of *City of Harare v Farai Mushoriwa*<sup>10</sup> where the Supreme Court of Appeal (SCA) reversed the decision of the High Court with regard to the legality of water disconnections in Zimbabwe.

## 2 The right to water under international law

It is important to explore the various international legal instruments that provide for the right to water. This is because the way in which the right to water is interpreted under international law becomes

6 Sec 77 Constitution of Zimbabwe.

7 Sec 86 Constitution of Zimbabwe.

8 HH 205/16.

9 Community Water Alliance ‘Supreme Court ruling on arbitrary water disconnections: Implications on the human right to water in Zimbabwe’, <http://www.kubatana.net.ac.za> (accessed 7 November 2019).

10 *City of Harare v Farai Mushoriwa* SC54/2018.

relevant in determining the scope and application of the right in our jurisdiction. Section 46 of the 2013 Constitution enjoins any competent court, tribunal, forum or body to consider international law and all relevant treaties and conventions to which Zimbabwe is a state party.<sup>11</sup>

It should be highlighted at this point that the right to water as contemplated by these international legal instruments has been domesticated into the law of Zimbabwe, culminating in section 77 of the Constitution. Section 327 of the Constitution requires international law to be domesticated under an Act of Parliament for it to be binding. It can therefore be ascertained that section 77 of the Constitution has the effect of domesticating international law on the right to water such that it becomes binding on Zimbabwe.

The convenient starting point to discuss the right to water in the international context is the United Nations Charter of 1945 (UN Charter).<sup>12</sup> The UN Charter is the founding document of the UN and is an instrument of international law. The document codifies the major principles of international relations and is binding on all members. While the UN Charter is not a source of international human rights law, it commits member states to certain values relevant for the attainment of human rights. One of these ideals is the promotion of higher standards of living, full employment, and conditions conducive to economic and social development.<sup>13</sup>

In addition to this, the UN Charter also calls for the identification of solutions to international social, economic and health-related problems.<sup>14</sup> These standards are relevant to the realisation of the right to water. This is because, while they do not expressly refer to the right, the right may be inferred from these provisions. This is because it may be argued that a society with perennial shortages of safe drinking water would certainly be hostile to these set goals. Therefore, an obligation to provide adequate potable water to citizens would be inherent under this Charter.

The second document essential to this debate is the Universal Declaration of Human Rights (Universal Declaration) which was adopted by the UN General Assembly in 1948.<sup>15</sup> From the outset it is important to note that the Universal Declaration is not a

11 Sec 46 as read with secs 326 and 327 of the Constitution of Zimbabwe 2013.

12 Charter of the United Nations.

13 Art 55 UN Charter.

14 Art 55(b) UN Charter.

15 Proclaimed by the United Nations General Assembly in Paris on 10 December 1928 by UNGA 217A.

binding instrument, nor is it a source of law in the strict sense. This notwithstanding, it is paramount to consider this document as it is the basis upon which many international agreements were concluded.<sup>16</sup> Further, the provisions of the Universal Declaration should be considered forceful because many of its contents form part of customary international law,<sup>17</sup> which is considered binding in many countries, including Zimbabwe.<sup>18</sup> Section 326 of the Constitution of Zimbabwe provides that customary international law is binding on Zimbabwe to the extent that it is not inconsistent with the Constitution or any Act of Parliament.

Article 25 of the Universal Declaration provides that everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and health. As is evident, article 25 of this document does not expressly mention the right to water.<sup>19</sup> However, there is a strong argument that this right is implied in this provision. This is because the understanding is that article 25 is not exhaustive but rather provides elements that constitute the right to an adequate standard of living. Moreover, it can further be argued that it was not necessary to expressly include the right to water in this document as one could not discuss the rights to food and health while excluding the right to water which is a prerequisite to the realisation of these rights.<sup>20</sup> This is reinforced by the foundational argument that human rights are interconnected and indivisible.<sup>21</sup>

In 1966 UN member states adopted International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>22</sup> ICESCR gives effect to the UN Charter and the Universal Declaration in relation to certain fundamental rights and freedoms.<sup>23</sup> It 'provides the legal framework to protect and preserve the most basic economic, social

16 N Silva, G Martins & L Heller 'Human rights interdependence and indivisibility: A glance over the human rights to water and sanitation' (2019) 19 *BMC International Health and Human Rights* 1.

17 H Hannum 'The UDHR in national and international law' (1998) 3 *Health and Human Rights* 145.

18 *France v Turkey* PCIJ 1927, on the application of customary international law. see also *North Sea Continental Shelf* cases; *S v Mann* 2008 (1) ZLR 1 (H).

19 Art 25 provides that everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care, and necessary services.

20 J Scanlon et al *Water as a human right?* (2004) 53.

21 I Koch *Human rights and indivisible rights: The protection of socio-economic demands under the European Convention of Human Rights* (2009) 1.

22 International Covenant on Economic, Social and Cultural Rights adopted by the UN General Assembly on 16 December 1966 through GA Resolution 2200A (XXI), entered into force on 3 January 1976.

23 Preamble to ICESCR.

and cultural rights'.<sup>24</sup> Article 11 of ICESCR recognises the rights to an adequate standard of living, including sanitation, food and the continuous improvement of living conditions. In attempting to provide an interpretation of article 11 which considers the right to water, this provision has to be read with article 12 which provides for the right to health. As discussed earlier, the right to water cannot be discussed in isolation to other rights such as those to sanitation, food and health.<sup>25</sup> This stems from the very important debate on the interconnectedness and indivisibility of human rights.<sup>26</sup>

The task of providing an interpretation to this Covenant has been entrusted to the Committee on Economic, Social and Cultural Rights (ESCR Committee). The ESCR Committee is an independent expert body that has been appointed to oversee the implementation of the Covenant by state parties. The ESCR Committee consists of 18 experts that are appointed by way of ballot for four-year terms.<sup>27</sup> The ESCR Committee periodically provides General Comments on a myriad of issues such as the substantive issues arising from ICESCR.<sup>28</sup> General Comment 6 (1995)<sup>29</sup> explored the economic, social and cultural rights of older persons. The ESCR Committee noted concerning article 11 of ICESCR that '[o]lder persons should have access to adequate food, water, shelter, clothing, and health care through the provision of income, family and community support and self-help'.<sup>30</sup> In so doing, the ESCR Committee recognised the right to water via the right to an adequate standard of living.

In 2002 the Committee made available to the public General Comment 15. The General Comment considers substantive issues arising in the implementation of ICESCR. More specifically, it focuses on deciding whether this right is implicit in articles 11 and 12 of ICESCR.<sup>31</sup> The ESCR Committee found in favour of the existence of such a right when a generous interpretation of these provisos was afforded. It found that the legal bases of the right to water were as follows:<sup>32</sup>

24 Women, Peace and Security 'International Covenant on Social and Cultural Rights', <https://blogs.lse.ac.uk/vaw/int/treaty-bodies/international-covenant-on-economic-social-and-cultural-rights/> (accessed 9 April 2021).

25 P Hall et al 'The human right to water: The importance of domestic and productive water rights' (2014) *Science and Engineering Ethics* 849.

26 Silva et al (n 16) 1. See also J Bouchard & P Meyer-Bisch 'Intersectionality and interdependence of human rights: Same or different?' (2016) 16 *Equal Rights Review* 186.

27 Women, Peace and Security (n 24).

28 See, eg, ESCR Committee General Comment 9 (1998).

29 ESCR Committee General Comment 6 (1995).

30 ESCR Committee General Comment 6 (n 29) 7.

31 ESCR Committee General Comment 15 (2002) 1.

32 ESCR Committee General Comment 15 (n 31) 2.

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

The ESCR Committee was of the view that the list of rights giving effect to the right to an adequate standard of living was not intended to be exhaustive.<sup>33</sup> This was as a result of the use of the word 'including' which signalled that the drafters intended more rights than simply the stipulated rights (food, clothing and housing) to be covered.<sup>34</sup> A considered interrogation of the right to water would indicate that the right to water was essential to the guarantee of an adequate standard of living as it was vital to the survival of any person.<sup>35</sup>

The right to water was inevitably linked to the right to the highest attainable standard of health in article 12 of ICESCR and other rights in the International Bill of Human rights such as the right to life and human dignity.<sup>36</sup> The ESCR Committee reasoned that in leading a life in human dignity, the right to water was indispensable and was a prerequisite to the realisation of other rights such as the rights to an adequate standard of living, including food, clothing and housing.<sup>37</sup>

The ESCR Committee noted that a major reason for the adoption of such an approach was the fact that the implementation and enforcement of this human right had been challenging in the context of a developing country.<sup>38</sup> At the time of the drafting of the General Comment (in 2003), over 1 billion persons across the globe lacked access to water, while several billions (an estimated 2,3 billion) lacked access to proper sanitation, a major cause of water contamination and water-based diseases.<sup>39</sup>

Instructive for the purposes of this article was the discussion on the normative content of the right to water in the General Comment.<sup>40</sup> It was noted that the right to water contains both freedoms and entitlements. Freedoms, *inter alia*, include 'the right to maintain access to existing water supplies necessary for the right to water,

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33 As above.

34 As above.

35 As above.

36 As above.

37 ESCR Committee General Comment 15 1.

38 As above.

39 As above.

40 ESCR Committee General Comment 15 4.

and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.<sup>41</sup> In contradistinction, entitlements include 'the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water'.<sup>42</sup>

The ESCR Committee noted that, in determining whether the provision of water is adequate, it must be noted that the adequacy of the water could not be narrowly interpreted by focusing on volumetric quantities and technologies.<sup>43</sup> Rather, water had to be treated as a social and cultural good as opposed to a social good.<sup>44</sup> This notwithstanding, how this goal is attained had to be done in a manner that was sustainable, to ensure the future attainment of this right.<sup>45</sup> Of key importance was the fact that while what could be considered as an adequate amount of water for the realisation of this right could vary, certain factors had to be present in every scenario.<sup>46</sup> These are availability, quality and accessibility.

First, in terms of availability, the ESCR Committee notes that each person must have access to a sufficient and continuous water supply for personal and domestic use.<sup>47</sup> The amount made available for this purpose should correspond with the World Health Organisation (WHO) guidelines for domestic water quantity. Currently, the WHO provides that each person must be given access to 15 litres per day per person, as soon as possible.<sup>48</sup> It is worth noting that while this estimate is provided as a guide, it is recommended that every person be given access to at least 50 to 60 litres of water every day.<sup>49</sup> In emergencies, this daily limit may be reduced to 7,5 litres per person per day.<sup>50</sup> In this event, untreated water may be used for personal purposes such as laundry and bathing.<sup>51</sup> Importantly, the WHO notes that these amounts should be provided even if the quality of the water cannot be guaranteed.

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41 As above.

42 As above.

43 As above.

44 As above.

45 As above.

46 ESCR Committee General Comment 15 5.

47 As above.

48 World Health Organisation 'Water, sanitation and health', <https://www.who.int/teams/environment-climate-change-and-health/water-sanitation-and-health/environmental-health-in-emergencies/humanitarian-emergencies> (accessed 30 March 2021).

49 M Gorsboth & E Wolf *Identifying and addressing violations of the human right to work: Applying the human rights approach* (2008) 8.

50 World Health Organisation (n 48).

51 As above.

Second, in terms of quality, the ESCR Committee notes that the water should be safe, meaning that it must be free of any micro-organisms, chemical substances, or radiological substances that could pose a danger to a person's health.<sup>52</sup> In other words, the water must have an acceptable colour, odour and taste necessary for personal and domestic use.<sup>53</sup> Finally, in terms of accessibility, four overlapping dimensions were identified. These were (i) physical accessibility – focusing on the fact that adequate water facilities had to be close to all sections of the population; (ii) economic accessibility – this entails that water, and water facilities and services must be affordable for all; (iii) non-discrimination – this entails that water and water facilities and services must be accessible to all, including the most vulnerable or marginalised sections of the population; and (iv) information accessibility – this includes the right to seek, receive and impart information concerning water issues.<sup>54</sup>

Another critical aspect of General Comment 15 was that involving the general legal obligations of state parties.<sup>55</sup> The ESCR Committee observed that, while ICESCR provided for progressive realisation, in acknowledgment of the critical challenge of available resources, state parties have immediate obligations concerning the right to water.<sup>56</sup> These include the guarantee to dispense the right to water without discrimination and the obligation to take deliberate, concrete and targeted steps to realise articles 11(1) and 12 of ICESCR in as far as they relate to the right to water.<sup>57</sup> The ESCR Committee stated:<sup>58</sup>

State parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realisation of the right to water. The realisation of the right should be feasible and practicable, since all states parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.

This requires, as with all other rights, that states respect, promote and fulfil this right.<sup>59</sup> The obligation to 'respect' includes the fact that states must refrain from engaging in any practice or activity that results in the limitation of equal access to water or arbitrarily interfering with traditional or customary arrangements for water

52 ESCR Committee General Comment 15 5.

53 As above.

54 ESCR Committee General Comment 15 6.

55 ESCR Committee General Comment 15 8.

56 As above.

57 As above.

58 As above.

59 ESCR Committee General Comment 15 (2002) 9.

allocations.<sup>60</sup> This includes 'disconnecting any person's water supply arbitrarily, without notice, consultation or reasonable opportunity for redress or in any situation where the person genuinely cannot afford water'.<sup>61</sup> The obligation to 'protect' requires the state to take all measures necessary to ensure that third parties do not interfere with the enjoyment of the right to water. This includes putting in place measures to ensure that any agents (individuals, groups, corporations and other entities) acting under their authority observe this obligation.<sup>62</sup> The obligation to 'fulfil' requires states to facilitate, promote and provide.<sup>63</sup> The obligation to promote dictates that the state must take positive measures to ensure the enjoyment of the right, while the obligation to provide entails that the state must assist individuals or groups that are unable to realise this right through their own means.<sup>64</sup>

Subsequent conventions became explicitly clear in recognising the right to water. Examples are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which in article 14(2)(h) entitles women to enjoy adequate living conditions, which include the right to water.<sup>65</sup> As far as children's rights are concerned, the Convention on the Rights of the Child (CRC) in article 23 provides for 'the right of a child to enjoy the highest standards of life, to combat diseases and malnutrition ... [provision] of adequate nutritious food and clean drinking water'.<sup>66</sup> Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) binds state parties to take measures to ensure the provision of adequate nutrition and safe drinking water.<sup>67</sup>

Given these developments, on 28 July 2010 the United Nations (UN) General Assembly adopted Resolution 64/292 which recognises the human rights to water and sanitation, acknowledging the centrality of these rights in the realisation of all human rights.<sup>68</sup> In terms of this resolution, states and international organisations are encouraged to provide financial resources for the purpose of building

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60 As above.

61 Right to Water and Sanitation *Programme legal resources for the right to water and sanitation: International and national standards* (2008) 13.

62 ESCR Committee General Comment 15 9.

63 As above.

64 ESCR Committee General Comment 15 10.

65 Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981.

66 Convention on the Rights of Children, adopted 20 November 1989, entered into force 2 September 1990.

67 African Charter on the Rights and Welfare of Children CAB/LEG/24.9/49 (1990).

68 General Assembly Resolution 64/292 of 28 July 2010. See also United Nations 'International Decade for Action 'Water for life' 2005-2015', [https://www.un.org/waterforlifedecade/human\\_right\\_to\\_water.shtml](https://www.un.org/waterforlifedecade/human_right_to_water.shtml) (accessed 30 March 2021).

capacity to realise the rights to water and sanitation.<sup>69</sup> The Resolution also welcomes the decision by the Human Rights Council that the independent expert on human rights obligations related to access to safe drinking water and sanitation must submit an annual report to the General Assembly.<sup>70</sup> This is built upon earlier resolutions of the Human Rights Council on human rights, specifically the rights to water and sanitation, such as Council Resolutions 7/22 of 28 March 2008 and 12/8 of 1 October 2009 as well as General Comment 15 by the ESCR Committee.<sup>71</sup>

It has been a decade since the recognition of water and sanitation as human rights by the UN General Assembly. The Special Rapporteur<sup>72</sup> on the Human Rights to Safe Drinking Water and Sanitation,<sup>73</sup> Léo Heller, released a statement to mark the occasion.<sup>74</sup> He was of the view that the adoption of the General Assembly Resolution on the rights to water and sanitation had positively influenced other decisions.<sup>75</sup> He cited three specific examples for this purpose. First, the Human Rights Council in September 2010 adopted Resolution 15/9 which affirmed the recognition of the rights to water and sanitation by the General Assembly. The Resolution clarified the legal recognition of these rights, observing that the rights were derivatives of the right to an adequate standard of living, which is considered a binding human right in most states.

Second, in May 2011 the WHO passed Resolution 64/24. This Resolution calls upon member states to ensure that their national health strategies promote the rights to water and sanitation as well as the Millennium Development Goals (MDGs) in so far as they relate to water and sanitation.<sup>76</sup> Finally, the UN General Assembly in December 2015 adopted Resolution 70/169 which acknowledges

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69 As above.

70 General Assembly Resolution 64/292 of 28 July 2010.

71 As above.

72 A Special Rapporteur is an investigator who, within special procedure mechanisms, reports on a specific country perspective or a thematic issue to the UN Human Rights Council. They are appointed on a three-year basis without remuneration. By September 2020, there were 44 thematic and 11 country mandates. See United Nations Human Rights Office of the High Commissioner 'Special procedures of the Human Rights Council', <https://www.ohchr.org> (accessed 31 March 2021).

73 The function of a Special Rapporteur on the Right to Water and Sanitation had been there since 2008. Back then, the expert was called an independent expert on water and sanitation. The title changed in 2010 to Special Rapporteur on the Human Rights to Water and Sanitation when the UN General Assembly Resolution was passed.

74 United Nations Human Rights Office of the High Commissioner '10th anniversary of the recognition of water and sanitation as a human right by the General Assembly', <https://www.ohchr.org> (accessed 30 March 2021).

75 As above.

76 See World Health Organisation Resolution 64/24.

that the rights to water and sanitation are separate and distinct rights, which require different treatment to avoid possible implementation challenges and the possible neglect of sanitation as a result of it being treated as a secondary right.

The Special Rapporteur also noted that an important and critical achievement with regard to the rights to water and sanitation was the increased recognition of the links between the rights to water and sanitation and other human rights.<sup>77</sup> This accounts for a very important consideration in the human rights framework, that is, the interdependence and indivisibility of human rights. This work, in the opinion of the Special Rapporteur, has been supported the development of the domestic framework as well as the improved roles of various institutions and stakeholders.

For instance, the Special Rapporteur notes the refreshment of various legal frameworks since 2010 in countries such as Costa Rica, Egypt, Fiji, Kenya, Mexico, Morocco, Niger, Slovenia, Somalia, Tunisia and Zimbabwe, which now provide for express rights in this regard. He further observed that other countries that already afforded constitutional protection to these rights, such as Australia, Nepal and Togo, had gone a step further by developing subordinate legislation to enunciate the scope and limitations of these rights.

Concerning the institutional framework, the Special Rapporteur noted the importance of the roles of players such as autonomous water bodies and civil society organisations. More importantly, he observed the special role played by the courts. Many jurisdictions had passed judgments that reflected the UN General Assembly's decision to extend protection to these rights. For example, the Court of Appeal in Botswana, in the matter of *Mosethanyane & Others v Attorney-General*,<sup>78</sup> affirmed the rights to water and sanitation. In coming to its decision, the Appeal Court cited UN General Assembly Resolution 64/292.<sup>79</sup> It further observed the interdependence of the rights to water and sanitation to the rights to health and life.

The analysis of the Special Rapporteur concerning the rights to water and sanitation is critical but fair. Developments on the international front around these rights have been slow but steady. Over time, these developments have placed many governments in

77 'Water and sanitation as a human right by the General Assembly', <https://www.ohchr.org> (accessed 30 March 2021).

78 (2011) CACLB-074-10.

79 See, eg, *Mosethanyane & Others v Attorney-General of Botswana* (2011) CACLB-074-10 16.

a better position in which they can promote, protect and fulfil these rights as a result of the enhanced legal standing these particular rights now enjoy through interpretation and recognition (for example, via the various Resolutions discussed above).

### 3 Right to water as a constitutional right

Section 77 of the Constitution of Zimbabwe provides that every person has the right to safe, clean and potable water.<sup>80</sup> An obligation is placed upon the state to take legislative and other measures within the resources available to ensure the progressive realisation of this right.<sup>81</sup> The first point to note is that, unlike other rights that apply to citizens or persons who are ordinarily resident in Zimbabwe, the right to water is a right afforded to every person.<sup>82</sup> This means that any person who is within the boundaries of Zimbabwe has a right to water regardless of their status, the legality of their presence in Zimbabwe, or the period of their stay therein. Once a person finds themselves within the boundaries of Zimbabwe, section 77 begins to operate in their favour.<sup>83</sup> The second point is that the right to water is narrowed down to the right to potable, clean and safe water.<sup>84</sup> This must be distinguished from the right to have access to water bodies, the right to irrigation water, or the right to water in general as these fall in the ambit of environmental rights.<sup>85</sup> The Zimbabwean Constitution specifically provides for the right to safe, clean and potable water.

The question that arises at this juncture is what safe, clean and potable water is. What is the benchmark or, rather, the standard against which to measure whether water is safe, potable and clean? These questions are answered by General Comment 15 of the ESCR Committee.<sup>86</sup> It provides that water, as contemplated by section 77 of the 2013 Constitution, must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. A further qualification was

80 Sec 77 Constitution of Zimbabwe.

81 Sec 77(b) Constitution of Zimbabwe.

82 As above.

83 For an understanding of the meaning of the phrase 'every person', see A Magaisa 'Property rights in Zimbabwe's draft Constitution: Zimbabwe Briefing' *Issue 86*.

84 The rationale behind expressly providing for the right to potable, clean and safe drinking water is the need to preserve life in conformity with the obligation placed on the state.

85 Sec 73 Constitution of Zimbabwe 2013.

86 PH Gleick 'Basic water requirements for human activities: meeting basic needs' (1996) 21 *Water International Journal* 83.

that the water must be of acceptable colour, odour and taste for personal domestic use.<sup>87</sup>

## 4 *Mushoriwa case*

### 4.1 Facts of the case

The case revolved around the issue of water disconnections in Harare as empowered under the Urban Councils Act and the Water Bylaws. Specifically, in May 2013 the applicant received a water account of US \$1 700.<sup>88</sup> The applicant disputed the contents of the bill, claiming that it belonged to a bulk water meter not connected to his leased premises.<sup>89</sup> On 31 May 2013 the respondent unilaterally and arbitrarily disconnected the applicant's water supply.<sup>90</sup> The applicant then filed an urgent chamber application.<sup>91</sup> Specifically, he sought a spoliation order directing the respondent to restore water services pending resolution of the dispute by the courts.<sup>92</sup>

Noting the urgency of the matter, and the importance and centrality of the provision of water, Bhunu J, with the consent of the parties, ordered that water services be immediately restored pending the determination of the application.<sup>93</sup> The rationale was that for the applicant to remain without water would be a 'catastrophe'.<sup>94</sup> The interim order, therefore, was aimed at ameliorating the situation.<sup>95</sup> Notwithstanding this lawful consent order prohibiting the respondent from disconnecting the water services of the applicant until the finalisation of the application, the respondent disconnected water services from the applicant's premises without a lawful court order.<sup>96</sup> For the respondent to restore water services at the applicant's property, it required threats of imprisonment for contempt of a valid court order.<sup>97</sup>

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87 Safe drinking water is water that can be delivered to the user and is safe for drinking or food preparation, personal hygiene and washing. The quality is relative and depends on the standards of each country: MO Dinka 'Safe drinking water: Concepts, benefits, principles and standards' (2018) *Water Challenges of an Urbanising World, Intech Open*.

88 *City of Harare v Farai Mushoriwa* (n 10).

89 As above.

90 As above.

91 As above.

92 *Farai Mushoriwa v City of Harare* HC 4266/13 HC ZWHHC 195.

93 As above.

94 As above.

95 As above.

96 As above.

97 As above.

It was argued by the applicant that the termination of water supplies by the respondent without a court order amounted to unlawful self-help.<sup>98</sup> Moreover, it was the dispossession of the applicant's peaceful and undisturbed possession of water.<sup>99</sup> The High Court then issued a judgment granting a provisional order in favour of the applicant.<sup>100</sup> The matter, in this case, is now an appeal of this High Court decision by the City of Harare. At the time of this appeal, the respondent (applicant in the High Court) had already vacated the premises in question.<sup>101</sup>

## 4.2 High Court decision

In analysing the matter, the Court first examined the context of the matter. The Court noted that the matter was one falling squarely within the rights and obligations of the water service provider and the consumer.<sup>102</sup> Thereafter, the Court noted that the question to be answered was whether in the case of a disputed payment the appellant was entitled to self-help and unilaterally terminate water supplies to a citizen without recourse to law and become a law unto itself.<sup>103</sup> From the pleadings, it appears that there was an agreement that there was an obligation on the respondent to provide water to the applicant and a concomitant duty on the latter to pay. The dispute was squarely on the different approaches taken by the parties on what happens if there is disagreement in reading payment. The argument by the Harare City Council was that the bylaws give it an unfettered discretion to discontinue water without recourse to the law. The applicant countered the argument by pointing out that such an interpretation would be *ultra vires* section 198 as read with section 69(2) of the Third Schedule to the Water Act.

The Court found that in terms of the Act, the Council could only disconnect the water supply when it has sufficient proof that the amount claimed is due and after giving 24 hours' notice. Although the dispute could be resolved through the interpretation of the bylaws and the enabling Act, it would have been undesirable to ignore the Constitution owing to the implications that the judgment would have on the Bill of Rights. The Court then considered section 77 of the Constitution and concluded that as a public body, the Council is mandated by section 44 of the same to refrain from denying a citizen

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98 As above.

99 As above.

100 *City of Harare v Farai Mushoriwa* (n 10).

101 As above.

102 *Farai Mushoriwa v City of Harare* (n 92) 195.

103 As above.

water without just cause. It appears from a reading of the judgment that 24 hours' notice and evidence of non-payment suffice as just cause to deny access to water. The Court further opined that where there is a dispute, it must be resolved by the court. Section 8 of the bylaw, therefore, was *ultra vires* the enabling Act and Constitution to the extent that it allows arbitrary disconnections.

### 4.3 Supreme Court decision<sup>104</sup>

Eight grounds of appeal were raised by the appellants in the Supreme Court, but these were narrowed down by the Court as relating to (i) the relief granted by the court *a quo*; and (ii) the legality of the appellant's actions of disconnecting water generally.<sup>105</sup> The second ground of appeal is relevant to this article. The appellant argued that the finding of the High Court that the bylaw which allows the City Council to disconnect water supply without recourse to the courts is both unconstitutional and *ultra vires* the enabling Act.<sup>106</sup> It was further argued that the right to water is not absolute, but subject to limitations necessary for regional and town planning.<sup>107</sup>

In the context of the above grounds of appeal the Supreme Court was called upon to make two determinations, namely, first, whether clause 8(a) of the Standard Contract (scheduled to the 1913 bylaws)<sup>108</sup> is inconsistent with the Third Schedule of the Urban Councils Act in so much as it allows the disconnection of water for non-payment by giving 24 hours' notice and without compensation. The second issue was the determination of the constitutionality of the bylaws. With regard to the first issue, the respondents argued that section 198(3), which contains the phrase 'in the opinion of the council', is subject to the Third Schedule of the Act which omits the phrase, therefore prohibiting the council from acting arbitrarily.<sup>109</sup> The Supreme Court found this conclusion to be 'somewhat narrow and unilinear'.<sup>110</sup> It held that the broad enabling provision empowers every urban council to do whatever it deems necessary to administer or effectuate its bylaws.<sup>111</sup> On the strength of this reasoning, it declared that the bylaws are *intra vires* the enabling provisions of the Act. The Court concluded that 'the 1913 bylaws regarded as a

104 As above.

105 *City of Harare v Farai Mushoriwa* (n 10).

106 As above.

107 As above.

108 General Notice 164 of 1913 titled bylaws for Regulations the Supply and Use of Water within the Municipality of Salisbury.

109 *City of Harare v Farai Mushoriwa* (n 10).

110 As above.

111 As above.

whole, are not only compliant and *intra vires* the enabling provisions of the Urban Councils Act, but also perfectly concordant with the overreaching notions of reasonableness'.<sup>112</sup>

The second issue for determination was whether the bylaws were constitutional in allowing the disconnection of water for non-payment by giving 24 hours' notice and without compensation. The Court referred to Gabru's work on the right to water in South Africa<sup>113</sup> in holding that the obligation imposed on the state is not unqualified to impose a duty on the state to provide water upon demand.<sup>114</sup> It noted that the reference to access rather than the right to the water means that the state only has an obligation towards those without means to ensure access to water.<sup>115</sup> More fundamentally it held that 'the availability of access to food and water depends upon the availability of the resources at the disposal of the state'.<sup>116</sup> The Court associated itself with the reasoning of Gabru<sup>117</sup> 'that fundamental rights and freedoms are not absolute, their boundaries being demarcated by the rights of others and by legitimate needs of society'.<sup>118</sup>

#### 4.3.1 *Implications of Supreme Court decision in the Mushoriwa case*

The decision by the Supreme Court in the *Mushoriwa* case has a significant impact not only on the realisation of the right to water as a constitutional right, but also has a bearing on the social context. The Supreme Court established that the relationship between the state and a citizen about the right to water is the same as that between a service provider and a consumer. Properly understood, this means that, whereas the state must provide safe water to its citizens, there is a concomitant duty placed on the recipients to pay for the water they consume.<sup>119</sup> Accordingly, it is permissible and constitutional for water to be disconnected on 24 hours' notice and for non-payment. In this regard, the Court summarised as follows:<sup>120</sup>

Bearing in mind the enormous economic and budgetary considerations that would ordinarily arise in the provision of safe and clean water to

112 As above.

113 N Gabru 'Some comments on water rights in South Africa' (2005) 8 *Potchefstroom Electronic Law Journal* 12.

114 *City of Harare v Farai Mushoriwa* (n 10).

115 As above.

116 As above.

117 As above.

118 As above.

119 As above.

120 As above.

a large populace, it cannot be said that the disconnection of water supply because of non-payment for water consumed in any specific instance constitutes an infringement of the constitutional right to water. Indeed, it may be necessary to do so to ensure that the majority of non-defaulting consumers continue to enjoy their respective rights to water. This approach accords squarely with the dictates of section 86(1) of the Constitution, to wit, that fundamental rights and freedoms must be exercised reasonably and with due regard to the rights and freedoms of others.

The other implication of this decision is that it makes no provision for those who are not in a financial position to pay for the water they consume. The assumption is that every person can pay for water provision rendered by the state and that, therefore, those who do not pay must have their water supply disconnected to compel them to pay since they have capacity. In reaction to the *Mazibuko* judgment, which essentially is similar to the one under review, Rothmyr remarked that the Court approached the issue of disconnections based on an assumption that people do not pay because they are bad and are unwilling to settle their obligations.<sup>121</sup>

On the social sphere, the *Mushoriwa* judgment leaves the poor and the vulnerable exposed to the risks associated with a lack of access to clean, safe and potable water. With the legal obligation placed on the state to ensure the progressive realisation of the right to water diluted by the concomitant obligation placed on the recipient to pay for the water, there is no legal recourse for the poor. If the City Council decides to follow the letter of the law and proceed to disconnect the water supply to everyone who fails to pay for the service on the strength of this judgment, the result would be a social catastrophe.<sup>122</sup>

## 5 Critique of the Supreme Court of Appeal decision in the *Mushoriwa* case

As can be gleaned from the previous part, the reasoning and judgment of the Supreme Court in the *Mushoriwa* case presents us with several problems as far as the realisation of the right to water is concerned. Since the right to water is located within the social context, the decision has the potential of having a detrimental effect on the social well-being of the populace. It is submitted, with respect, that the Court failed to take into consideration the social impact the

<sup>121</sup> 2010 CCR 317.

<sup>122</sup> *Farai Mushoriwa v City of Harare* (n 92) 195.

decision bore which, had they so considered, would have led the Court to a different conclusion.

First, the right to water is unique in its character and substance, thus it should not be analysed in isolation. An analysis of the right to water lays bare the interconnectedness and interdependence of universal human rights. The right to water, therefore, is inherent in other human rights, the most important being the right to life. Section 48 of the Constitution provides for the right to life,<sup>123</sup> as does article 6(1) of the International Convention on Civil and Political Rights (ICCPR).<sup>124</sup> Section 86(3)(a) of the Constitution makes the right to life absolute except in terms where the death penalty is imposed by a court of law in limited circumstances. It has been argued that the right to life requires a broader and extensive interpretation which imposes both a negative and positive obligation on the state in ensuring that the right is fully enjoyed. In the General Comment on the Right to Life, the Human Rights Council observed that '[t]he right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the expression of this right requires that states adopt positive measures.'<sup>125</sup>

Taking this interpretation about the right to water, a synergy between the two rights was established. It was well put in the following manner:<sup>126</sup>

Disregarding this new development in the understanding of article 6 of ICCPR and assuming a narrow interpretation of such a right will nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water because this is one of the most fundamental resources necessary to sustain life.

Put differently, the right to water gives life to the right to life, for no person can survive without access to clean water. It follows that, even if the argument that the right to water is not absolute and can therefore be limited in terms of section 86 of the Constitution, such an argument would eventually not stand if this submission is anything to go by. Limiting the right to water essentially is tantamount to limiting the right to life and, therefore, it becomes unconstitutional even though this can be a far-reaching argument, and unlawful. The same argument will apply *mutatis mutandis* concerning the right to water and the right to human dignity which is also an absolute

123 *S v Makwanyane* 1995 (3) SA 391 (CC).

124 International Convention on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1973.

125 General Comment 6.

126 J Scanlon et al *Water as a human right?* (2004) 53.

right.<sup>127</sup> It warrants no argument to say that a person's dignity is violated when they are denied access to clean water regardless of the intelligence of the grounds.

This argument is also sustained by the jurisprudence developed by the Inter-American Court of Human Rights on the right to water. It has been said that since the right to water is not included in the International Bill of Rights, its recognition has been achieved in two ways: first, as a subordinate right necessary for the realisation of other recognised rights whether civil and political rights or social economic, and cultural rights (derivative right); second, the right to water can be recognised as a stand-alone, new right (stand-alone right).<sup>128</sup> Proceeding from this standpoint, and assuming the argument that the right to water as provided for by the Constitution of Zimbabwe can be limited, it creates an absurdity when the right of water is derived from the right(s) to life and human dignity and, therefore, cannot be limited in terms of section 86 of the Constitution.

In other words, the effect of finding that the right to water can be limited may be summarised as follows: When the right to water is derivative from the right to life, it is absolute, but when it is provided as a stand-alone right, it can be limited in terms of section 86. The logical impurity of such a scenario is that the right to water will be afforded more and stronger protection in countries that do not explicitly provide for it in their constitutions, and weaker and less pronounced protection in countries that explicitly recognise the right.

The Court's finding in *Mushoriwa* that the right to water as enshrined in the Constitution places a concomitant obligation on the right holder to pay for the service is also problematic. The juridical impurity of such a finding is twofold, namely, (a) it neglects to canvass the issue of affordability; and (b) it significantly limits the obligation of the state to ensure that there is sufficiently clean, potable water for its people. These two issues will be dealt with in turn.

## 5.1 Affordability

Paragraph 12(c)(ii) of General Comment 15<sup>129</sup> reads that water and water facilities and services must be affordable for all. The direct

<sup>127</sup> Sec 51 Constitution of Zimbabwe.

<sup>128</sup> JM Chávarro 'The right to water in the case-law of the Inter-American Court of Human Rights' in R Abello-Galvis (ed) *Anuario Colombiano Derecho Internacional* (2014) 39.

<sup>129</sup> As above.

and indirect costs and charges associated with securing water must be affordable. The issue of affordability ought to be canvassed sufficiently to establish what it contemplates as it is a relative concept that depends on the status and income of an individual. To some, affordability means parting with a few dollars while to others affordability may mean not paying anything at all. It is this latter class of people that are especially sought to be protected when the application of the right to water is analysed.

Section 56 of the Constitution prohibits, among other things, discrimination based on economic status.<sup>130</sup> Paragraph 13 of General Comment 15 recognises that vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes. Hence, there cannot be a blanket application of measures, but such should be targeted and specifically chosen to have regard to the income and economic status of each community. That there is a state obligation to provide water for free to people who cannot pay for the water was put beyond doubt by the General Comment.<sup>131</sup> The societal and economic situation of Zimbabwe ought to be taken into consideration when determining the issue of affordability, where over 90 per cent of the population is not formally employed. The Court should have concluded that a considerable portion of the population would not have the means to pay their water bills. Even Gabru, on whose work the Court relied, insinuated that 'the state's duty is only limited to those sections of the population without the means to ensure access to health care, food, water, and social security'.<sup>132</sup> Commenting on the South African case of *Mazibuko*, Kidd observed that the inability to pay for prepaid water would mean spending a considerable time without not only sufficient water but without water completely.<sup>133</sup> This highlights the adverse social impact of the lack of access to safe drinking water.

## 5.2 Obligation of the state

In addition to the international obligation of the state to ensure access to clean drinking water, section 77 of the Constitution also imposes an obligation on the state to take legislative and other measures, within the resources available to it, to ensure the progressive realisation of this right. A narrow interpretation of this phrase, as adopted by the Supreme Court in the *Mushoriwa* case, will effectively

<sup>130</sup> Sec 56(3) Constitution of Zimbabwe.

<sup>131</sup> United Nations Human Rights Office of the High Commissioner (n 74).

<sup>132</sup> Gabru (n 93) 12.

<sup>133</sup> M Kidd *Environmental law* (2008) 92.

lift this responsibility from the state to the citizens. This provision requires the state to be innovative, creative and to take positive steps to ensure that everyone – the 'haves' as well as the 'have-nots' – has access to clean and adequate water. Once the state relies solely on the purportedly concomitant obligation to pay for water, it has abdicated its obligation.

This approach is not congruent with the constitutional obligation inherent in the right to water. The state should find ways to protect those who cannot afford it, for they are also entitled to the enjoyment of the right. Such an obligation was placed on the state in the full realisation that 'all state parties exercise control over a broad range of resources including water, technology, financial resources, and, international assistance'.<sup>134</sup> Perhaps the Zimbabwean government can take lessons from South Africa, which provides a limited amount of potable water free of charge to poor households.<sup>135</sup> It is also estimated that at least 7,5 million (13 per cent) South Africans access no-cost drinking water through communal taps provided by municipalities.<sup>136</sup> Worth noting is the fact that the free basic water made accessible to these households through public taps can easily surpass the 6m<sup>3</sup> per month per household that is prescribed by law.<sup>137</sup> It appears more encompassing and progressive, and a considerable fulfilment of the state's obligation.

The other ground for disagreeing with the decision of the Court is that it failed to apply its mind on the social implications of its judgment, particularly on women and children. It has already been highlighted that women and children, as vulnerable groups, have their right to water that is recognised under international law. When water is disconnected from a household, it is the women and children that suffer the most among other vulnerable groups, such as persons with disabilities. For women and children, the water crisis is personal. They are responsible for finding a resource their families need to survive for drinking, cooking, sanitation and hygiene.

Scanion<sup>138</sup> noted that the right to water provided in CEDAW<sup>139</sup> was a realisation of the traditional burden placed upon women in

134 Para 18 General Comment 15.

135 *City of Harare v Farai Mushoriwa* (n 10).

136 KW Scheihing et al 'A strategy to enhance management of free basic water via communal taps in South Africa' (2020) 64 *Utilities Policy* 1043.

137 Free Basic Water Implementation Strategy Version 2, now superseded by Free Basic Water Implementation Strategy 2007. See further *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC) paras 167-169 where the Court upheld the free basic water policy.

138 As above.

139 As above.

developing countries go long distances to fetch water. The plight of children is far worse. Being children, they do not have money to pay for the water and rely on the ability of their parents to do so, failing which they are exposed to a lack of access to water, diseases, and general traumatic conditions. A household is a composite unit, which often includes women and children not disregarding the ever-evolving composition of families, and if the Court had considered their welfare, it probably would have arrived at a different conclusion.

In any event, section 81(2) of the Zimbabwean Constitution unequivocally states that in any matter that may involve a child, the best interests of the child are the paramount consideration. Although this was not a matter brought before the Court, it would have been prudent to consider the implications of the Supreme Court of Appeal's judgment in later matters, and how this ruling could effectively limit the rights of vulnerable groups such as women and children. In this case, the interests of the child were not even considered, let alone given significant consideration. It was incumbent upon the Court to consider such interests, but the Court failed the child. According to section 81(2) it is unconstitutional for a court to give a judgment that is averse to the welfare of the child. The lack of clean, sufficient water is an antithesis to the best interests of the child.

### 5.3 Comparative law

Recent jurisprudential developments regarding the right to water have added another requirement that must be present for disconnections to be justified. Where both substantive and procedural requirements as discussed above have been met to warrant legal water disconnections, water authorities must ensure the provision of basic minimum amounts of water and sanitation to the person faced with disconnection, in order to preserve life.<sup>140</sup> Disconnections, therefore, must only affect the individual to the extent that he is deprived of access to water which is beyond that which is necessary for his basic well-being and survival. The underlying argument here is that access to a basic minimum amount of water has nothing to do with the ability to pay, but has everything to do with dignity, health, and the realisation of other rights, even where disconnection is allowed.

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<sup>140</sup> C de Albuquerque 'On the right track: Good practices in realising the right to water and sanitation' United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Lisbon 2012.

In South Africa, the Constitution<sup>141</sup> which also enshrines the right to sufficient water in section 27, mirroring section 77 of the Constitution, the courts have had to rule on the issue. In the case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*<sup>142</sup> the Court held that the disconnection of water supply must not result in the denial of basic water supply for non-payment where the person proves, to the satisfaction of the authorities, that they are not able to pay for basic water services. In finding against the Council, the Court established that the respondent had neither proved that the disconnections were carried out on valid grounds, nor did it show that due process was followed in effecting the disconnections. This is an approach that has been recommended for adoption in Indian jurisprudence on the right to water.<sup>143</sup>

However, some countries have gone a step further by expressly prohibiting the disconnection of water for domestic use. The United Kingdom government in 1999 amended its Water Industry Act to the effect that disconnections of water and sewage services for reasons of non-payment by domestic consumers became illegal. In New Zealand the Local Governance Act prohibits the disconnection of water and sanitation services except in the interests of public health. The approach that was taken by the court here is progressive. It only requires those affected by the disconnection to allege that there indeed was a disconnection.

The onus will fall on the authority carrying out the disconnection to prove that the disconnection was done according to valid grounds and that due process was followed. It is not for the affected persons to prove that the disconnections were done on invalid grounds and that due process was not followed. In *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*,<sup>144</sup> for example, the Superior Tribunal de Justiça in Brazil dismissed an appeal by the State Water Utility after it had shut down the water supply to a resident who was experiencing financial difficulties as a result of the accidental burning down of the resident's dwelling (a wooden shack). The Superior Tribunal found that water was an essential public service that could not be interrupted based on non-payment, in the event of a lack of means. Such disconnections were found to be inhumane illegal acts. The Superior Tribunal Reasoned as follows:

141 The Constitution of the Republic of South Africa, 1996.

142 2002 (6) BCLR 625 (W).

143 J Kothari 'The right to water: A constitutional perspective' (2005) 8 *Potchefstroom Electronic Law Journal* 1.

144 *Superior Tribunal de Justiça Resp* [1999] 201 112.

The water company must use the appropriate legal means available and it cannot take justice in its own hands as we live in the rule of law and disputes are decided by the judiciary and not by individuals. It further emphasised that '[w]ater is an essential and indispensable good for the health and hygiene of the population. Its supply is an indispensable public service, which is subordinated to the principle of continuity, making impossible its interruption especially due to late payment.'

It referred to its own earlier judgment in case 8.915 – MA, DJ of 17 August 1998 where it was ruled that

water supply, because it is a fundamental public service, essential and vital for human beings, cannot be suspended for late payment of respective fees, as the public administration has reasonable means to recover user debts. Moreover, if the public services are provided on behalf of all the community, it is an illegal measure to deny it to a consumer merely for late payment.<sup>145</sup>

Another interesting case in South Africa was *City of Cape Town v Strümpher*.<sup>146</sup> As opposed to the approach of the Superior Tribunal, particularly about the issue of the disconnection of water services for non-payment, *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*, which approached the matter of disconnections from a public service public good perspective, the Supreme Court of Appeal approached the issue of disconnection of water supply over non-payment as not only a right to water violation, but also a fairness and equity violation. The thinking in this regard was that '[t]he 'right to the supply of water cannot be construed as only resulting from contractual obligations without giving any consideration to the principles of fairness and equity which apply in case of disconnection of water supply under South African law'.<sup>147</sup>

In *Quevedo, Miguel Ángel y Otros c/ Aguas Cordobesas SA*<sup>148</sup> the Juez Sustituta de Primera Instancia Civil y Comercial in Argentina adopted a similar approach to *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*, identifying the public service nature of the water provision. However, the two cases differ on whether or not disconnections should be permissible. It was held in *Quevedo* that if private water companies (under a public concession contract) sought to disconnect water over non-payment, they must provide a minimum daily amount of 200 litres of water per household, if the

145 As above.

146 2012 54 (ZASCA).

147 As above.

148 *Quevedo, Miguel Ángel y Otros c/ Aguas Cordobesas SA* (2002) Juez Sustituta de Primera Instancia Civil y Comercial (Ciudad de Córdoba).

reason for the disconnection of the water supply was non-payment due to a lack of means.

From these cases it is clear that there is no one approach to dealing with the issue of disconnections across jurisdictions. However, the preferred approach is that disconnections for non-payment are lawful only on the condition that they are not arbitrary and that the person facing disconnections is left with access to a basic minimum amount of water necessary for their well-being.

## 6 The missed opportunity

The *Mushoriwa* case presented the judiciary with the opportunity to pronounce itself on the scope of the obligation of the state to ensure the realisation of socio-economic and cultural rights. It should be noted that the decision in *Mushoriwa* transcends beyond the right to water, to include most socio-economic rights. Unfortunately, the effect of the judgment was that there is no distinction between the right to water before the enactment of the 2013 Constitution and after its enactment, although the 2013 Constitution introduces third-generation rights in Zimbabwe's constitutional dispensation. There was an expectation that the Court would use the Constitution as a transformative tool, in transforming the society following the emerging notions of social justice. A comment on the role of the South African Constitution in transforming society is instructive:<sup>149</sup>

At the same time, the Constitution could not only look into the past but also needed to provide some kind of vision of the future society South Africa would become. There are elements of the Constitution which we classify under the heading 'reform' that are not backward-looking but seek to provide a blueprint for a future just society: the socio-economic rights in the Constitution, we argue, fall under this heading, although they are also partly justified by the redress component.

The narrative of the transformative nature of the Constitution was outlined by Klare who distinguishes a constitutional order that seeks to retain and maintain the *status quo* from the one that seeks to transform it. He theorises the latter as transformative constitutionalism which he describes as 'a long-term project of constitutional enactment, interpretation, and enforcement ... committed to transforming a country's political and social institutions'.<sup>150</sup>

149 D Bilchitz *International Institute for Democracy and Electoral Assistance (International IDES): Assessing the performance of the South African Constitution* (2016).

150 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

The Constitution of Zimbabwe is transformative having been a product of over a decade of lobbying for a new constitution. It marks a break with the past and also sets goals for the future and the new trajectory on which the country shall traverse. The concept of transformative constitutionalism was not only negated but the Court saw a 1913 bylaw which related to access to water compliant with a constitution enacted in 2013, 100 years later.

## 7 Conclusion

The *Mushoriwa v City of Harare* judgment, with respect, fundamentally limits the realisation of not only the right to water but to socio-economic rights in the broader sense. It therefore is impugned on the grounds canvassed herein. It is based on a narrow and isolated appreciation of the declaration of rights, generally, and the right to water, in particular. Disconnections of water supplies for domestic use where access pre-exists is lawful only under very limited circumstances. It is submitted that the disconnection of water supply for non-payment should be in strict adherence to due process so that it does not become arbitrary and, therefore, unconstitutional.

Foreign jurisprudence discussed in this article, especially in the case of *Ademar Manoel Pereira x Companhia Catarinense de Agua e Saneamento – CASAN*, demonstrates that the disconnection of water services for non-payment should be deemed an inhuman and illegal act which should not be given space in our societies. This is particularly because of the impact of water disconnections on health and hygiene, as well as on other inter-related human rights such as life and dignity. While such foreign jurisprudence only has a persuasive value in our jurisdiction, it is instructive in demonstrating the availability of much bolder approaches in the recognition, application and enforcement of the right to water.

The substance of the right to water and how it is inherent in some of the non-derogable rights in the Constitution must compel us to lean towards outlawing disconnections rather than legalising them. The importance of access to water was even noticed in the High Court in the *Mushoriwa* case where the judge had to order that pending the determination of the case, water access had to be restored immediately. The judge stated:<sup>151</sup>

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<sup>151</sup> *Mushoriwa v City of Harare* HH-195-14 (our emphasis).

Having regard to the urgency of the case when seized with the matter I immediately ordered by consent of the parties restoration of the water services forthwith pending the determination of this application to avert a catastrophe as one cannot survive without water. The respondent duly complied thereby ameliorating the urgency of the matter.

It therefore is an affront of logic to assume that there will be no catastrophe if water disconnections stemming from non-payment take place.

However, if the thinking is that non-payment is a legitimate ground for disconnections, on the basis that citizens would not be compelled to pay their water bills if there are no serious consequences in the case of non-payment (such as disconnections), there must still be a rights-based approach to this. The UN Human Rights Council Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation in 2010 identified an approach that could be useful for this purpose. The expert noted:<sup>152</sup>

When water disconnections are carried out due to defaulting payment, due process must be followed before disconnection and it must be ensured that individuals still have at least access to a minimum essential level of water. Likewise, when water-borne sanitation is used, water disconnections must not result in denying access to sanitation.

Therefore, if water disconnections take place, the minimum core obligations concerning this right must still be realised. This having been said, it may be soundly concluded that, while including the right to water in the Declaration of Rights was one step forward, the restrictive interpretation of the right by the courts and the pursuance of cost recovery measures by the state effectively make the right redundant and makes a mockery of the Declaration of Rights in totality.

<sup>152</sup> Cited in W United & W Lex. *The human rights to water and sanitation worldwide: A selection of national, regional and international case law* (2014) 28. See also UNHRC Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation 'Good practices related to access to safe drinking water and sanitation: Questionnaire' (2010) [Question 3].