

ARTICLE

Constitutionalising a Human Right to Water in the Southern African Development Community

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At present no binding human rights instrument referring to an explicit right to water exists within the Southern African Development Community's (SADC) human rights legal framework. There are, however, implicit references to such a right within a number of SADC policy documents, and three Constitutions of SADC member states (South Africa, Zimbabwe and the Democratic Republic of the Congo) explicitly contain a right to water. In order to provide the peoples of SADC a legal basis upon which to enforce these implicit and explicit human rights, a SADC human right to water must be constitutionalised within a binding human rights instrument. In giving content to this proposed constitutionalised human right to water the 'reading in' approach found in General Comment 15 of the Committee on International Economic, Social and Cultural Rights as interpreted by the African Commission on Human and Peoples' Rights will be applied to specific SADC water policy documents. In this manner, references to aspects related to the right to water – most notably water quality and water quantity will be identified and discussed. These references will be interpreted and will be applied to inform the content of the proposed constitutionalised SADC human right to water.

Keywords: water; human; right; SADC; constitutionalise; interpretation

1. Introduction

The Southern African Development Community (SADC) consists of 16 southern African member states, namely: Angola, Botswana, Comoros, Democratic Republic of Congo (DRC), the Kingdom of *Eswatini*,¹ Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and Zimbabwe. In line with the mandate contained in section 5(2)(c) of the Treaty Establishing SADC, 1992, member states must create appropriate mechanisms (including legal instruments) to facilitate the implementation of SADC programmes and in this regard a number of binding and non-binding legal instruments have been drafted to regulate water resource management in SADC. The Revised Protocol on Shared Watercourses 2000; the Regional Water Policy 2005; the Regional Water Strategy 2006; the Regional Infrastructure Development Plan: Water Sector Plan 2012 and the Regional Strategic Action Plan on Integrated Water Resources and Development Management 2016–2020 (among others) currently comprise the SADC legal framework on shared watercourses management. These documents are intrinsically linked to the central research question of this article which is: what should be included in the definition of a SADC human right to water? In answering this question, the listed documents will be evaluated in order to indicate to what extent their implicit references to aspects related to a human right to water might inform the content of the proposed constitutionalised SADC human right to water.

At the international law level, the right to water is formally recognised in the UN Resolution 64/292, the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 15, as well as the 2010 Resolution of the Human Rights Council.² The teleological interpretation approach followed by the CESCR to read an implicit right to water into existing human rights was largely applied by the African Commission on Human and Peoples' Rights (African Commission). The African Commission is the interpreter of the African

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¹ Formerly known as Swaziland, the name of the country was changed by King Mswati on 18 April 2018.

² Human rights and access to safe drinking water and sanitation 2010, A/HRC/RES/15/9.

Charter on Human and Peoples' Rights 1986 (Banjul Charter) and in fulfilling this task has derived a right to water and food (among others) from existing African human rights. In *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 30th session (13–27 October 2001), the African Commission purposively interpreted sections 22³ and 24⁴ of the Banjul Charter to read a right to food and water into the stated provisions. At the time of writing this article, no binding human rights declaration exists at the SADC regulatory level and it is this legal *lacuna* which leads the author to the following: the central tenet of this article is that a formally binding and constitutionalised right to water in the SADC region is indispensable in ensuring that the peoples of SADC can enforce their basic water needs. While member states have constitutions (containing bills of human rights), the SADC legal framework is lacking in this regard. Delimiting the study in order to focus on a concise research question, the author will not fixate upon the process of constitutionalising in itself, nor the enforcement of the proposed human right to water – although these aspects will be touched upon.⁵ The central research focus is rather on what the content of a constitutionalised right to water should be. In order to be deemed as constitutionalised, the proposed SADC right to water must be included in a binding human rights instrument. The constitutional codification of a right to water presents a legal basis for clear and enforceable remedies in the case of violations thereof.⁶ Constitutionalising the human right to water was a topic addressed in General Comment 15 where states are encouraged to recognise this right in domestic laws, and more specifically, in their national constitutions.⁷ The 'enhancement of the scope and effectiveness of remedial measures' was cited as one of the primary reasons for increased constitutional codification of a right to water.⁸ Constitutional rights place a moral and legal obligation on states to respect, protect and fulfil them and moreover provide the basis for legal and political arguments when these rights have been violated.⁹ Expressly codifying a right to water in a binding SADC human rights instrument looks to have a host of positive outcomes, namely: clearly establishing member states' obligations towards meeting basic water needs; empowering communities and individuals to claim this right; identifying the causes for lack of access; and providing remedies for addressing lack of access.¹⁰ Auxiliary to this, is the hypothesis that the content of this proposed constitutionalised SADC right to water be informed by two distinct sources – namely international and regional human rights jurisprudence. The following methodology will be applied in order to address this hypothesis satisfactorily. In the first instance it will be argued that a nuanced approach to the interpretation approaches followed by the CESCR and the African Commission AU could be fruitfully applied at the SADC level. The nuance lies in the fact that the SADC right to water will not be derived or read in from existing SADC human rights (seeing as how these largely do not exist) but rather by reading such a right into the implicit references contained in the listed SADC water law and policy instruments. The nuanced interpretation approach will then be applied to the SADC region in order to provide guidance on what the content of a SADC right to water might be.

The article / contribution will be structured around a series of related themes. In the first instance the current status of water as natural resources in SADC will be discussed in order to highlight issues such as competing water needs and water scarcity as drivers for advocating for a Southern African human right to water. This will be followed by an exposition of the approach of the African Union's (AU) Commission on Human and Peoples' Rights in deriving a right to water as an auxiliary right to existing AU human rights. Focus will also fall on the explicit and implicit mention of a right to water in AU legal instruments such as the Revised African Convention on Nature and Natural Resources 2003. Hereafter, the status of human rights law in SADC will be highlighted where after the listed SADC legal and policy documents will be evaluated in terms of their implicit references to aspects related to the human right to water. The findings contained in the foregoing evaluations will form the basis of recommendations as to what the content of the proposed SADC right to water should be.

³ '[A]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'. (2) '[S]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development'.

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⁵ The SADC Tribunal as enforcement mechanism will be discussed under 4.1.

⁶ J May and E Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2016) 177. In South Africa, the explicitly constitutionally codified right to water was dealt with in the case of *Mazibuko v City of Johannesburg* [2010] 4 SA 1 (CC). Here the Constitutional Court put the right to water on the same level as the right to life and provided redress to citizens who were deprived of sufficient access to water. Caiphaz Brewster Soyapi, 'Water Security and Right to Water in Southern Africa: An Overview.' (2017) *PELJ* 6.

⁷ U.N. Doc. E/C.12/2002/11, [57].

⁸ U.N. Doc. E/C.12/2002/11, (n 7) [8, 46, 50 and 55].

⁹ Andrew Guzman and Katerina Linos, 'Human Rights Backsliding.' (2014) *California Law Rev.* 603–654.

¹⁰ Emilie Filmer-Wilson, 'The Human Rights-Based approach to development: The Right to water.' (2005) *Neth. Q. Hum.* 213–241.

2. Water as natural resource in the Southern African region

The SADC is a region rich in natural resources that play a central role in the economy of the region as well as the well-being of its peoples. The 16 Member States currently comprising the SADC jointly recognise the importance of the sustainable utilisation and stewardship of natural resources and address shared natural resources issues by focusing on five key areas, namely forests, trans-frontier conservation areas, wildlife, water and fisheries.¹¹ The SADC legal frameworks pertaining to the regulation of these shared natural resources include the SADC Protocol on Forestry 2000; the SADC Protocol on Wildlife Conservation the Revised SADC Protocol on Shared Watercourses 2000 and the SADC Protocol on Fisheries 2001. Of specific relevance to this chapter is the regulation of SADC water resources and before moving to a discussion of the instruments comprising the SADC water regulatory framework some contextualisation of water as natural resource in the region is warranted.

The challenges related to sustainable water management in the Southern African region are numerous and relates to topics such as differences in precipitation levels among member states; recurrence of droughts; degradation of surface water resources; uneven distribution of water resources; competing water demands; increased agricultural water use and the number of shared watercourses.¹² Water is a finite and, in many instances, scarce natural resource in Southern Africa. The 16 SADC Member States differ widely in the availability of water which is mainly attributable to rainfall varying across the region. While the Member States situated in the North-West of the region enjoy seasonal water abundance,¹³ the South-Western Member States are labelled as water scarce and suffer perpetual water deficit.¹⁴ **Figure 1** shows the discrepancies in national annual rainfall among SADC Member States with some areas such as the Kalahari and Namib Deserts receiving less than 100 mm while countries situated in the central tropic regions enjoy over 2000 mm annually.

The varying precipitation levels among Member States effects water resource distribution at the spatial and temporal levels. Looking first at the spatial distribution of water resources in SADC one notes that nearly 70% of surface water resources in Southern Africa take the form of trans-boundary courses or –basins,¹⁶ while a number of different types of aquifers host available groundwater resources.¹⁷ The term trans-boundary refers to the fact that watercourses are shared between two or more Member States and the 15 trans-boundary watercourses located in SADC have a total mean annual runoff (MAR) of 650 km³. A salient point

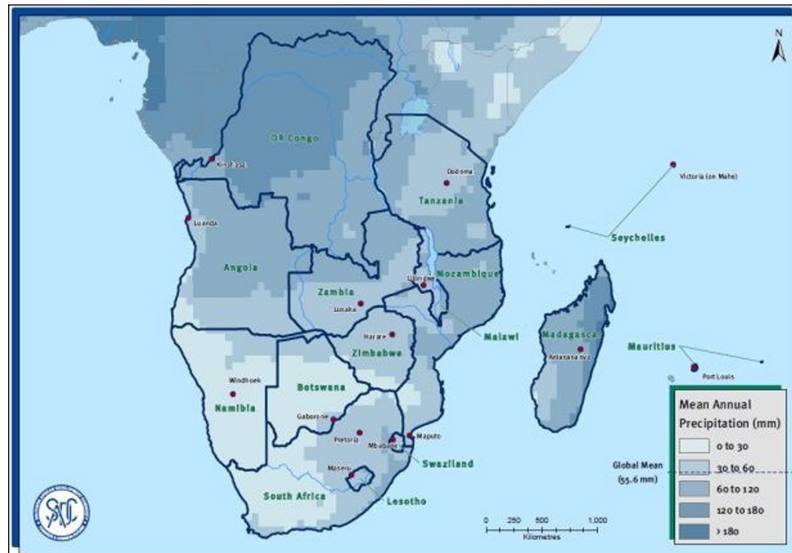


Figure 1: Mean Annual Precipitation in SADC.¹⁵

¹¹ <<http://www.sadc.int/themes/natural-resources/>> accessed on 8 August 2017.

¹² Greenwell Matchaya, Luxon Nhamo, Sibusiso Nhlengethwa and Charles Nhemachena, 'An overview of Water Markets in Southern Africa: An Option for Water Management in Times of Scarcity' (2019) *Water*. 1. Luxon Nhamo, Tafadzwanashe Mabhaudhi, Albert Modi 'Preparedness or repeated short-term relief aid? Building drought resilience through early warning in southern Africa.' (2019) *Water*. 20. Luxon Nhamo, Bekithemba Ndlela, Charles Nhemachena, Tafadzwanashe Mabhaudhi, Sylvester Mpandeli, Greenwell Matchaya, 'The water-energy-food nexus: Climate risks and opportunities in southern Africa.' (2018) *Water*. 567.

¹³ Democratic Republic of the Congo, Angola and Tanzania.

¹⁴ Namibia and the Western Cape Province of South Africa.

¹⁵ <<http://www.sadc.int/themes/meteorology-climate/>> accessed 8 August 2017.

¹⁶ Mabhaudhi, et al. (n 12) [2].

¹⁷ Kevin Pietersen, and Hans Beekman, 'Groundwater Management in the Southern African Development Community' Working Paper prepared for the SADC Groundwater Management Institute (2018) 12.

to keep in mind when discussing the topic of trans-boundary water resources in the region is that a third of SADC Member States are dependent on neighbouring countries for over half of their water needs.¹⁸ From this one can foresee that the futures of basin states with regards to the management of topics such as water access, water quantity, water quality and flow patterns are intimately intertwined. **Figure 2** sets out the 15 trans-boundary watercourses or –basins as well as the countries sharing them.

| | |
|---|---|
| Buzi River basin (Revuê River) | Mozambique, Zimbabwe |
| Congo River basin (Congo River) | Angola, Democratic Republic of Congo, Tanzania, Zambia |
| Cuvelai River basin (Cuvelai River) (Etosha Pan) | Angola, Namibia |
| Incomati River basin (Incomati River) (Lomati River) (Crocodile River) (Sabie River) (Sabi River) (Massintonto River) (Mazimchopes River) (Lake Chual) | Mozambique, South Africa, Swaziland |
| Kunene River basin (Kunene River) (Cuvelai River) (Okovango River) | Angola, Namibia |
| Limpopo River basin (Limpopo River) (Vaal River) (Olifants River) (Crocodile River) (Incomati River) (Usutu River) (Great Marico River) (Notwane River) | Botswana, Mozambique, South Africa, Zimbabwe |
| Maputo River basin (Maputo River) | Mozambique, South Africa, Swaziland |
| Nile River basin (Nile River) (Kangera River) (Lake Victoria) | Democratic Republic of Congo, Tanzania |
| Okavango River basin (Okavango River) (Cubango River) (Okavango Swamps) (Cuito River) (Omatako River) | Angola, Botswana, Namibia |
| Orange River basin (Orange River) (Senqu River) (Caledon River) (Vaal River) (Molopo River) (Nossob River) (Fish River) (Oanob River) | Botswana, Lesotho, Namibia, South Africa |
| Punguê River basin (Punguê River) (Urema River) (Muda River) | Mozambique, Zimbabwe |
| Ruvuma River basin (Rovuma River) (Lugenda River) (Lake Chiuta) | Malawi, Mozambique, Tanzania |
| Save River basin (Save River) (Odzi River) (Runde River) (Mutirikwi River) | Mozambique, Zimbabwe |
| Umbezezi River basin (Umbezezi River) (White River) (Black River) (Matola River) (Tembre River) | Mozambique, Swaziland |
| Zambezi River basin (Zambezi River) (Borotse Swamp) (Eastern Caprivi Swamp) (Kafue Swamp) (Busanga Swamp) (Lukanga Swamp) (Lake Malawi) | Angola, Botswana, Malawi, Mozambique, Namibia, Tanzania, Zambia, Zimbabwe |

Figure 2: Trans-boundary watercourses/basins and sharing Member States.¹⁹

¹⁸ Food and Agricultural Organisation of the United Nations, (Aquastat land and water use database 2006) <<http://www.fao.org/ag/agl/aglw/aquastat/main/index.stm>> accessed 11 August 2017.

¹⁹ P Heyns 'Water-resource management in Southern Africa' in M Nakayama (ed.), *International Waters in Southern Africa* (United Nations University Press 2003).

The temporal variability of water resources in southern Africa again relates to a large extent to variation in precipitation levels among Member States. This manifests in the southern-most States suffering from year-long droughts interrupted by large scale floods and 'average' annual rainfall fluctuating widely.²⁰ The temporal instability of water resources has the knock-on effect of making water use planning difficult, which in turn has an adverse effect on livelihood security of the population of the region.²¹ Adding to the distinct challenges of water availability and variability of water resource allocation is the topic of competing water needs and uses. Water needs and uses in SADC are broadly identified as industrial (mining, energy generation, waste management), domestic (drinking water, water used for washing, water used for cooking and sanitation), agriculture and ecosystems.²²

The countries comprising the SADC are individually and collectively intensely dependent on agriculture for their basic and export food stock needs. It is therefore unsurprising that the agricultural practices are by far the largest consumer of water in the region. Up to 80% of all available water resource is currently being applied in the agriculture sector (both subsistence and commercial farming).²³ With reference to industrial water usage in the region, South Africa's electricity production sector is the most water intensive industrial user of water – mainly as a coolant in coal-fired power stations. While the total amount of water used is relatively low, water used in the process of coal-based electricity generation has a higher temperature when released in recipient water systems which results in a number of negative ecological impacts such as habitat loss and ecosystem degradation.²⁴ Another very important industrial use of water in the SADC region takes place in the mining sector, and seeing as how this sector provides for almost 40 percent of total foreign exchange earnings and employs roughly two million people, further development of the region's mineral wealth seems inevitable.²⁵ The same as with electricity generation, the activity of mining is not necessarily a heavy water consumer but it does lead to water quality issues – a situation which negatively impacts on water accessibility of human populations and the ecology.²⁶

The challenges discussed above, individually and/or collectively negatively influence water access security in the region as a whole, but also some Member States specifically, and is set to have a notable future impact in the next decade. Forecasts show that South Africa, Namibia, Botswana and Zimbabwe will become physically water stressed by 2025 and the rest of the SADC region looking to become economically water scarce in the same time.²⁷ With the SADC population growth set to increase incrementally by 2025, water demand for agriculture, domestic use and energy generation will also increase – a situation which is untenable with the physical and economic availability of water resources in the region. Adapting to these challenges is necessary in order to ensure equitable access to water resources for social, economic and ecological development as well as the protection and fulfilment of human rights such as the rights to food, life, health and development. Following a human rights based approach to integrated water resource management (IWRM) would embody an adaptive strategy to address issues of equitable access to water in SADC. Initially included in the text of Agenda 21,²⁸ and later elaborated upon in target 6.5 of Sustainable Development Goal 6,²⁹ IWRM can be defined as a 'process which promotes the coordinated development and management of water, land and related resources in order to maximize economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems.'³⁰ This definition highlights the fact that competing demands (economic, social and ecological) on water exist and that mechanisms to promote equitable access by means of fair allocation must be put in place. In terms of the human rights based approach to IWRM, human rights embody these mechanisms and provide the holders of these rights with the legal basis to

²⁰ R Hirji, P Johnson, P Maro, and CT Matiza, *Defining and Mainstreaming Environmental Sustainability in Water Resources Management in Southern Africa*. (Technical Report for SADC and development Partners: Maseru/Harare/Washington DC 2002).

²¹ Daniel Malzbender, and Anton Earle, 'Water Resources of the SADC: Demands, Dependencies and Governance Responses' (2006) *Research Paper for the Institute for Global Dialogues and the Open Society Initiative for Southern Africa's Research Project on Natural Resources Dependence and Use in Southern Africa: Economic and Governance Implications* 4.

²² SADC Regional Water Policy 2005 and JP Msangi, 'Managing Water Scarcity in Southern Africa: Policy and Strategies' in JP Msangi (ed), *Combating Water Scarcity in Southern Africa* (Springer 2014) 24.

²³ Mabhaudhi, et al. (n 12) [8].

²⁴ Mabhaudhi, et al. (n 12) [9].

²⁵ Mabhaudhi et al. (n 12) [7].

²⁶ Water Research Commission, 'The Water Wheel' (Volume 5, No3, May/June 2006.) <<http://www.wrc.org.za/the-water-wheel/>> accessed 6 October 2020.

²⁷ Mabhaudhi et al. (n 12) [235].

²⁸ Agenda 21: A Programme of Action for Sustainable Development (1992) ch 18 [3].

²⁹ 2030 Agenda for Sustainable Development in the form of United Nations General Assembly Resolution 70/1.

³⁰ Global Water Partnership 'The need for an Integrated Approach' (Technical Advisory Committee of the Global Water Partnership 2016) <<https://www.gwp.org/en/About/why/the-need-for-an-integrated-approach/>> accessed 6 October 2020.

enforce their basic human water needs. Before heading into the topic of SADC human rights and the manner in which human rights references contained in existing SADC water law and policy may inform the proposed constitutionalised SADC human right to water, attention will first turn to African Union human rights jurisprudence. In line with the methodology stipulated under section 1 above, the derivative interpretation approach applied by the African Commission in deriving rights implicit to existing explicit human rights will be expounded upon. This will be done in order to lay the groundwork for applying a similar but nuanced interpretation approach in the SADC legal context.

3. The human right to water – An African Union approach

3.1. The derivative interpretation approach followed by the African Commission on Human and Peoples' Rights

The Banjul Charter is a legally binding African Union (AU)³¹ legal instrument which includes a list of civil, political and socio-economic rights comprising the corpus of African human rights. The fact that a charter of human rights exists at the African continental level is already a step forward from the SADC situation (where such an instrument is lacking) but unfortunately a right to water is not included in the text of the Banjul Charter. The lack of express reference to a right to water in the Banjul Charter has however, to some extent, been remedied by some innovative interpretation of its provisions by the African Commission on Human and Peoples' Rights (African Commission).³²

In *SERAC & Another v Nigeria* the African Commission dealt with alleged violations by Nigeria of development-related rights in the restive region of the Niger Delta.³³ The complainants alleged violations of the right to life, the right to health, the right to a healthy environment, the right to property, the right to housing and food, and the protection of the family.³⁴ Drawing on international law, the African Commission restated the four obligations of states regarding human rights: to respect, protect, promote and fulfil them, and furthermore insisted that these obligations applied to all guaranteed rights contained in the Banjul Charter.³⁵ It was found that the right to health and the right to a generally satisfactory environment had been violated. On the content of the environmental right, the African Commission stated that it requires a government 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'³⁶ Furthermore, articles 16 and 24 imply the following obligations:³⁷ to order, or at a minimum, to permit independent scientific monitoring of threatened environments; to require and publish environmental and social impact studies prior to major industrial developments; to provide information to communities exposed to hazardous materials and activities and to provide meaningful opportunities to be heard and to participate in development decisions.³⁸ The council for the applicants in the *SERAC* case focused on the right to a healthy environment as an avenue to derive a right to water, arguing that it (the right to water) is auxiliary to a healthy environment.³⁹ In its decision the African Commission agreed with this argument and declared that a human right to water (among others) is indispensable to the realisation of the right to a healthy environment. In a shift away from the teleological approach applied by the CECSR in General Comment 15, the African Commission did not read a right to water into existing human rights, but rather views a right

³¹ The AU is a continental union which consists of 55 African member states and in terms of the provisions of its Constitutive Act of the African Union (2000) the AU's primary objective is regional economic integration by means of regional cooperation. <<https://au.int/>> accessed 6 September 2017.

³² Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998.

³³ See ACHPR, *Communication No 155/96: The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 30th session (13–27 October 2001) [8–9].

³⁴ These rights are contained in articles 16, 24, 14 and 18 of the Banjul Charter respectively.

³⁵ Universal Declaration of Human Rights ('UDHR') U.N. Doc. A/810, 71 (1948); International Covenant on Economic, Social and Cultural Rights ('ICESCR'), U.N. Doc. A/6316 (1966); International Convention on the Rights of the Child ('CRC'), U.N. Doc. A/RES/44/25 (1989); International Covenant on Civil and Political Rights ('ICCPR'), U.N. Doc. A/6316 (1966).

³⁶ *SERAC* (n 33) [52].

³⁷ The article 16 right, '[a]t a very minimum, ... obliges the Nigerian government not to destroy the housing of its citizens.' The right to adequate housing 'also encompasses the right to protection against forced evictions.' Similarly, the Protocol explicitly mandates that women have 'access to adequate housing' and 'acceptable living conditions in a healthy environment.' Further, the right to housing is widely recognized by other international human rights instruments and tribunals. *SERAC* 52 (n 33) [52].

³⁸ *SERAC* (n 33) [53].

³⁹ The right to a general satisfactory environment favourable to development as contained in article 24 of the Banjul Charter will, for the sake of brevity, be hereinafter referred to as the right to a healthy environment.

to water as an 'auxiliary human right that attract protection as a component of other explicit rights.'⁴⁰ This approach is commonly referred to as the derivative approach and has the effect of linking the realisation of existing human rights (such as the right to a healthy environment in the *SERAC* case) with the recognition and realisation of auxiliary rights (right to water) implicitly related to the existing right. The derivative approach may, however, have one very distinct negative result in that the derived right lacks independent legal status and can in essence not be claimed unless its 'parent' right has been violated. This has the effect of rendering the derived right to water a subservient entitlement dependent on explicitly guaranteed rights for its protection.⁴¹ The aforementioned might be one of the reasons why the African Commission in its final judgement in the *SERAC* case stopped short of actually prescribing that the right to water be accepted as a derived human right in terms of the Banjul Charter. While the *SERAC* communication embodies an innovative approach to the interpretation of AU human rights (and their auxiliary rights), the legal basis of the rights derived via its approach remains problematic. In finding solid legal grounding for the African right to water one must look towards explicit and legally binding references to such a right outside of the text of the Banjul Charter. Such references – both explicit and implicit in nature – do exist in the texts of three binding AU legal instruments namely the African Charter on the Rights and Welfare of the Child 1990 (Children's Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2000 (Women's Protocol) and the Revised African Convention on Nature and Natural Resources 2003 (Revised African Nature Convention).

3.2. The human right to water in AU regulatory instruments

Another major difference between the regulatory frameworks of the SADC region and the AU is that at least three binding AU legal instruments contain provisions which refer expressly to a right to water. The African Children's Charter provides for the provision of 'adequate nutrition and safe drinking water'⁴² while the African Women's Protocol mandates States to take 'appropriate measures to provide women with access to clean drinking water.'⁴³ The African Nature Convention embodies the AU regulatory response to a series of environmental disasters such as droughts, desertification and the deterioration of water resources.⁴⁴ It entered into force in 2016 and was revised in order to bring the original Convention in line with international environmental principles and guidelines contained in instruments such as the Rio Declaration on the Environment and Development, 1992, the Stockholm Declaration on the Human Environment, 1972 and Agenda 21.⁴⁵

The grundnorm upon which the Revised African Nature Convention is based is that the 'conservation, utilisation and development of water resources in Africa must take place with due regard to the best interest of the (African) people.'⁴⁶ The Revised Nature Convention has a similar provision and mandates the conservation and sustainable use of natural resources which is defined in the provisions of the Revised Nature Convention to include water.⁴⁷ With reference to the right to water, the Revised Nature Convention goes further than the African Children's Charter and the African Women's Protocol in that it contains provisions which expressly regulates the topics of water quantity and water quality.⁴⁸ On the topic of water quantity the Convention states clearly that member states must strive to guarantee a sufficient and continuous supply of suitable water,⁴⁹ while water quality depends upon AU member states fulfilling the duty of preventing and controlling water pollution.⁵⁰ While it is true that the Revised African Nature Convention is not a human rights instrument in the strict sense of the word, its incorporation of terms such as 'sufficient', 'continuous' and 'suitable' with reference to water quantity and quality relates directly to the minimum core require-

⁴⁰ Takele Soboka Bulto, 'The human right to water in the corpus and jurisprudence of the African human rights system' (2012) *African Human Rights Law Journal* 347.

⁴¹ Amanda Cahill, 'The human right to water – A right of unique status: The legal status and normative content of the right to water' (2009) *International Journal of Human Rights* 389.

⁴² Article 14(2)(c) of the Children's Charter.

⁴³ Article 15(a) of the Women's Protocol.

⁴⁴ Morné van der Linde, 'A review of the African Convention on Nature and Natural Resources' (2002) *African Human Rights Law Journal* 33.

⁴⁵ Preamble to the Revised Nature Convention.

⁴⁶ Article II of the Revised Nature Convention.

⁴⁷ Article II and Article of the Revised Nature Convention.

⁴⁸ Article VII of the Revised Nature Convention.

⁴⁹ Article VII(2) of the Revised Nature Convention.

⁵⁰ Article VII(1) of the Revised Nature Convention.

ments for a right to water as laid down in General Comment 15 of the CESCR. This requirement relates to the types of water uses that are considered *essential* to human well-being as well as the availability, quality and accessibility of water resources which collectively embody the minimum threshold of a right to water.^{51,52,53,54}

The Revised African Nature Convention does not provide substantive rights (such as a right to water) but it does provide a legal basis upon which individuals may enforce duties relating to water quality and quantity prescribed in its text. This means that African peoples are entitled to claim – as their right – a sufficient and continuous supply of unpolluted water from their governments. The Revised African Nature Convention enshrines a solid normative source with which to inform the content of a potential human right to water in Africa and should therefore, to the mind of the author, be applied by the African Commission in any further interpretation related to deriving an African human right to water.

The two approaches to establishing a legally sound basis for an African right to water relate to a derivative interpretation of human rights existing within the provisions of the Banjul Charter as well as the recognition of a right to water from the texts of other AU legal instruments. SADC member states, due to their intrinsic relationship with the AU are bound to AU legal instruments and the interpretation thereof by the African Commission.⁵⁵ This means that (depending on whether a member state has ratified the Revised African Nature Convention) the content thereof as well as the interpretation of its provisions by the African Commission will be applicable to SADC member states. It is suggested by the author that complimentary to AU human rights jurisprudence on a right to water, a similar approach should be considered to address the specific water needs and resources of the SADC region. The methodology proposed is the following: that the primary regulatory responses to water management in the SADC region be evaluated in order to identify provisions which may provide a binding legal basis to inform a proposed constitutionalised SADC right to water. The following section looks to the topic of human rights in SADC and more specifically, the possibility of a human right to water as basis for enforcing the fulfilment of basic water needs.

4. Towards a Southern African human right to sustainable water access

4.1. Contextualising human rights within the SADC regulatory framework

In terms of Articles 4 and 5 of the Treaty Establishing the Southern African Development Community 1992 (SADC Treaty), the community must strive to enhance the standard and quality of life of peoples of Southern Africa and in so doing must act in accordance with the principles of human rights law.⁵⁶ From the foregoing it is clear that the SADC Treaty realises the link between enhancing the standard and quality of human life and the recognition and realisation of human rights. This clear human rights mandate notwithstanding, there is currently no binding human rights instrument existing within the SADC legal framework and also no enforcement mechanism undoubtedly provided the stimulus for the drafting of the Charter of Fundamental Social Rights in SADC in 2003 and while the Charter does not address water as a human right (but rather focuses on the rights of workers) it does reaffirm the region's recognition of human rights principles.⁵⁷ At the outset of this discussion it must be stated that no human right to water, or access to water,

⁵¹ The only two types of water uses that are considered essential and therefore falling within the ambit of the minimum core requirement are personal and domestic uses of water. These two types of water uses comprise the use of water for drinking, washing, cooking, bathing and other sanitation purposes. U.N. Doc. E/C.12/2002/11, (n 7) [2,6 and 12].

⁵² The availability of water as minimum core requirement relates to the quantity of water available to satisfy the personal and domestic uses of water of people. General Comment 15 links this aspect of the minimum core requirement with the guidelines of the World Health Organisation but also allows for differential treatment of groups and individuals on account of different health, climate and work conditions. No fixed per capita water availability number has been laid down by the CESCR and this aspect is usually addressed at the national level via legislation and/or case law. U.N. Doc. E/C.12/2002/11, (n 7) [2, 12(a)].

⁵³ This requirement is usually stated in the negative in that water must not pose a threat to human health. General Comment is a bit more specific and states that water should be of an acceptable colour, odour and taste for personal and domestic uses. U.N. Doc. E/C.12/2002/11 (n 7) [12(b)].

⁵⁴ This aspect has a dual nature in that water must be physically accessible as well economically. Physical accessibility implies the right to have sufficient and clean water within or in the immediate vicinity of each household, education institution and workplace. Economic accessibility on the other hand ensures the affordability of clean and sufficient water delivery to all. U.N. Doc. E/C.12/2002/11, (n 7) [12, 25].

⁵⁵ The Regional Economic Communities (RECs) of which SADC is one, owe their creation to the provisions of the AU instrument Protocol on Relations between the African Union and the Regional Economic Communities 2007 and in terms of this protocol are bound to the AU regulatory framework.

⁵⁶ While the SADC Treaty lists human rights principles (among others) as directive principles for the conduct of SADC and its member states in pursuing its objectives, the text is not clear on whether these human right principles refer to international, regional or domestic human rights.

⁵⁷ Different to the SADC Treaty, the Charter makes explicit reference to international (UN Declaration of Human Rights) and regional (Banjul Charter) legal instruments' principles which should direct the conduct of SADC and its member states. Article 3.1 of the

exists at the SADC sub-regional level. In actual fact, very few legally binding SADC human rights are to be found within the SADC regulatory framework despite the SADC Treaty stating that enhancing the quality of life of Southern African peoples are dependent upon the principles of human rights.⁵⁸ The explicit recognition of human rights and their role in promoting human wellbeing throughout the region has however not led to the drafting of or formal acceptance of a bill of SADC human rights. While an in depth discussion of the historical development of human rights under SADC law falls outside the scope of this chapter, some historical highlights warrant discussion. The history of human rights under the SADC regulatory framework starts with the drafting of the Windhoek Resolutions at a Ministerial Conference on Democracy, Peace and Security held in 1994 which called for the drafting of a SADC Bill of Rights as well as for the creation of a SADC Human Rights Commission. In 1996 such a human rights charter was duly drafted by group of non-governmental organisations of a number of SADC member states but due to a lack of binding legal status found no formal application.⁵⁹ In the following year (1997) a panel of legal experts,⁶⁰ tasked with establishing the SADC Tribunal, considered the drafting of a separate SADC human rights instrument in the form of a Protocol or a Southern African Convention on Human Rights but these aspirations were never realised.⁶¹ The general consensus on the reason why this localized SADC human rights instrument was never formally adopted is that the Banjul Charter already embodied a bill of African human rights in terms of which SADC human rights could be observed.⁶² The existence of a continental human rights instrument and institution such as the Banjul Charter and the African Commission should not preclude the development of sub-regional human rights jurisprudence at the SADC (and other regional economic communities') level. To underline a shift in the direction of a sub-regional approach to human rights one can list the provisions of the Economic Community of Eastern African States (ECOWAS) Protocol on Democracy and Good Governance 2001 and the East African Community (EAC) Treaty 1999 and the SADC Treaty itself. These instruments provide for the establishment of appropriate institutions for human rights adjudication as well as human rights adherence as a prerequisite for membership.^{63,64} The SADC Treaty expressly refers to human rights but does not provide for any specific rights within its text,⁶⁵ while references to specific socio-economic as well as civil and political rights can be read directly or indirectly into a number of SADC Protocols.⁶⁶ Above and beyond the SADC Treaty and the SADC Protocols (which are binding regional legal instruments), a number of non-binding instruments also pertain to the issue of human rights in the SADC regulatory framework. The most notable of these is the Charter of Fundamental and Social Rights in SADC 2003 which lays down specific human rights related to employment and labour.⁶⁷

The same applies to human rights enforcement mechanisms at the SADC level. For a brief period between 2005 and 2012 the SADC Tribunal heard and adjudicated various human rights issues in terms of jurisdiction derived from SADC Treaty provisions read in conjunction with article 14 of the Protocol of the Tribunal and the Rules of Procedure 2000.^{68,69} Article 14 of the Protocol of the Tribunal does not include human rights as a specific basis for jurisdiction and for this reason various member states were sceptic of its derived human rights jurisdiction, which was perceived as the Tribunal overstepping its mandate. Most notably, in

Charter of Fundamental Social Rights in SADC 2003.

⁵⁸ Articles 4 and 5 of the SADC Treaty, 1992.

⁵⁹ The Charter contained a list of civil and political rights as well as a number of specific socio-economic rights of which the right to health and a clean environment were notable inclusions. The Charter also called for the creation of a SADC Human Rights Court but this was never realised. Frans Viljoen, 'The realisation of human rights through sub-regional institutions' (1999) *African Yearbook of International Law* 185.

⁶⁰ This panel consisted of the late Professor Kamba (founding Dean of the Faculty of Law at the University of Namibia) and Justice Jacobs (Judge at the Court of Justice of the European Communities). OC Ruppel, 'Regional economic communities and human rights in East and southern Africa' in A Bosl, and J Diescho, (eds.), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (MacMillian Education Namibia 2009) 291.

⁶¹ Frans Viljoen, *International human rights law in Africa*. (Oxford University Press 2007).

⁶² JP Barroso, 'Profile of the Southern African Development Community' in C Heyns (ed), *f-lumun Rights Law in Africa* (Marlinus Nijhoff 2004) 675.

⁶³ Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance.

⁶⁴ Article 3(3)(b) of the EAC Treaty.

⁶⁵ The preamble and chapter 3 of the SADC Treaty.

⁶⁶ Ruppel (n 60) [293].

⁶⁷ The other non-binding SADC instruments that contain human rights references are the Principles and Guidelines Governing Democratic Elections 2004; the Declaration on Agriculture and Food Security 2003 and the Declaration on HIV and AIDS 2003.

⁶⁸ The establishment of the Tribunal was mandated by the provisions of the SADC Treaty.

⁶⁹ Preamble to the SADC Treaty read with Article 49(c) of the SADC Treaty.

the case of *Campbell v Zimbabwe*,⁷⁰ where the Tribunal found that Zimbabwean Law mandating the expropriation of land without compensation was in violation of the right to access to justice,⁷¹ the judgement was heavily opposed (and not enforced) by the Zimbabwean government. The trepidation of member states towards the human rights jurisdiction of the Tribunal came to a head during 2012 when the SADC Heads of Government, acting upon a Report from the Attorneys Generals drafted a Resolution stating that a new Protocol of the Tribunal should be drawn up.⁷² In terms of this new protocol the jurisdiction of the Tribunal should be confined to interpreting the SADC Treaty and Protocols relating to disputes between member states – thereby completely terminating any human rights jurisdiction.⁷³ It is however positive to note that a recent South African judgement as found in *Law Society of South Africa (LAWSA) and Others v President of the Republic of South Africa and Others* (that the decision of the (then) South Africa President, Jacob Zuma's, participation in suspending the SADC Tribunal and his signing of the 2014 Protocol on the SADC Tribunal was unlawful and unconstitutional. Judge Mlambo stated that:

It is clear that the president's [Zuma] signature could not have ensured the respect of an institution as the respondents would have it. In fact, it severely undermined the crucial SADC institution, the Tribunal. It detracted from SADC's own stature and institutional accountability and violated the SADC Treaty itself.⁷⁴

This decision by the South African High Court and reaffirmed by the Constitutional Court) might bode well for the revival of the SADC Tribunal as a forum of judicial recourse for Southern African people who might struggle to overcome the procedural obstacle in approaching the African Commission.⁷⁵ Moreover, the possibility of similar cases being brought against the governments of the other 13 SADC member states who participated in the suspension of the SADC Tribunal could provide the impetus for the political will for re-opening the Tribunal.

The lack of explicit reference to specific human rights in SADC legal instruments combined with the absence of a judicial institution capable of hearing human rights cases can only be understood as a lack of political commitment to provide Southern African peoples with neither a judicial basis for action nor an avenue to have said action enforced. While it might be argued that the African Commission already provides a forum for the interpretation and enforcement of human rights at the African continental level and the need for a localised avenue is therefore nullified, certain pertinent weaknesses of the African Commission may be tabled to counter this argument. The African Commission is widely criticized for its lack in providing timely and credible legal recourse as well as the general lack of acceptance of its jurisdiction by a number of African states.⁷⁶ The lack of a human rights enforcement mechanism at the SADC level is a serious issue which warrants further discussion and research but due to the limitations set out in the problem statement, research question and methodology of this study, focus now shifts to the content of the proposed right to water. It is with the foregoing in mind that the author will now move to analysing the instruments comprising the SADC water regulatory framework in order to identify provisions related to a right to water which might inform the constitutionalised SADC right to water.

5. SADC water management regulatory measures – the legal basis from which to derive a Southern African human right to water

Before embarking on a discussion of specific legal and policy documents contained within the SADC water management regulatory framework a brief note on the legal status of the instruments. The Regional Water Policy 2005 (RWP), the Regional Water Strategy 2006 (RWS), the Regional Infrastructure Development Master Plan: Water Sector Plan 2012 (RIDMP) and the Regional Strategic Action Plan on Integrated Water Resources and Development 2016–2020 (RSAP) are all policy instruments with non-binding legal status. These docu-

⁷⁰ Case No 2/2008 SADC (T), 28 November 2008; (2008) AHRLR 199.

⁷¹ As contained in both the South African Constitution and the Banjul Charter.

⁷² Final Communiqué of the 32nd Summit of SADC Heads of State and Government, Maputo Mozambique, 18 August 2012, para 24, <http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2012.pdf> accessed 6 September 2017.

⁷³ Frederick Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) Human Rights Law Review 163.

⁷⁴ (20382/2015) [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP) [40].

⁷⁵ Mia Swart, 'A house of justice for Africa: Resurrecting the SADC Tribunal' *Africa in focus* <<https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/>> accessed 29 November 2019.

⁷⁶ F Viljoen, 'Human Rights in Subregional Institutions' in F Viljoen (ed), *International Human Rights Law in Africa* (Oxford University Press 2012) 487.

ments have all been drafted to inform the content of any further binding SADC legal instruments – including national legislative efforts. Therefore, despite their non-binding legal status, these instruments play an important role in the development of future water laws in the SADC region and should accordingly be discussed. The only binding SADC legal instrument pertaining to water currently in existence is the Revised Protocol on Shared Watercourses 2000 (Revised Protocol). The reason for analysing this binding SADC Protocol is two-fold and both reasons support the methodology of the article. In the first instance, the Water Protocol provides a binding legal basis from which to read in a human right to water from its implicit and explicit human rights references. Secondly, these references furthermore provide the departure point from which to make recommendations as to the content of the proposed constitutionalised SADC right to water.

5.1. Revised Protocol on Shared Watercourses 2000

As indicated under paragraph 2 above, the SADC region hosts 15 trans-boundary or shared watercourses and the sustainable management of these watercourses is governed by the Revised Protocol. The Revised Protocol is the only binding SADC legal instrument on water and is very specific in its application field seeing as it only refers to the management of shared watercourses. In terms of Article 1, the concept of shared watercourses is defined as ‘a watercourse passing through or forming the border between two or more watercourse States.’⁷⁷ The Revised Protocol aims to facilitate a coordinated approach to the sustainable management, protection and utilisation of shared watercourses as a driver for further regional integration, poverty reduction and the promotion of a higher standard of living for SADC peoples.^{78,79} Actions directed at the achievement of the above-mentioned objective include the advancement of the sustainable, equitable and reasonable utilisation of shared watercourses and the harmonisation of laws and policies regulating the allocation of water resources.⁸⁰ These actions relate directly to the topics of water supply and water uses with the Revised Protocol including (but not prioritising) domestic water use in its list of recognised shared watercourses water uses.^{81,82} With regard to the topic of water supply, a number of provisions in the Revised Protocol implicitly refer to the aspects of water quality and water quantity. In this regard terms such as ‘equitable and reasonable’ are included to describe water quantity,⁸³ while water quality is inferred from provisions relating to the prevention of water pollution that may cause harm to human health.⁸⁴ Watercourse States are also mandated to utilise shared watercourses in such a manner as to limit significant harm among one another and in the event of a planned measure (which falls outside domestic and/or environmental uses) potentially having adverse effects upon other watercourse States, timely notice must be given.^{85,86} In order to facilitate a coordinated approach to prevention of water pollution, watercourse States must work together to set and implement joint water quality objectives.⁸⁷ These provisions (as interpreted by the author) may imply the minimum core requirements of water quality and water quantity as set out in General Comment 15 specifically to the SADC context. The Revised Protocol focuses squarely on providing instruction to watercourse States on how to interact with one another on managing shared watercourses and pays little, if any, attention to the rights of the end users of these shared watercourses. Furthermore, the Revised Protocol pertains exclusively to shared watercourses and while it is true that the majority of SADC water resources exist in the form of shared watercourses, they are not the only forms of water resources in SADC. The content of the Revised Protocol largely reflects the provisions of the Conventional on the Law of the Non-Navigational Uses of International Watercourses 1997 (UNWC) with regards to aspects such as the importance of the formation of basin agreements and –institutions; the harmonization of these existing and future basin agreements and alternative dispute resolution within the water management context. Importantly, the Revised Protocol differs from the UNWC in its approach to balancing the rule of no significant

⁷⁷ The Revised Protocol.

⁷⁸ Article 2 of the Revised Protocol.

⁷⁹ Article 3(4) of the Revised Protocol.

⁸⁰ Article 2(b) and (d) of the Revised Protocol.

⁸¹ Domestic use is defined as water for drinking, washing, cooking, bathing, sanitation and stock watering purposes. Article 1 of the Revised Protocol.

⁸² Water uses apart from domestic use recognised by the Revised Protocol are agricultural use, environmental use, industrial use and navigational use. Article 3(2) (n 78) of the Revised Protocol.

⁸³ Article 3(8)(a) of the Revised Protocol.

⁸⁴ Article 4(2)(b)(i) of the Revised Protocol.

⁸⁵ Article 3(10)(a) of the Revised Protocol.

⁸⁶ Article 4(1)(b) and 4(4) of the Revised Protocol.

⁸⁷ Article 4(2)(b)(iii)(aa) of the Revised Protocol.

harm with the principle of equitable and reasonable utilization with specific reference to the prioritization of vital human needs as prescribed by the UNWC.⁸⁸

5.2. Regional Water Policy, 2005

The primary objective of the RWP is to 'provide a framework for sustainable, integrated and coordinated development, utilisation, protection and control of national and transboundary water resources in the SADC region.'⁸⁹ Closely related to this objective are the nine thematic areas to be addressed by SADC water resources management regulatory responses with one of these themes pertaining to water for development and poverty reduction.⁹⁰ Water for basic human needs is highlighted as a sub-theme to be addressed in policy or law resulting under the thematic area of water for development poverty reduction.⁹¹ The policy principles read in conjunction with the thematic areas referred to inform the policy statements of the RWP. With reference to the policy statements related to the water for development and poverty reduction theme, the policy statements of water for socio-economic development and water supply, sanitation and hygiene are specifically relevant to the current discussion.⁹² Under these policy statements focused policy actions are listed and those directly applicable to the topic of water as a human right are: water is a social good that is essential to human dignity and well-being,⁹³ member states have a responsibility to ensure sustainable access to safe water supply for basic human needs, member States must prioritise the allocation, access and utilisation of water resources for basic human needs, the water resource allocated for domestic uses must be clean and once this basic water use need has been met, water must also be provided for productive uses.⁹⁴ On the topic of water as a social good essential to human dignity and well-being the RWP expressly states that water allocation and access must always be aimed at fulfilling the social needs of the peoples of SADC but it does not elaborate on what these social needs are. The RWP is silent on the topic of water quantity as minimum core requirement of a right to water as there are no references to concepts such as sufficient or continuous water supply.

5.3. Regional Water Strategy 2006

The RWS should be read in conjunction with the RWP seeing as the RWS represents the framework for implementation of the RWP in that its provisions pertain to actions, responsibilities and timeframes for SADC water management. The RWS contains a number of strategic objectives and strategies that are related to the policy statements and actions contained in the RWP. With reference to the policy statement of water for development and poverty reduction, the RWS states as its strategic objective the promotion of equitable and efficient water allocation in a sustainable manner in order to optimise the social upliftment of the region's peoples.^{95,96} A number of strategies aimed at the achievement of this strategic objective are then listed and of specific relevance to this chapter is the strategy pertaining to promoting availability and accessibility of water for socio-economic development.⁹⁷ Specific actions to be undertaken in following this strategy should, according to the provisions of the RWS, be undertaken through a holistic approach among Member States embodied in SADC legal measures to ensure availability and access to water.⁹⁸ Looking to the policy statement of water supply, sanitation and hygiene as contained in the RWP, the RWS states as

⁸⁸ Section 7 of the UNWC.

⁸⁹ RWP Executive Summary paragraph 5 page vii.

⁹⁰ RWP (n 89) [7].

⁹¹ The RWP does not contain a specific list of what basic water needs should be seen to include but it does refer to domestic consumption, sanitation, agriculture (water for food) and energy security under the heading of water for development and poverty reduction. RWP (n89) [9].

⁹² RWP (n 89) [9].

⁹³ RWP (n 89) [9(b)(ii)].

⁹⁴ RWP (n 89) [9(b)(iii)].

⁹⁵ The RWS does not include in depth definitions of concepts such as equitable, efficient and sustainable in its text but it does link these concepts with integrated water management (discussed earlier in the chapter).

⁹⁶ RWS paragraph 4.1.

⁹⁷ The mismatch between availability and demand due to the variability in the distribution of water resources needs to be addressed through a holistic approach which includes the following specific actions: Develop adaptation strategies to minimise the impact associated with the effects of Climate Change on the supply/demand balance of water resources and resulting increase in diseases; Develop and adopt measures to ensure availability and access to water (e.g. demand management, recycling/reuse, conjunctive use of surface and groundwater, dams); and Support development and implementation of awareness programmes on water-use efficiency, to make more water available for productive use. RWS (n 96) [4.1].

⁹⁸ RWS (n 96) [4.1(c)(ii)].

its strategic objective the promotion of an integrated and accelerated approach to sustainable delivery of water supply.⁹⁹ One of the strategies listed under this objective relates to the formulation and adoption of a regional definition of basic water supply and more specifically the quality of the water to be supplied.¹⁰⁰ To date, no such regional definition has been formulated. Apart from the mandate to formulate and adopt a regional definition for water quality, the RWS does not go any further in prescribing what such a definition could possibly include. The RWS is also silent as to the topic of water quantity.

5.4. Regional Infrastructure Development Master Plan: Water Sector Plan 2012

The RIDMP is a strategic framework document primarily focused on defining the minimum infrastructure development requirements needed to facilitate the implementation and realisation of key water infrastructure by 2027.¹⁰¹ This primary objective is linked with the SADC goal of attaining an integrated regional economy based on balance, equity and mutual benefit which in turn is premised on realising the three key goals of poverty eradication, food security and economic development. The RIDMP acknowledges that water is the core natural resource that will contribute the most to achieving SADC's goal and adds that it is essential to improving social conditions in the region. The foregoing provisions may in themselves already embody the necessary basis for discovering a SADC human right but the RIDMP goes further than the RWP and expressly states that due to its inherent importance to social upliftment, water supply should be considered a human right.¹⁰² In realising this right to water supply, infrastructure to enhance universal access to water supply for domestic water use in SADC must be provided.¹⁰³ The RIDMP lists domestic water supply alongside agriculture, hydropower generation and sanitation as priority water needs areas. This stands in contradiction with the generally accepted content of a human right to water which puts basic human water needs at the centre of water access as the most important water use to be focused on in its planning and implementation phases. With reference to the topics of water quality and quantity, some implicit references can be read into the RIDMP. In chapter 3, where the strategy for addressing gaps in water access is addressed, the RIDMP refers to the growing demand for clean and safe water in the SADC region.¹⁰⁴ This relates to the issue of water quality and could be seen as the RIDMP's definition of the type/quality of water to be supplied in fulfilling its objective and aims. This classification of the type of water to be supplied once again relates to the minimum core requirement set out by General Comment 15. The RIDMP does not quantify the water that is to be supplied by using words such as continuous or suitable, but rather sets out very specific targets for water supply up to and beyond 2027. In this regard it states that access levels to water for domestic uses must increase from 61% of 260 million people served to 75% of 350 million people served.^{105,106}

5.5. Regional Strategic Action Plan on Integrated Water Resources and Development Management 2016–2020

The RSAP (IV) embodies the strategic plan to implement the RIDMP Water Chapter. In terms of this document SADC water infrastructure development must take place in line with the Sustainable Development Goal (SDG) 6 which improved water infrastructure for socio-economic development.¹⁰⁷ One of the policy interventions listed under the topic of water supply is that a human rights approach to water supply should be followed pertains to the 'availability and sustainable management of water (and sanitation) for all.' The RSAP (IV) contains a five-year programme outlining those priority interventions needed to facilitate the achievement of.¹⁰⁸ No specific instruction is given as to what the content of this human rights approach to water supply should entail, but mention is made of the approach adopted by the United Nations. The RSAP

⁹⁹ RWS (n 96) [4.2].

¹⁰⁰ RWS (n 96) [4.2(a)].

¹⁰¹ The water sector infrastructure development targets are set to be executed over a period of 15 years divided into three five-year periods. 2012–2017 (Planning phase), 2018–2022 (Implementation phase with 40% of RIDMP targets having been met), and 2023–2027 (Implementation phase with 100% of RIDMP targets having been met). RIDMP Executive Summary pages 5 and 8.

¹⁰² RIDMP (n 101) [2.3].

¹⁰³ The other water uses listed in the RIDMP are: Aquaculture, mining, irrigation, livestock uses, manufacturing, hydro- and thermal power generation, navigation and recreation and environmental flows. RIDMP (n 101) [2.3].

¹⁰⁴ RIDMP (n 101) [3.1.1].

¹⁰⁵ RIDMP (n 101) [3.4].

¹⁰⁶ The status of progress on water projects in the SADC region may be scrutinized by viewing the SADC Regional Strategic Development Short Term Action Plan Assessment 2019 paragraph 3.4 pages 47–51.

¹⁰⁷ RSAP (IV) Programme 5: Infrastructure Development, Operation and Maintenance, 22.

¹⁰⁸ RSAP (IV) 23 (n 107) [5.2.2].

(IV) does not refer explicitly to any specific UN instruments in this regard but, to the mind of the author, implicit reference to UN Resolution 64/292 and General Comment 15 is to be inferred. After mentioning that the UN approach to a human right to water supply be applied in the SADC context, the RSAP (IV) proposes that regional dialogues should be held in order to build consensus on a human rights approach to water supply. No provisions on water quality and/or quantity are contained in the RSAP (IV). The inclusion of the concept of a human rights approach to water supply in the SADC via the text of the RSAP (IV) bodes well for the argument in favour of discovering a Southern African right to water. Member States are given an express mandate for applying this approach and are instructed to follow the UN approach in doing so. The content of this approach may be inferred to be that of UN Resolution 64/292 and General Comment 15.

6. Conclusion

Southern African challenges related to water access and availability which manifests in competing water needs – primarily basic domestic water needs versus industrial water needs – warrants a localised approach to addressing these specific issues. One such an approach (as part of integrated water resource management) is to provide for a human rights based approach to regulating water access issues in SADC. A localised approach to informing the content of a constitutionalised human right to water in SADC should be considered as complimentary to existing international (General Comment 15) and continental (SERAC communication of the African Commission) jurisprudence. By following the international and continental approaches to either read in or derive auxiliary human rights from existing rights, it can be argued that provisions existing within SADC law and policy can be interpreted to, not only arguing in favour of constitutionalising a right to water at the SADC level, but that the content of existing SADC law and policy inform the content of such a human right to water.¹⁰⁹ In this regard, the provisions of existing legal instruments puts the focus squarely on the importance of preventing water pollution that may cause harm to human health, the provision of clean and safe water as well as equitable and efficient water allocation in reference to water quality. On the topic of water quantity, the term ‘sufficient’ water supply is generally used but apart from the specific domestic water access figures contained in the text of the RIDMP, the interpretation of the concept of water quality is linked to the interpretation thereof in General Comment 15. The institutional obstacles in gaining access to the African Commission and AU member states’ government resistance to implementing the communications of the Commission are major drivers for the argument in favour of the reinstatement of the SADC Tribunal with jurisdiction to adjudicate on human rights issues. A positive step in the direction of the aforementioned is the judgement by the South African High Court on the unconstitutionality of the decision to suspend the Tribunal by the South African president.¹¹⁰ A constitutionalised SADC human right to water, the content of which is informed by the derivative and teleological interpretation of existing SADC law and policy, would add to the corpus of existing international and continental and provide the people of SADC with a broader avenue of human rights enforcement mechanisms.

Competing Interests

The author has no competing interests to declare.

¹⁰⁹ See paragraphs 5.1–5.5 above.

¹¹⁰ See paragraph 4.1 above.

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