

# The Right to Water in Relation to the Inalienable Right to Life

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**SCHEDULE A**

“I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL.B is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.”

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*"All human beings, whatever their cultural or historical background, suffer when they are intimidated, imprisoned or tortured . . . We must, therefore, insist on a global consensus, not only on the need to respect human rights worldwide, but also on the definition of these rights . . . for it is the inherent nature of all human beings to yearn for freedom, equality and dignity, and they have an equal right to achieve that"*

-The Dalai Lama

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## **ABSTRACT:**

In essence, the water question concentrates and reflects within itself all the elements of exploitation, oppression and discrimination that characterized and still characterize Namibian society. By studying the content of the water question, we are able to look at the quality and condition of our whole society, for all of it depends on water.<sup>1</sup>

The right to water concerns drinking water and not water in general it also concerns the management of local public utilities. In most states, the right to water does not grant every individual the same right because there are considerable differences between regions.<sup>2</sup> It is important to note that the right to water does not entail the right for everyone to receive their water for free, just as the right to food does not entail the right to receive one's food for free.<sup>3</sup>

Water is life. Its pre-eminent place in every society means that water cannot be treated simply like any other commodity. Access to drinking water for all is a unique right that needs to be identified so that it can be protected and developed.<sup>4</sup>

Water is perhaps the most basic resource: “ it is essential for life, crucial for relieving poverty, hunger and disease and critical for economic development.<sup>5</sup> There is no life on earth without water.

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<sup>1</sup> Mungunda, N.F. (2011) *Access to Water: A human right; in Namibian Law Journal*, Volume 03-Issue 02. Windhoek: Konrad Adenaur Stiftung, p. 79.

<sup>2</sup> Ibid at p. 80.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Mungunda, N.F. (2011) *Access to Water: A human right; in Namibian Law Journal*, Volume 03-Issue 02. Windhoek: Konrad Adenaur Stiftung, p. 71.

# CHAPTER 1

## 1. INTRODUCTION:

At its most narrow, The Bill of Rights gives protection to the ‘traditional’ liberal rights to equality, personal liberty, property, free speech, assembly and association and most importantly, the right to life. These are the well known civil and political rights or ‘first -generation’ rights.<sup>6</sup> These are usually thought of as ‘negative’ rights which take power away from the government by imposing a duty not to act in certain ways.<sup>7</sup> However, the recognition that human rights and the basic social conditions of human beings are fundamentally interconnected has encouraged attempts to include less traditional rights in modern constitutions.<sup>8</sup> These are referred to as the socio-economic or second-generation rights.<sup>9</sup> These are ‘positive’ rights which impose obligations on all governments. The idea of socio-economic rights is that the state must be obliged to do whatever it can to secure to all citizens a basic set of social goods.

The interconnection and interdependence of the two types of rights is recognized in the principal international human rights instrument protecting socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR). According to the Covenant’s preamble ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights’.

Namibia is a state party to the International Covenant on Economic, Social and Cultural Rights and in terms of this covenant the Namibian Government has an obligation to respect, protect, promote and fulfill the right of every citizen to an adequate standard of living for himself and his/her family. This includes adequate food and water.<sup>10</sup> Like food, water is a basic essential

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<sup>6</sup> First-generation rights (so-called because, historically, they were the first rights to achieve legal recognition and protection) are based on the idea that individuals should be free of government interference when it comes to what they do in their personal and private lives and in their associations with others. De Waal, J.; Curie, I. & Erasmus G.(2000) *The Bill of Rights Handbook*, 3<sup>rd</sup> ed. Juta & Co.

<sup>7</sup> Supra.

<sup>8</sup> Supra.

<sup>9</sup> Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution (1997) 13 SAJHR 67, 71.

<sup>10</sup> Press release by NamRights, April 25 2005.

need that all human beings must have access to in order to live in dignity.<sup>11</sup> The right to dignity is guaranteed to every Namibian citizen under article 8 of the Namibian Constitution.

This dissertation primarily focuses on the right to water in Namibia. This is a very controversial issue in the Namibian society at the moment, as there have been grievances from citizens and litigation was started in the court on this issue. A good example of this would be the issue addressed by the Legal Assistance Centre in 2009, when Legal Assistance Centre staff during an investigation witnessed community toilets in a deplorable state. It transpired that the water supply of more than 4000 residents have been discontinued resulting in the toilets being in such a deplorable state.<sup>12</sup> Unfortunately, the issue of whether any human rights were violated was not tested in court since the matter was settled out of court. The right to water is one of those socio-economic rights which are directly related to the right to dignity and to the right to life as well. This will be explained in more detail under a separate heading.

This particular area of research is essential in order to determine whether or not Namibians have a justiciable right to clean and adequate water or any recourse what so ever, should they be deprived of this essential basic human right.

In answering this question, I will look at the following sources of law on the right to water, to mention a few;

- International instruments in order to formulate a comparative analysis of different jurisdictions;
- Regional instruments such as the African Charter on Human and People's Rights and lastly;
- National instruments; i.e. The Namibian Constitutions and the status thereof as to the right to water, legislation pertaining to water and national state policy.

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<sup>11</sup> Supra.

<sup>12</sup> Legal Assistance Centre To Fight For The Right To Adequate Water, 30 November 2009.

## 1.2 BACKGROUND:

This legal problem is directly related to human rights, and thus directly related to the rights enshrined in chapter 3 of the Namibian Constitution. The fundamental human rights.

### **What is the purpose of a Constitution?**

The Namibian Constitution is not wholly an indigenous document. It has the added legitimacy of having been sanctioned by the people through their representatives. The Constitution reflects the 1982 Constitutional Principles which were themselves inspired by democratic values, and a concern for fundamental rights derived from international standards that provide a context within which the Constitution should be interpreted and applied.<sup>13</sup>

The Constitution does not only contain a declaration of human rights, but also a number of other provisions which enhance fundamental rights and freedoms, and which provides for good governance.

The Constitution should be interpreted in light of its aims, objects, spirit and values. In *S v Acheson*<sup>14</sup> a very influential Namibian precedent which described the Constitution as “*a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.*”

It is fundamental to mention the fact that the Namibian courts apply the principle of the “presumption of constitutionality”.<sup>15</sup> Hence, a strict construction is placed on statutory provisions that interfere with fundamental rights. The questions to be answered therefore are:

1. Is water a fundamental right or a commodity?

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<sup>13</sup> *S v Heita and Another* 1992 (3) 785 (Nm), 787-8, *S v Tcoeib* 1993 (1) SACR 274 (Nm).

<sup>14</sup> 1991 (2) SA 805 (Nm).

<sup>15</sup> *Kauesa v Minister of Home Affairs* (Case No A125/94, unreported).

2. Do the statutes that regulate water, its consumption and payment methods not violate an inalienable right?
3. The fact that Namibians have to pay for water, is this not in contravention of a socio-economic and fundamental right?
4. Lastly, how many rights are violated when one is deprived of this very important one?

The onus is on the applicant to prove on a balance of probabilities that a fundamental right or freedom has been infringed or threatened, and that s/he has *locus standi* as an aggrieved person under Article 25(2) of the Constitution. This is the aim of this dissertation, and thus what I shall be proving to society.

### **1.3 RESEARCH METHODOLOGY**

Research methodology is a systematic approach to the generation of new knowledge. It involves the issue of scientific tools and methodologically acceptable steps in order to reach certain conclusions. Different types of research are done in order to generate certain types of information or in order to achieve particular objectives.

The research methodology I will be using in order to achieve my end objective is desk research also known as library research. I will mostly consult previous writings on the topic, judicial precedents and statutory law. These materials are supported by text books, journal articles, documentary reports, parliamentary debates, internet materials, archival materials and other relevant literature.

### **1.4 STATEMENT OF THE PROBLEM**

When one has to look at the statement of the problem, it is important to look at what the right to water means? What does it entail? To give it a literal interpretation in order to ascertain the core elements this comprises the right to water.

Water is essential to the well-being of human kind, vital for economic development, and a basic requirement for the healthy functioning of the world's ecosystems. Clean water, together with hygienic sanitation, is necessary to sustain human life and to ensure good health and human

dignity. The right to water is a crucial aspect for the struggle to improve the situation of more than 1 billion people that do not have access to safe water.<sup>16</sup>

So what does the right to water entail? The right comprises of the following:<sup>17</sup>

- **Sufficient water:** water supply for each person that is sufficient and continues for personal and domestic uses, which normally include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.
- **Clean water:** safe water that in particular, is free from hazardous substances that could endanger human health, and whose color, odor and taste are acceptable to users.
- **Accessible water and sanitation:** water and sanitation services and facilities are accessible within, or in the immediate vicinity, of each household, educational institution and workplace. Sanitation is safe, adequate and conducive to the protection of public health and the environment.
- **Affordable water and sanitation:** water and sanitation can be secured without reducing any person's capacity to acquire other essential goods and services, including food, housing, health services and education.
- **Non-discrimination and inclusion of vulnerable and marginalized groups:** there is no distinction based on grounds such as race and color which leads to unequal access to water and sanitation.
- **Access to information and participation:** all people have the right to participate in decision-making processes that may affect their rights. All people are given full and equal access to information concerning water, sanitation and the environment.
- **Accountability:** persons or groups denied their right to water and sanitation have access to effective judicial or other appropriate remedies, for example courts, national ombudspersons or human rights commissions.

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<sup>16</sup> COHRE, AAAS, SDC and UN-HABITAT, *Manual on the Right to Water and Sanitation*, (2007), at p. xiv.

<sup>17</sup> Mungunda, N.F. (2011) *Access to Water: A human right*; in Namibian Law Journal, Volume 03-Issue 02. Windhoek: Konrad Adenaur Stiftung, p. 82.

## **1.5 LITERATURE REVIEW**

According to Amoo, S.K. (2008) an introduction to Namibian law including the Sources of law in Namibia can be outlined as Constitutional law; Roman-Dutch law; the Common law; Customary law; Legislation; Juristic writings and International law. This laid the foundation of this research paper as the right to water relates to most of these sources of law. The classification of laws as the hierarchy of laws needs to be understood in order for certainty as to which branch of law human rights relates too. As a law student it is important to be able to identify the category that a legal problem falls into to be able to solve a particular problem. Hence the identification that this human rights issue is part of public law as a constitutional law issue.

Bosl, A. Horn, N. & Du Pisani, A. (2010) described the position of international law vis-à-vis municipal law: an appraisal of article 144 of the Namibian Constitution from a human rights perspective was described very adequately. This contributed primarily to my indispensable argument and conclusion that has been reached with regard to this right.

The two authors above, including Davis, D. Cheadle, H. and Haysom, N. (1997) is a good compilation of commentary and cases on fundamental rights. David et al. however relates more to the 1993 South African Constitution and Chapter 2 of the 1996 Constitution. Of which the right to water is the core for purposes of this paper. In Mubangizi, J.C. (2004) South Africa's constitution, adopted in 1996, has been praised as the model social rights constitution. This book explains how the South African Constitution recognizes the right to water as a basic essential human right. Section 27.1(b) confirms that everyone has the right to access to sufficient food and water. In countries such as South Africa, in which the right to water is enshrined in the national constitution, courts have supported and enforced an explicit right to water. This right will be explained in much more detail later on. This book also explains the relationship between international human rights norms and the South African legal system.

According to De Waal, J., Curie, I. & Erasmus, G. (2000) there is a great distinction between first and second generation rights which needs to be understood for purposes of this dissertation. The authors also deal with socio-economic rights in international and comparative law and justiciability of socio-economic rights. The authors have contributed to the writings of this

dissertation in that one can now have clarity on the type of protection afforded to the right to water under various constitutions.

According to Horn, N & Bosl, A. (2008) the inclusion of the very comprehensible and defined article on the justiciability of socio-economic rights in Namibia and the issue relating to third generation human rights and their protection in Namibia is a crucial factor under national law. It also includes the issue relating to the protection and promotion of human rights in Namibia. The emphasis is clearly stated that socio-economic rights can indeed be justiciable rights. This will be explained in more detail in the continuation of my academic manuscript, as it is one of the essential elements of this manuscript. Nakuta, J (2011) also addressed the issue on the Justiciability of Socio-economic Rights in Namibia. Especially the legal challenges and Opportunities. This was however at a separate Conference on Economic, Social and Cultural Rights. In this paper Mr. Nakuta's main argument related to the two main ways in which the right to water can be protected domestically and internationally. An in depth analysis will be explained shortly. Naldi, G.J. (1995) *Constitutional Rights in Namibia*: also outlines the features of the Namibian Constitution, the interpretation of the Constitution, the basic principles of the Constitution, and most importantly an in depth discussion of the fundamental rights and freedoms enshrined in Chapter 3 including the civil and political rights and very important the socio economic rights which is the heart of this paper. The importance of human rights can never be over emphasized. In this book every human right that it of utmost importance for human existence is discussed in detail. As well as the principles of state policy and the socio-economic rights, this will be discussed in detail throughout this dissertation.

In the compilation of the Labour Resource and Research Institute (LARRI) (2004) the true essence of this dissertation was established, as this compilation assisted immensely in the dissertation as it dealt a lot with the struggle of marginalized communities and their right of access to water which is the essence of this paper and one of the main arguments raised.

These authorities form the core basis of this dissertation and will lead the arguments raised throughout the dissertation.

## CHAPTER 2

### 2.1 INTERNATIONAL POSITION:

When dealing with the international position relating to the right of water, we are covering a very broad field. For we first and foremost have to start with human rights in general then narrow it down specifically to the right to water. This hierarchy will therefore be divided into the following sub-headings:

- Does the right to water fall within the definition of human rights?;
- The origin and history of the concept of the right to water;
- Why should the right to water as a basic essential human right be protected?;
- Classification of the right to water as a basic human right;
- International protection of the right to water as a basic human right;
- The status of international law in Namibian National law;
- An appraisal of Article 144 of the Namibian Constitution from a human rights perspective ;
- The position of human rights and in particular the right to water in the Namibian society.

#### 2.1.1 What are Human Rights:

This sub-topic focuses on the question of whether water is a fundamental human right or rather a commodity. Therefore it is important to define what human rights comprise in order to make this distinction.

Human rights are usually referred to by various names and phrases. These include fundamental rights, basic rights, natural rights or sometimes even common rights.<sup>18</sup> Although these phrases do not mean the same thing they are used interchangeably. It is however clear that fundamental and/or basic rights are those rights which must not be taken away by any legislation or act of the state and which are often set out in the fundamental law of the country, for example in the Bill of

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<sup>18</sup> See P S Jaswal & N Jaswal (1996) *Human Rights and the Law*, p 3.

Rights of the Constitution of the Country.<sup>19</sup> Natural or common rights on the other hand are seen as belonging to all men and women by virtue of their human nature.<sup>20</sup>

The UN has described human rights as those rights which are inherent in our nature and without which we cannot live as human beings.<sup>21</sup> In that regard the rationale for the protection of human rights is described as follows:

“Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.”<sup>22</sup>

In a general sense, human rights are understood as rights which belong to an individual as a consequence of being a human being and for no other reason.<sup>23</sup> Clearly then, human rights are those rights one possesses by virtue of being human.

The principle of universality of human rights is founded on the notion that all human rights apply uniformly and with equal force throughout the world. The principle of interdependence of all human rights holds that the full and meaningful enjoyment of a particular right is dependent on the possession of all the other rights, even the right to water... and the principle of the indivisibility of human rights is founded on the assumption that all human rights have the same basic characteristics and should be upheld through the medium of equally potent enforcement mechanisms.<sup>24</sup>

The inference from the principles outlined above is that human rights are universal and should apply to all persons at all times without distinction. It can also be inferred that political,

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<sup>19</sup> Mubangizi, J. (2005) *The Protection of Human Rights in South Africa: A Legal and Practical Guide*. Durban: Juta & C, at p 2.

<sup>20</sup> Supra.

<sup>21</sup> United Nations, *Human Rights: Questions and Answers 4* (1987).

<sup>22</sup> Supra.

<sup>23</sup> See Piechovaik ‘What are Human Rights? The Concept of Human Rights and their Extra- Legal Justification’ in R Hanski & M Suksi (eds) *An Introduction To The International Protection of Human Rights* (2002) p 3.

<sup>24</sup> Mubangizi supra at p 4.

economic and cultural differences cannot and should not be used as an excuse for the denial or violation of human rights.<sup>25</sup>

In a nutshell, we have to look at commodification, as the objective is to determine whether water is perceived as a human right or a commodity. For only when water is treated as a commodity can it be effectively commercialized, and eventually privatized. In order to answer this question we need to look at the following sub-topics:

### **2.1.2 The Origin and History of the Concept of the Right to Water:**

To understand the concept of human rights, one must first examine its origin and history. I will however only be giving a brief overview and not an in-depth analysis of the history of human rights.

It is generally believed that the concept of human rights has its origin in religion, humanitarian traditions and the increasing struggle for freedom and equality in all parts of the world.<sup>26</sup>

The concept of human rights can also be traced to the Greek thinkers who developed the idea of ‘natural law’. This idea was propagated by people like Socrates and Cicero who viewed natural law as providing a standard for making, developing and interpreting law.<sup>27</sup> The signing of the *Magna Carta* in England in 1215 AD has introduced a new perception of the concept of natural rights. Also known as the ‘Great Charter of Liberty’, the *Magna Carta* provides inter alia that:

*“No person shall be captured or imprisoned or dispossessed or outlawed or exiled or in any way destroyed, nor will we go against him or sent against him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice.”*

After the signing of the *Magna Carta* of 1215 AD, several developments in the rest of the world contributed to the shaping of the concept of human rights. In England these included the Petition of Rights (1628), the Agreement of People (1647) and the Bill of Rights (1688).<sup>28</sup> In France the

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<sup>25</sup> Supra.

<sup>26</sup> Jaswal & Jaswal supra at p 3.

<sup>27</sup> C R M Dlamini (1995) *Human Rights in Africa: Which Way South Africa?* p. 10.

<sup>28</sup> Dlamini supra at p 12-13.

most outstanding event was the French Revolution of 1789. In North America, the most important event was the American Declaration of Independence drafted by Thomas Jefferson. In 1791 the United States adopted the Bill of Rights by incorporating the first ten amendments into the American Constitution.

After the destruction and suffering caused by the Second World War in particular, the international community began to show some interest in the promotion and protection of human rights through the medium of international law.<sup>29</sup> The most immediate manifestation of this interest was the creation of the international organization known as the United Nations. This organization was established by the Charter of the United Nations, which was adopted in San Francisco on June 25, 1945. One of the Charter's objectives is 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.'<sup>30</sup>

The establishment of the UN led to the drafting of the very first UN human rights instrument, the Universal Declaration of Human Rights, along with other UN instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These will later on be discussed in much more detail when we deal with the various international instruments Namibia has ratified to date.

### **2.1.3 Why should the Right to Water as a basic Human Right be protected?**

If we look at the various definitions of human rights, it is clear that in the absence of human rights human beings cannot fully develop and use their human qualities, their intelligence, their talents and their conscience in order to satisfy both their spiritual and physical needs. Quite apart from the various definitions and descriptions, there is no doubt that human rights are a necessary of any democratic society. The protection of human rights is therefore necessary for democracy. Democracy is an ideal towards which all civilized nations are striving. In order to recognize that ideal societies have to protect human rights of their members.

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<sup>29</sup> The Protection of Human Rights in South Africa supra at p 6.

<sup>30</sup> See preamble to the Charter of the United Nations.

#### **2.1.4 Classification of the Right to Water as a basic Human Right:**

There are a number of different ways of classifying human rights and some rights may fall into more than one of the various categories. Sometimes human rights are classified in terms of those which are fundamental or non-fundamental, those which are violable or non-violable, those which are collective or individual or those which are justiciable or non-justiciable. The European Community's *Human Rights Handbook* classifies human rights into two categories, namely classic rights and social rights.<sup>31</sup> According to this definition classical rights include civil and political rights, which generally restrict the power of the state in respect of actions affecting the individual. Whereas social rights include, cultural and economic rights, which require the state to act in a positive, interventionist manner so as to create the necessary conditions for human development. Then there is the more generally accepted method of classification into three different categories; first, second and third generations. The first generation rights refer to civil and political rights; the second generation rights referred to are economic, social and cultural rights and the third generation rights are referred to as quite descent in origin. These are solidarity rights. These rights are collective in nature and depend upon international cooperation for their achievement.

It must be emphasized that the above categorization of human rights is by no mean a closed list. It is however relevant for purposes of this dissertation. From the above water is unquestionably more a basic essential human right, rather than a commodity. We will therefore look at international protection of human rights in order to strengthen this argument.

#### **2.1.5 International protection of Human Rights:**

Protection of human rights generally takes place at two levels, both the domestic and the international level.

A brief description will be outlined on how human rights are protected at international, regional and national levels.

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<sup>31</sup> Netherlands Ministry of Foreign Affairs *Human Rights Handbook*. (1955) p 4-7.

## 2.2 The United Nations System of Human Rights:

### ❖ United Nations instruments providing for the international protection of human rights:

After the second World War, world leaders recognized the importance for the protection of human rights. The commitment was embodied in the Charter of the United Nations. Although the charter is not, and was not meant to be a human rights instrument, it clearly adopts an approach which reflects human rights as one of the prerequisites for ensuring international peace and security, welfare of people, and other socio-economic objectives.<sup>32</sup>

The Universal declaration of Human Rights was adopted by the United Nations in 1948. Although this document is in the form of a declaration rather than a convention and therefore lacks formal binding force, it has been widely recognized as binding due to the obligations contained in the Charter of the UN and because parts of the declaration have become part of customary international law.<sup>33</sup>

The importance of the declaration as a human rights instrument cannot be over-emphasized. Writing in 1993, Davidson said of the Universal Declaration of Human Rights:

“It has not only formed the basis for the drafting of two international covenants and three regional human rights treaties, but it has also been the paradigm for the drafting of the human rights provisions of over 25 domestic constitutions”.<sup>34</sup>

This declaration is seen by many as the cornerstone of human rights and the ‘mother’ of an international human rights culture.

In 1966 two covenants were adopted by the UN General Assembly, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Unlike the Universal Declaration on Human Rights, they contain binding obligations. Both the ICCPR and the ICESCR came

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<sup>32</sup> See Drzewicki ‘The United Nations Charter and the Universal Declaration of human Rights’ in Hanski & Suksi (eds) *An Introduction To The International Protection of Human Rights* (2002) 68.

<sup>33</sup> The Protection of human Rights in South Africa *supra* at p 13.

<sup>34</sup> See Davidson *Human Rights* (1993) p 67.

into force in 1976.<sup>35</sup> Together with the Universal Declaration of Human Rights, they are usually regarded and described as the ‘international bills of rights.’<sup>36</sup> In addition to these general international human rights instruments, a number of declarations and conventions dealing with human rights issues have come into being. Some of them which are also of application to this paper includes; the International Convention on the Elimination of All Forms of Racial Discrimination (1956), the Convention on the Right of the Child (1989); etc.

### **2.3 The Regional System of Human Rights Protection:**

Regional arrangements is another level through which the protections of human rights take place. In international human rights sphere the term ‘regional system’ refers to the continental arrangements in Europe, the America’s and Africa; all of which have some form of intergovernmental system of human rights protection. The following are some of the regional systems in operation:

- **The European System:**

Established by the Council of Europe in 1949, the European system for the protection of human rights mainly revolves around, and has its legal source in two treaties: the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>37</sup>, and the European Social Charter.<sup>38</sup> Whereas the convention guarantees basic civil and political rights, the Charter on the other hand proclaims a catalogue of economic and social rights. Therefore in a way the Charter compliments the Convention.<sup>39</sup>

- **The Inter-American System:**

The inter-American system of human rights protection mainly revolves within the framework of the Organization of American States (OAS), a regional inter-governmental organization which was found in 1948. The system has its origin in

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<sup>35</sup> These covenants were adopted by Resolutions 2200A (X1) and 2200 (XX1) of the UN General Assembly on 16 December 1976. They required 35 states to ratify them before they came into force.

<sup>36</sup> See Drzewicki supra at p 76.

<sup>37</sup> Signed on 4 November 1950 and entered into force on 3 September 1953.

<sup>38</sup> Opened for signature on 18 October 1961 and came into force on 26 February 1965.

<sup>39</sup> Supra at p 17.

two distinct but interrelated legal sources. Firstly, the system has evolved and developed within the context of the OAS Charter, under which all member states of the organization have assumed human rights obligations simply by being members. Secondly, some states have voluntarily assumed human rights obligations under the American Convention of Human Rights by becoming parties to it and accepting to be bound by it.<sup>40</sup>

- **The African System:**

The African system for the promotion and protection of human rights is based primarily on the African Charter on Human and People's Rights, also known as the Banjul Charter.<sup>41</sup> The system was designed to function within the institutional framework of the Organization of African Unity (OAU), a regional intergovernmental organization that was formed in 1963 with the aim of promoting unity and solidarity amongst African states. The OAU has since been replaced by the African Union (AU), but it is important to note that the AU recognizes the Charter, as article 3(g) of the Constitutive Act of the African Union provides that the promotion and protection of human and people's rights in accordance with the African Charter and other relevant human rights instruments are objectives of the Union<sup>42</sup>. Thus the African Charter on human and people's Rights remains the primary instrument for the protection and promotion of human rights in Africa.<sup>43</sup> The African Charter and its distinctive features will be discussed in more detail under the regional position with reference to the position of other SADC countries and their stance on the right to water.

## **2.4 REGIONAL POSITION: (SADC COUNTRIES)**

There are a total of 14 SADC countries which form part of the SADC community as a whole. The International Covenant on Economic, Social and Cultural Rights requires States Parties to formally recognize the rights within their national legislation, to provide laws and regulations to

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<sup>40</sup> The Protection of Human Rights in South Africa supra at p. 22.

<sup>41</sup> Article 64(2).

<sup>42</sup> Supra.

<sup>43</sup> Supra.

fulfill these essential human rights. Therefore it is important to draw a comparative analysis between some or most of these countries, with regard to their stance on this very important right.

Recognizing the right to water and sanitation domestically is intrinsic to fulfilling the right; it entitles individuals to demand it politically, administratively and judicially. As a result of constitutional recognition, development and interpretation of legislation and policies must be in accordance to the right.

Some governments have adopted a participatory process to review its legislation and policies, and improve its legal and policy framework. In other countries grass roots movements have managed to use existing law to legally claim their rights.

Below are those countries that have enshrined the right to water within their national constitutions, or have framed the right explicitly or implicitly within national legislation:

<b>AFRICA</b>	<b>ASIA</b>	<b>LATIN AMERICA</b>	<b>MIDDLE EAST</b>	<b>EUROPE</b>
Algeria	India	Nicaragua	Iran	United Kingdom
Morocco	Indonesia	Panama	Kazakhstan	Netherlands
Eritrea	Sri Lanka	Uruguay		Belgium
Ethiopia	Philippines	Costa Rica		France
Kenya		Honduras		
Tanzania		Paraguay		
Uganda		Peru		
Mozambique		Venezuela		
South Africa		Bolivia		
Zambia		Columbia		
Angola		Ecuador		
Madagascar		Dominican		
Democratic Republic of Congo		Republic		

Gambia Mauritania		Guatemala Chile Brazil		
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A few of these countries will be mentioned and compared to each other, in order to establish the essence of the right to water in other African countries not just Namibia. South Africa will be discussed in greater detail as the country plays a major role in our law generally.

### 2.4.1 South Africa

South Africa’s constitution, adopted in 1996, has been praised as the model social rights constitution.

Section 27.1(b) confirms that everyone has the right to access to sufficient food and water.

South Africa’s Water Services Act, Act 108 of 1997, contains Section 3 on Right of access to basic water supply and basic sanitation. It states that: 1) **Everyone has a right of access to basic water supply and basic sanitation.** 2) Every water services institution must take reasonable measures to realize these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realize these rights...

The National Water Act<sup>44</sup> discusses permissible water use. Section 1 states that a person may (a) take water for reasonable domestic use in that person’s household, directly from any water resource to which that person has lawful access;

(b) take water for use on land owned or occupied by that person, for

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<sup>44</sup> Act No 36 of 1998.

(i) reasonable domestic use;

(ii) small gardening not for commercial purposes; and

(iii) the watering of animals (excluding feedlots) which graze on that land within the grazing capacity of that land, from any water resource which is situated on or forms a boundary of that land, if the use is not excessive in relation to the capacity of the water resource and the needs of other users; (c) store and use run-off water from a roof; (d) in emergency situations, take water from any water resource for human consumption or firefighting.

In countries in which the right to water is enshrined in the national constitution, courts have supported and enforced an explicit right to water. Here are examples of cases that dealt with this right in South Africa:

In the following cases mentioned, we will have a brief overview of how South African courts have dealt with the issue of the right to water. In *The Bon Vista Mansions Case, September 2001 Residents of Bon Vista Mansions v Southern Metropolitan Local Council* High Court of South Africa, Case No. 01/12312;

It was clearly demonstrates how the right to water can be used as a legal tool to make a difference to the lives of those living in poverty.

The case was brought by a resident of the Bon Vista Mansions block of flats, Mr. Ngobeni, on behalf of himself and his fellow residents, following the disconnection by the local Council of the water supply to the flats, due to non-payment of water charges. Due to the urgent nature of the case, the applicant requested interim relief, in the form of a court order to restore the water supply immediately, while the case was being heard by the court.

After some debate regarding the applicant's eligibility to sue the council for disconnection on behalf of the other residents, the court found the fact that the applicant was himself a resident of the flats reason enough to grant him locus standi to act, especially due to the 'inherent urgency' of the case.

The court used, as a basis for its decision, Section 27(1) (a) of the South African Constitution, which provides that everyone has the right of access to water. The court also referred to the International Covenant on Economic, Social and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights and its General Comment 12 on the Right to Food, which imposes on States Parties the obligation to respect existing access to adequate food by not taking any measures that result in preventing such access. [Note to reader – this case pre-dated the adoption of UN General Comment No. 15 on the Right to Water]

The Court found that the applicants had existing access to water before the Council disconnected the supply, and that the conditions and procedures for disconnection had not been ‘fair and equitable’ in accordance with Section 4 (3) of the South African Water Services Act 108 (1997), since reasonable notice of termination and the opportunity to make representations had not been provided.

The importance of having the opportunity to make representations was stressed. This was required by the provision that water supply may not be discontinued if it results in a person being denied access to basic water services due to non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

The Court consequently found that the Council’s disconnection of an existing water supply to consumers constituted prima facie a breach of its constitutional duty to respect the right of (existing) access to water and that the applicants had satisfied the requirements for the granting of an interim interdict. The water supply to the flats was subsequently reinstated.

In *Manqele v Durban Transitional Metropolitan Council in South Africa*, Durban High Court, 2002 (6) SA 423 (D);

This case highlights some of the remaining challenges in the legal enforcement of the right to water.

The applicant, Thulisile Christina Manqele, was an unemployed mother of seven, whose water supply had been disconnected as a result of the non-payment of her water account.

Manqele sought a declaratory order that the discontinuation of the water supply was unlawful and invalid, under the terms of the Water Services Act of 1997, as the disconnection had resulted in the applicant and her dependants being denied access to basic water services when she was unable to pay for the services.

The South African Water Services Act 108 (1997) refers to the right to a basic water supply, defining this as “the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene”. It defines “prescribed” as “prescribed by regulation”.

As there was no such guideline ‘prescribed by regulation’ in place in South Africa at that time, the respondent had adopted a policy of providing the first six kilolitres of water per month free to domestic consumers in an attempt to fulfill their obligation under the Act. The applicant’s water consumption per month had, without her knowledge, far exceeded the basic six kilolitres free service provided by the respondent.

The court found that, in the absence of regulations defining the extent of the right of access to a basic water supply, it had no guidance from the legislature or executive to enable it to interpret the content of the right embodied in the Act. It therefore held that the right to water, upon which the applicant relied, was in this case incomplete and therefore unenforceable.

This case raises many issues, such as the need for comprehensive national legislation on the right to water and the clarification of minimum water requirements.

There will now be a brief description of the protection of the right to water in other African countries. This is essential to note, so that the reader can realize that this is not just a local phenomenon, but also regional and international.

### **2.4.2 Angola**

Article 10 of the Water Act, 2002, obligates the government to provide the population in a continuous and sufficient manner with potable water in order to satisfy their needs for domestic uses and for hygiene.

### **2.4.3 Democratic Republic of the Congo**

Article 48 of the Constitution of the Democratic Republic of the Congo, 2006, asserts that the State shall guarantee the right to a decent dwelling, **access to potable water** [unofficial translation].

### **2.4.5 Madagascar**

Water Code, Law No. 98- 029, Article 37, confirms that the public service is responsible for the universal provision of **potable water**, which is based on the obligation to provide a minimum quantity and a minimum service of potable water.

### **2.4.6 Tanzania**

Article 10 of the Water Utilization Act, 1974, as revised 1993, pronounces the right to **water** for domestic purposes.

### **2.4.7 Mozambique**

Article 26, Water Act, states priority of **water** allocation for human consumption and sanitation

### **2.4.8 Zambia**

The Constitution of Zambia, 1996, in Article 112 stipulates that the State shall endeavor to provide **clean and safe water**.

There is one country that is worth noting although it does not form part of the SADC community, which also deals with the right to water in a very serious stance. This is the position of

**India:**

The Supreme Court ruled that both **water and sanitation** are part of the constitutional right to life (Article 21). The Court has stated that ‘the right to access to **clean drinking water** is fundamental to life and there is a duty on the state under Article 21 to provide clean drinking water to its citizens’ *A.P. Pollution Control Board II v Prof. M.V. Naidu and Others* (Civil Appeal Nos. 368-373 of 1999).

For most countries, the lack of explicit reference to a right to water in the national legislation necessitates creativity in enforcing the right through the courts.

Cases have been brought under environmental or public health legislation or courts have interpreted the right to water under other constitutional rights, such as the right to life or a healthy environment.

In India, where the right to water is not enshrined as a fundamental right in the national Constitution, courts at both state and federal level have interpreted Article 21 of the Constitution, the right to life, as encompassing the right to safe and sufficient water and sanitation.

In 1990, for example, The Kerala High Court in *Attakoya Thangal v. Union of India* recognized the fundamental importance of the right to water.

In this case, the petitioners claimed that a scheme for pumping up ground water for supplying potable water to the Laccadives (now known as the Lakshadweep Islands) in the Arabian Sea would upset the fresh water equilibrium, leading to salinity in the available water resources and causing more long-term harm than short-term benefits.

The Kerala High Court, in its judgment, requested deeper investigation and monitoring of the scheme and the judge clearly recognized the right of people to clean water as a right to life enshrined in Article 21, observing that:

“...the administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art 21. The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet

water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself.”

## **2.5 THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LEGAL SYSTEMS:**

The relationship between international law and national law is by no means clear-cut. There are those who believe that the two constitute distinct branches of the law which never overlap.<sup>45</sup> This theory sometimes referred to as the dualist theory, claims that international law and national law ‘differs so greatly with regard to their sources, contents, and the relationship they govern, that they must represent two separate legal spheres’.<sup>46</sup> On the other hand, there are those who maintain that the international legal system and the national systems together constitute one legal order within which the national legal system take a subordinate position. This universalistic approach, also known as the monist theory, seems to be more contemporary and more acceptable.<sup>47</sup>

Some states apply the principle that international norms automatically form part of domestic law and even have priority over domestic norms. In other states, international law has no guaranteed applicability in their municipal legal system.

In order to appreciate the difficulties of incorporating international obligations into domestic law, it is important to understand the main differences between international and domestic law. The Namibian Constitution under Article 144 of the Namibian Constitution incorporates international law into Namibian law as long as it is not in conflict with national law. On the other hand, According to Lillich and Newman<sup>48</sup>, the distinction firstly stem from the fact that traditionally the two systems were quite separate: the international legal system was a law of nations, that is, concerned only with the rights and duties of states, not of individuals,<sup>49</sup> while the various

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<sup>45</sup> See Triepel ‘Les rapports entre le droit interne et le droit international’ RCADI 1 (1923I) 77-118 at 83, as quoted in A J G M Sanders *International Jurisprudence in African Context* (1997) 215.

<sup>46</sup> Sanders supra at p 215.

<sup>47</sup> The Protection of Human Rights in South Africa supra at p 32.

<sup>48</sup> Lillich & Newman *International Human Rights: Problems of Law and Policy* (1979) at p 54.

<sup>49</sup> Supra.

domestic systems remained completely free to regulate the lives of their own citizens.<sup>50</sup> Secondly, unlike domestic legal systems which are hierarchical in nature, with laws flowing from a constitution and enforced by national courts, under the international legal system there is no sovereign body whose legislative and judicial authority is universally accepted. The United Nations, the International Court of Justice and the other international tribunals do not and cannot quite fulfill those roles. Hence the enforcement of international norms largely depends on the voluntary consensus of member states rather than on any sense of legal obligation.<sup>51</sup>

Understanding the basic distinction between international and domestic law requires an understanding of the sources of international law. These are reflected in Article 30 of the Statute of the International Court of Justice. Article 38(1) provides all the sources of international law that the court should apply, these include amongst others, international conventions, international customs, the general principles of law recognized by civilized nations and judicial decisions. National systems, on the other hand, draw on legislation, common law, judicial precedents and custom as their main sources of law. Wherefore one has to look at legislation and judicial precedents as the main sources of law relating to the protection of the right to water.

For the international judge, international law is supreme while for the national judge, the national law is supreme. This raises the question of the relevance of international law in Namibian national law.

## **2.6 THE PRESENT RELATIONSHIP BETWEEN INTERNATIONAL LAW AND NAMIBIAN LAW:**

The Republic of Namibia, formerly South West Africa, attained independence in 1990.<sup>52</sup> Namibia adopted a national constitution that not only embraces general international law, but also regulates the relationship between international law within the national legal sphere.<sup>53</sup> The Constitution lays down conditions and circumstances under which international law operates within Namibian municipal law. In order to see the role international law plays in Namibian

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<sup>50</sup> Supra.

<sup>51</sup> See Lillich and Newman at p 54.

<sup>52</sup> The Republic of Namibia attained its independence on 21 March 1990.

<sup>53</sup> Article 144 of the Namibian Constitution

national law I shall make reference to both the pre and post-independence position in order to determine whether or not there has been a fundamental change ever since.

### **2.6.1 Conceptual Context: Monism and dualism:**

At a theoretical level the interrelationship between international law and national law is regulated by two rival theories: monism and dualism.<sup>54</sup> According to monism, international and national law constitutes aspects of a single universal system. Thus the two systems are interrelated parts of a single legal structure. The monist school argues that not only do international legal rules and various national legal orders constitute a single universal system, but, in cases of conflict, national legal orders take a subordinate position.<sup>55</sup>

Dualism regard international law and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character. The two legal systems are different in the particular relations that they govern: State law deals with the individuals in the country and International law regulates the relations between states.<sup>56</sup>

In terms of Article 144 of the Namibian Constitution it is clear that Namibia follows a dualistic approach. As article 144 clearly states, international law will form part of the laws of the country as long as it conforms to national legislation.

### **2.6.2 The Namibian Constitution and international law:**

- **The legal position in the 1990 Constitution:**

It is worth noting that the Namibian Constitution has adopted a positive approach towards international law. A number of clauses in the Constitution deals with or, rather, relate positively to international law.<sup>57</sup> The most important one being Article 144 of the Constitution. The Preamble to the Constitution declares that the people of Namibia desire to promote among themselves the dignity of the individual and the unity and integrity of the Namibian nation “among and in

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<sup>54</sup> See Tshosa, O. (2010) *The Status of International law in Namibian national law: A critical appraisal of the constitutional strategy* in Namibian Law Journal, Volume 02 Issue 01. January 2010.

<sup>55</sup> Brownlie (1990:33); Shaw, Malcolm. 2003 “Sources”. *International Law* (Fifth Edition). Cambridge: Cambridge University Press, pp 100-101.

<sup>56</sup> (ibid.).

<sup>57</sup> (ibid.).

association with the nations of the world”. The Constitution also declares that the national territory of Namibia consists of the whole of the territory “recognized by the international community through the organs of the united Nations”.<sup>58</sup> Furthermore in terms of Article 95 of the Constitution, one of the principles of States is to

... actively promote and maintain the welfare of the people by adopting *inter alia*, policies aimed at the following:

...

(d) membership of the International Labor Organization (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO; ...

It is however important to note, that none of these are justiciable under Namibian domestic law.

Also, Article 96, which deals with Namibia’s foreign relations, declares, *inter alia*, that:

The State shall endeavor to ensure that in its international relations it:

- (a) adopts and maintains a policy of non-alignment;
- (b) promotes international co-operation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.

It is important to note that in terms of (d) above Namibia should foster respect for international law and treaty obligations. How can Namibia as a country conform to this obligation, if we do not have a justiciable right to water? This right is so widely protected under international instruments.

Furthermore, in terms of Article 99 dealing with foreign investments:

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<sup>58</sup> Article 1 (4) of the Namibian Constitution.

Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.

It is clear that the founding fathers and mothers of the Constitution felt that the intent to introduce the minimum democratic values in the territory of Namibia, did not stop at the country's national boundaries, but were to be extended to Namibia's international conduct- hence the proclaimed adherence of the newly constituted Namibian state to the general standards of behavior agreed upon by the vast majority of members of the international community.<sup>59</sup> Therefore upon attaining independence the framers of the Constitution had to anchor it firmly on international law.

- **International Law Clause: Article 144**

The Namibian Constitution recognizes both international law and customary law as part of the law of the land in Article 66 of the Namibian Constitution, as long as it conforms to the principles of the Namibian Constitution. Article 144 on the other hand explicitly and unequivocally declares the following:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The effect of this provision is to accord the general rules of public international law and international agreements direct and automatic application in Namibian municipal law, subject to two main qualifications.

Firstly, the general rules of international law and international agreements may be excluded from applying directly in municipal law by the Namibian Constitution itself. Secondly, they may be excluded by Act of Parliament. It is however important to state that the inclusion of the international law clause in the Constitution effectively accords rules of international law a constitutional status.

In essence then the Namibian constitution has adopted a dualistic approach regarding the relationship between international and national law.

How this all relates to the right to water and to the research question is actually very clear. As stated above, Namibia includes the principles of international law as part of its Constitution,

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<sup>59</sup> (ibid.).

therefore as part of the law of the country. Hence we need to look at the international instruments signed under domestic law, and their stance pertaining to the right to water. Whether or not the country is complying with these rules laid down.

By a human rights approach to the right to water, Namibia can change the social status of its population. This can primarily be done by illuminating the privatisation of water provisions, and by incorporating a process which is holistic, participatory, inclusive, and multisectoral. It is therefore, incumbent upon government and its institutions to deviate from viewing water as a commodity, recognize it as a human right, and militate against the continuation of such inequity that is, in effect a gross violation of the rights of poor communities that have been and continue to be adversely affected.<sup>60</sup>

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<sup>60</sup> Mungunda, N *supra*, at p.79.

## CHAPTER 3:

### 3.1 THE NAMIBIAN CONSTITUTIONAL FRAMEWORK:

This chapter aims to answer the research question as to how many rights are violated when a person is deprived of the very essential right to water. In order to answer this question, we have to look at the constitutional guaranteed rights enshrined in Chapter 3 of the Namibian Constitution that is directly related to the right to water. They will be discussed and related accordingly.

A constitution is defined in the oxford English Dictionary as *“a body of fundamental principles or established precedents according to which a state or organization is governed”*.

The preamble to the Namibian Constitution recognizes the inherent dignity, equality and inalienable rights of all members of the human family. These rights include, amongst others, the right of each and every citizen to life<sup>61</sup>, liberty and the pursuit of happiness, regardless of race, color, ethnic origin, sex, religion, creed or social or economic status.<sup>62</sup>

These are basic human right under the Namibian Constitution, as human rights are rights enjoyed by every citizen of the Namibian nation. A human right does not have to be acquired and cannot be lost or taken away, it is a guaranteed right.<sup>63</sup> A practical example of a human right which is of fundamental importance not just for every human being, but essential to the argument of this research paper as it cannot be separated from the right to water, is the right to dignity<sup>64</sup> and therefore the right to life. Article 6 of the Namibian Constitution provides that *“The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or tribunal shall have the power to impose a sentence of sentence of death upon any person. No executions shall take place in Namibia.”* The right may therefore be claimed by any person who believes his/her right to be threatened, infringed or violated.<sup>65</sup> This right applies to all citizens

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<sup>61</sup> Article 7 of the Namibian Constitution.

<sup>62</sup> Article 10 of the Namibian Constitution.

<sup>63</sup> Legal Assistance Centre. (2000) Namibian Police Human Rights Manual

<sup>64</sup> Article 8 of the Namibian Constitution.

<sup>65</sup> Police Human Rights Manual, p12.

without any form of discrimination what so ever. Whether it be race, religion, sex etc. whether it be the rich or the poor or the powerful and the powerless.

The basic right of the Constitution are largely, but not exclusively, derived from the universal Declaration of Human Rights. The Supreme Court of Namibia has proclaimed that these rights and freedoms ‘are framed in a broad and ample style and are international in character. In their interpretation they call for the application of international human rights norms’.<sup>66</sup>

Before I examine the scope, application and justiciability of socio-economic rights in Namibia it is important to discuss a few rights which is directly related to the enforcement of these rights and thus guaranteed under the Bill of Rights of the Namibian Constitution. This is in order to understand where the right to water comes in.

### **3.1.1 ARTICLE 6: THE RIGHT TO LIFE:**

Article 6 guarantees that the right to life will be respected and also protected in Namibia. The expression inherent right to life cannot be properly understood in a restricted manner, and the protection of this right requires that the Namibian government and institutions adopt positive, proactive steps to protect such right.<sup>67</sup> Therefore the explicit right to life, health and well-being, as guaranteed by the Constitution, clearly has to include the right to sufficient water, at the appropriate quality of sustaining life.<sup>68</sup>

The right to life is not only guaranteed by the Namibian Constitution, but also by various international human rights instruments.

Article 3 UDHR states that: “Everyone has the right to life, liberty and security of person”.

Article 6(1) ICCPR states that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

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<sup>66</sup> Minister of Defense, Namibia v Mwandighi 1992 (2) SA 355 (NmS), 362.

<sup>67</sup> Mungunda, N supra at p. 92.

<sup>68</sup> Ibid.

Article 4 of the Banjul Charter states that: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.

It is clear from all these international instruments that the value given to the right to live is of utmost importance, not just nationally as guaranteed by the Namibian Constitution but internationally as well.

The interpretation of Article 6 arose before O’Linn J in the High Court in the case of *S v Tcoeib*<sup>69</sup> where it was contended on behalf of the appellant that a sentence of life imprisonment was, inter alia, a sentence of death and was therefore unconstitutional under the terms of Article 6. In *S v Nehamia Tjijo*<sup>70</sup> Levy J stated, obiter, that life imprisonment amounted to a sentence of death.

These cases clearly outline the Namibian position as to the importance of the right to life of every individual. How can any human being enjoy the right so explicitly protected, without everyday access to clean and adequate water?

The Namibian Constitution has been described as “not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is ‘a mirror reflecting the national soul’, the identification of the ideals and aspirations of the nation; the articulation of the values bonding its people and disciplining its government.”<sup>71</sup>

How can any human being, or to narrow it down any citizen have the right to life which the Constitution so clearly guarantees, or the enjoyment of his right to life if left without appropriate access to water? Water is the way to life, you need it every day for survival, you just simply cannot live without it or even begin to imagine how to live without it. You need water to drink every day, to wash, to cook, to clean your house and to flush your toilet. If you have a guaranteed life, how can you live it fully without adequate access to water? It is simply humanly impossible. This answer will be clearly illustrated in the section of the marginalized communities and their struggle to water.

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<sup>69</sup> 1993 (1) SACR 274 (Nm).

<sup>70</sup> Unreported but cited in O’Linn J at 1993 (1) SACR 275-6.

<sup>71</sup> Namibian Human Rights manual supra at p.11.

### **3.1.2 ARTICLE 8: HUMAN DIGNITY:**

Article 8 basically declare that the dignity of all persons shall be inviolable. The same article prohibits torture, or cruel inhuman degrading treatment. Because human life requires access to clean, consistent, and ample supply of water for consumption and for hygiene and sanitation, there is a strong argument to be made that the courts would find that the right to human dignity necessarily includes access to water.<sup>72</sup>

Article 8 of the Namibian Constitution is headed “respect for human dignity” and provides a sub-article 1 that “the dignity of all persons shall be inviolable.” This basically means that the dignity of any Namibian citizen shall not be violated. Respect for human dignity is the basis of all human rights.

The importance of Article 8(1) becomes visibly apparent upon reading paragraph 2(a) and (b). Sub-paragraph (b) to Article 8(1) prohibits torture or cruel, inhuman or degrading treatment or punishment. Article 5 UDHR, Article 7 and 10 ICCPR, Article 3 ECHR, Article 5(2) ACHR and Article 5 of the Banjul Charter also guarantees basic human dignity to the human nation.

It is also important to note that under Article 24(3) of the Constitution no derogation from Article 8 is permissible so that the State assumed an absolute and unqualified obligation to refrain from any such behavior.<sup>73</sup>

Article 8 relates to the right to water, in that persons who do not have adequate access to water cannot use the services of flushable toilets (sanitation), as there are no water to make use of this pipeline service. This leads to unhealthy sanitation as people are forced to use very dirty toilets or even bushes and open air. No human being can be expected to have a decent living when treated in such inhuman degrading circumstances. This goes against each and every person’s right to dignity. These issues of water also leads to people having to use water from a dam in order to cook, wash themselves and their clothes, drink, in order to feed their livestock etc. This

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<sup>72</sup> Mungundda, N supra at p. 93.

<sup>73</sup> 1991 (3) SA, 76 (NmS), 86.

is where diseases also appears. This will be discussed in the sub-chapter dealing with marginalized communities.

Article 8 may be read in conjunction with Article 10 since discrimination also violates human dignity.<sup>74</sup> The provision that the dignity of all persons shall be inviolable is comparable to Article 1 UDHR, Article 5(1) ACHR and Article 5 of the Banjul Charter which, inter alia, prohibits “all forms of exploitation and degradation of man.”<sup>75</sup>

### **3.1.3 ARTICLE 10: EQUALITY AND NON-DISCRIMINATION:**

Article 1(1) of the International Covenant on the Elimination of All Forms of Racial Discrimination defines discrimination as any “distinction, exclusion, restriction or preference based on race, color, descent or natural or ethnic origins which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of Human Rights and Fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Discrimination on the grounds of social or economic status is prohibited. Similar prohibitions are to be found in the principal human rights documents which seeks to ensure the equal enjoyment of human rights and fundamental freedoms irrespective of wealth or other status.<sup>76</sup>

Namibia seems to be operating in a somewhat discriminatory fashion if we refer to our current economic status.

Namibian citizens have raised the issue of “water privatization, a new apartheid” due to the fact that only certain water regulations are applied to certain groups of people. In this event vulnerable groups of people suffer the most as they are left without access to water. Pipe line water to houses are too expensive for them to afford, hence prepaid water meters are being introduced in marginalized communities. If you do not have enough units on your reading card you simply do not have access to water. This is only being introduced into vulnerable communities, and the rest of the communities can live according to their afforded standard of

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<sup>74</sup> Namibian Constitution of 1990.

<sup>75</sup> Supra.

<sup>76</sup> Naldi supra p 61.

living. This is definitely inhuman, degrading and discriminatory towards the vulnerable victims. This will be clearly illustrated in the sun0heading dealing with the DTA community in Swakopmund, under the marginalized communities.

#### **3.1.4 ARTICLE 15: CHILDREN’S RIGHTS:**

How this article relates to the right to water is actually very understandable. How can a child enjoy their fundamental right to life and respect for human dignity if they do not have the necessities of life that cannot be separated from their right to the enjoyment of life? Any child that has to be disposed to a school or home environment without the necessary essentials such as adequate food and water to live a decent life cannot be expected to have a productive future, which in turn has a detrimental effect on the future of the Namibian economy.

In any caring society the importance of child welfare cannot be overemphasized, because the future welfare of the entire community, its growth and development, depends on the health and well-being of its children.<sup>77</sup> Children need to be regarded as valuable national assets because the future well-being of the nation depends on how its children grow up and develop. Since Independence, Namibia has ratified several key international legal instruments aimed at promoting and protecting the rights of children.<sup>78</sup>

### **3.2 THE POSITION OF THE NAMIBIAN CONSTITUTION WITH REGARD TO SOCIO-ECONOMIC RIGHTS:**

This sub-heading aims to answer the question as to whether the payment for water is/not in contravention of socio-economic and all other fundamental rights affected above.

Chapter 11 of the Namibian Constitution, Articles 95-101, is entitled ‘Principles of State Policy’. The principles listed therein cannot be classified as constitutional rights *strictu sensu* but can properly be described as societal goals.<sup>79</sup> Article 101 therefore makes it clear that the principles shall not be legally enforceable by any court, but shall nevertheless guide the government in

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<sup>77</sup> Kangandjela, L.N. & Mapaure, C. *Work in Progress: The Child Care and Protection Act in Namibia*.

<sup>78</sup> Supar.

<sup>79</sup> Naldi supra at p 99.

making and applying laws to give effect to the fundamental objectives of the principles.<sup>80</sup> The courts are however entitled to have regard to the principles in interpreting any laws based on them. The most important provision relevant to this academic paper is Article 95.

Chapter 3 of the Namibian Constitution is not solely concerned with civil and political rights but also seek to protect certain economic, cultural and social rights, generally referred to as second generation rights in international law. This is what forms the backbone of my research paper. It must however be observed that although some of these rights may be enforced through Article 5, many other economic matters are considered outside the context of rights but are rather classified as guiding principles of State Policy under chapter 11 of the Constitution. These guiding principles of state policy will be discussed in more detail.

### **3.2.1 ARTICLE 95:**

This article pledges the State to promote and maintain the welfare of the people by adopting various policies. It sets out certain policy objectives that the State considers morally and politically desirable and which in some cases will be implemented through legislation. They are objectives to be achieved as resources and parliamentary time permit.

Article 95(e) state as follows “ensures that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law”;

Article 95(g) states that “enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State”; and

Article 95(j) states as follows “consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.

The questions arising in many minds may be the relevance of these articles to this academic paper. Well, if you look at the wording of Article 95(e) does every citizen enjoy a right to fair

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<sup>80</sup> Supra.

and reasonable access to public facilities and service in accordance with the law if some communities have trouble in accessing clean drinking water or toilets in a proper state of usage without water operating thorough them due to no access to water?

As for Article 95(g) is there legislation enacted that provides the less privileged with the necessary social benefits for example running water from their taps?

Lastly, with reference to Article 95(j) how can any citizen of Namibia maintain an acceptable standard of living or improvement of public health when they are struggling just to get a basic necessity such as water running through their taps if they can't afford it? These are serious issues our government and society needs to consider, for as the famous human rights activist puts it "Nations will rise and fall, but equality remains the ideal. The universal aim is to achieve respect for the entire human race, not just for the dominant few."<sup>81</sup>

### **3.3 DEFINING THE MINIMUM ESSENTIAL LEVELS OF SOCIO-ECONOMIC RIGHTS IN NAMIBIA:**

As can be inferred from this paper, there are two sets of rights. Namely the socio-economic rights which forms the foundation of this research and the political rights. As they have already been defined and identified in the introduction, the main question to answer is "Why can Namibian citizens not freely exercise their socio-economic rights as they can with the rights enshrined in Chapter 3 of the Constitution. According to many writers who have gone into the subject matter of this question, this is for a number of reasons not possible. Factors such as the non-entrenchment of socio-economic rights in the constitution; the way these rights have been formulated in the Constitution; and the dominant perception that these rights are not enforceable under the current Constitutional dispensation."<sup>82</sup>

Research has shown that poverty is still widespread in rural areas, where nearly half of the households spend more than 60% of their income on food.<sup>83</sup> This example shows government's current social safety measures are not succeeding in reversing the ever-widening gap between

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<sup>81</sup> Carlos P. Romulo.

<sup>82</sup> Nakuta, J. in Horn & Bosl, *Human Rights and the Rule of Law in Namibia*, p89.

<sup>83</sup> Harris, A. (2007). *Spotlight on Development- Towards the Millennium Development Goal*. Windhoek: The NANGOF Trust, p4.

rich and poor in Namibia. For this reason additional strategies needs to be devised to complement their efforts. Human rights, especially socio-economic rights, can be one of the strategies to employ in order to achieve social justice in Namibia. The 1993 Vienna World Conference on Human Rights<sup>84</sup> reiterated that “all human rights are universal, indivisible, interdependent and interrelated”. This means that civil and political rights as well as socio-economic rights have to be treated on an equal manner.

Socio-economic rights as noted by Scheinin<sup>85</sup> are an essential part of the normative international code of human rights.<sup>86</sup> As pointed out they have their place in the Universal Declaration of Human Rights, in universal and regional conventions of human rights. At the universal level the UDHR and ICESCR are singled out as the most important sources of socio-economic rights. The ICESCR is regarded as the principle legal source of socio-economic rights. Furthermore, the Convention on the Rights of the Child upholds and affirms the applicability of many of the rights contained in the ICESCR to children. Various other international instruments contain provisions which are directly related to socio-economic rights. The Convention on the Elimination of All Forms of Racial Discrimination, for example prohibits discrimination on the bias of racial or ethnic origin with respect to socio-economic rights.<sup>87</sup> The Convention on the Elimination of Racial Discrimination against Women affirms the applicability of the full range of socio-economic rights for women.

### **3.4 SOCIO-ECONOMIC AND CULTURAL RIGHTS AS LEGAL RIGHTS IN NAMIBIA:**

As pointed out by Eide and Rosas<sup>88</sup>, fundamental rights should not be at the mercy of governmental policies and programs, but should be defined as entitlements. Treating ESC entitlements as mere political programs undermines the fundamental principle that human

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<sup>84</sup> World Conference on Human Rights: Vienna Declaration and Program of Action, Part I, para 5. UN Doc. A/CONF. 157/23.

<sup>85</sup> Scheinin, M. (2001) *economic and social rights as human rights*. Dordrecht: Martinus Nijhoff, p29.

<sup>86</sup> Nakuta, J. *supra* at p 92.

<sup>87</sup> *ibid* at p93.

<sup>88</sup> Asbjorn, E & R Allan. (2001) *economic, social and cultural rights: A universal challenge*. Dordrecht: Martinus Nijhoff, p 3.

rights are inalienable. Current practices in Namibia shows that ESC entitlements are still not regarded as legal rights unto themselves.<sup>89</sup> The perception of socio-economic rights as unenforceable principles of state policy cannot be left unchallenged, human rights and fundamental freedoms are indivisible and interdependent.<sup>90</sup>

### **3.5 ARE THESE RIGHTS JUSTICIABLE OR NOT:**

According to Liebenberg,<sup>91</sup> there is either a direct or an indirect way to protect these rights as justiciable rights within the domestic legal system. The South African Constitution provides a clear example of the direct protection of socio-economic rights, as these rights are contained in its Bill of Rights directly. This means that these rights are enshrined in the South African Constitution just as the civil and political rights and is therefore justiciable before a competent court or tribunal if violated. As for the indirect manner of protecting these rights, socio-economic rights are protected indirectly through an expansive interpretation of certain civil and political rights.

These rights can be enforced directly and indirectly under the Namibian Constitution. The direct enforcement of these rights is routed in the wording of Article 144 of the Namibian Constitution, which clearly states that *“Unless otherwise provided for by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”*

It is clear that Namibia follows a monist approach, meaning most international instruments assigned to automatically becomes part of the domestic legislation of the country. This would directly make the ICCPR and the ICESCR as ratified by parliament part of the domestic legislation of Namibia, on the date each entered into force in the Republic. The construction of Article 144 presupposes that the provisions and entitlements of the ICESCR have direct and immediate application within the Namibian legal System, thereby enabling individuals to seek enforcement of their international guaranteed rights in any competent Namibian court.

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<sup>89</sup> *ibid* at p 96.

<sup>90</sup> *ibid*.

<sup>91</sup> Liebenberg, S. (2001) *The protection of economic, social and cultural rights in domestic legal systems*. The Hague: Global Law International, pp 57-78.

The article has been used in the past to invoke certain provisions of international instruments binding in Namibia. A good example would be the case of *Kuaesa v Minister of Home Affairs & Others*<sup>92</sup>, where the court held that the African Charter on Human and People's Rights had become binding on Namibia and formed part of the law of Namibia and, therefore, had to be given effect in Namibia. The case of *Michael Andreas Müller & Imke Engelhard v Namibia* was another instance in which the utility of Article 144 was at issue. The United Nations Committee relying on Article 144 held that Article 26 of the ICCPR had direct application in Namibia.

This clarifies and reaffirms the now undisputed fact that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. It is clear that through the creative device of Article 144, the ICESCR may be directly invoked in the Namibian Legal system. As Namibia acceded to it and the Constitution incorporates international law that is not against any national legislation.

The right to water may also receive constitutional protection through an expansive interpretation of certain civil and political rights, such as the right to life, human dignity, equality or security of person. As I have outlined them above under the constitutional framework. This entails the indirect protection of socio-economic rights as justiciable rights within the domestic legal system. The best example of this type of protection is found in Indian constitutional jurisprudence, where the Directive Principles of State have been interpreted to give content to the civil and political rights as contained in the Bill Of Rights of the Indian Constitution. In the *Francis Coralie Mullin*<sup>93</sup> case, the Indian Supreme Court declared that

*“the right to life includes the right to live with human dignity and with all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.”*

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<sup>92</sup>Unreported Case No. A 125/94, unreported, pp 78-9.

<sup>93</sup> *Francis Coralie Mullin v The Administrator, union Territory of Delhi*, (1981) 2 SCR at 529.

It is clearly stated in this case, that the right to life must include the bare necessities of life which would undoubtedly include the right to water. There is just no human being that can live a decent, well deserved life without access to adequate water and sanitation for that matter. This holding states it so clearly.

It is clear that socio-economic rights need to be given greater prominence in order to address the high level of inequality, poverty and social exclusion in Namibia.

It is important to emphasize the fact that these rights are indeed directly and indirectly justiciable. Therefore our citizens together with our government should try our utmost best to make these essential sources for a fair and adequate standard of living available to each and every citizen! It is our guaranteed human right.

### **3.6 OVERVIEW OF THE STATUTORY AND REGULATORY FRAMEWORK:**

The main aim of this sub-heading is mainly to establish whether or not the statutes that regulate water; its consumption and payment methods are in violation of the right to access to water.

When we have to consider the national legislation in place pertaining to water law the scope of it is quite narrow. This can be divided into two main parts, comprising of national water policies and water legislation.

#### **3.6.1 NATIONAL WATER POLICIES:**

Namibia's Vision 2030 was launched by His Excellency President Sam Nujoma, in June 2004. The vision's main rationale is to provide long term alternative policy scenarios on the future course of development in a country at different points in time up until the target year 2030.<sup>94</sup> Chapter five of Vision 2030 generally deals with sustainable resource base and refers to freshwater and associated resources; production systems and natural resources; land and agricultural production; forestry; wildlife and tourism; fisheries and marine resources; biodiversity; and the urban environment.<sup>95</sup>

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<sup>94</sup> Ruppel, O.C. Training Manual on the Environment For the Work of the Ombudsman in Namibia, p 24.

<sup>95</sup> Supra.

Namibia's Vision 2030 visualizes the national Development Plans as the main vehicles for achieving its objectives and realising the long-term vision. The successive National Development Plans will contain the goals and intermediate targets that will eventually lead to the realisation of the vision.<sup>96</sup>

Key environmental concerns of NDP 3 include water, land, natural resources etc.

The main policies relating to water in Namibia includes the following:

- **The 1993 Water and Sanitation Policy**

This policy deals with water supply and sanitation issues. It aims to improve sustainable food self-sufficiency and security, and provides a foundation for the equitable and efficient development of water supply in Namibia.<sup>97</sup> The policy promotes the supply, improved sanitation and irrigation of water at an affordable cost to all Namibians. The policy laid the foundations for the establishment of a Directorate of Rural Water Supply, the community-based management of rural water supplies, and over 200 Water Point Committees countrywide.<sup>98</sup> The policy grants communities the right, with due regard for environmental need to plan maintain and manage their own water supply and choose their own solutions and levels of services. Yet, the policy makes it clear that this right is subject to the obligation that beneficiaries should contribute towards the cost of the water provision services. An important point being, what if you are unemployed and cannot afford to pay for these services, or in the alternative, you are a pensioner and your money is simply not enough to be able to afford to pay for water services, what happens to your right to water, dignity and a healthy life then? These are realities Namibians are dealing with, and the sad side of it is, then your water will simply be cut and you have to make ends meet to re-connect it.

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<sup>96</sup> Supra.

<sup>97</sup> Ruppel & Hinz supra at p 38.

<sup>98</sup> Supra.

- **The National Water Policy White Paper<sup>99</sup>**

This policy formed the foundation of the Water Resources Management Act. The policy provides a framework for equitable, efficient and sustainable water resources management and water services.<sup>100</sup> This policy states that water is an essential resource to life and that an adequate supply of safe drinking water is a basic human need. The policy makes it clear that water concerns extend beyond human needs for health and survival. Water is essential to maintain natural ecosystems and the policy recognizes that.<sup>101</sup>

- **The 2004 Draft Wetland Policy**

This policy is to manage national and shared wetlands wisely by protecting their vital ecological functions and life-support systems for the current and future benefit of people's welfare, livelihood and socio-economic development.<sup>102</sup>

### **3.6.2 NATIONAL WATER LEGISLATION:**

Water is a critical factor and water supply is a serious problem throughout Namibia. Sustainable water management is, therefore, a major challenge for the government.<sup>103</sup> According to Article 100 of the Namibian Constitution, Namibian water is owned by the State, but it is supposed to be used for the benefit of all citizens.<sup>104</sup>

Upon discussion of the water laws in place to date, it shall be discussed it in a specific manner. This would include the identification of the particular act, its applicability to Namibia and the scope of its content. The main sources of legislation pertaining to water include the following:

- **Water Act 54 of 1956:**

Even though considered outdated, this statute remains in force until the new Water Resources Management Act comes into force.

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<sup>99</sup> No 24 of 2004.

<sup>100</sup> Hinz & Ruppel supra at p 38.

<sup>101</sup> Supra.

<sup>102</sup> On wetland in Namibia, cf. Ruppel & Bethune (2007).

<sup>103</sup> Hinz, M.O. & Ruppel, O.C. (2008) *Biodiversity And The Ancestors: Challenges to Customary and Environmental Law. Case Studies from Namibia*, p 47.

<sup>104</sup> Supra.

This Act is mainly concerned with the control, use and conservation of water. Section 180(1) states “The State President may, by proclamation in the Gazette, apply any of or all of the provisions of this Act to the territory of South West Africa or any portion thereof.” Section 180(2) applies sections 1-4 of the act to South West Africa from the date of commencement of the Act. Section 180(3) and (4) give the State President the power to issue special water regulations for application in South West Africa, so long as such regulations are approved by both Senate and the House of Assembly.

The administration of the Act was transferred to SWA by the Executive powers Transfer Proclamation (AG 3/1977, as amended), dated 28 September 1977. None of the amendments to the act in South Africa after that date were made expressly applicable to SWA.

Section 42 of the Namibian Water Corporation Act 12 of 1977 affects the applicability of this Act to the NamWater Corporation.

The Act contains provisions relating to water quality and conservation. The Act gives the Minister the power to investigate water resources, plan water supply infrastructure, develop water schemes, control pollution, protect, allocate and conserve water resources, inspect waterworks, levy water tariffs, and advise on all matters related to the water environment in general. It makes the Department of Water Affairs responsible for the use, allocation, control, and conservation of Namibia’s surface water and groundwater resources.<sup>105</sup>

The Act also makes provision for the ownership, control and use of water, and categorically distinguishes between private and public water.

- **Water Research Act 34 of 1971**

This Act establishes a Water research Commission to promote research into water affairs, as well as a Water Research Fund. Section 15 states “The State President may by proclamation in the gazette declare any of or all the provisions of this Act and of any amendment thereof to be applicable in the territory of South West Africa or any portion thereof.” All of the provisions of the Act were made applicable to SWA by RSA Proc 279/1972 as from 27 October 1972.

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<sup>105</sup> Supra at p 88.

- **Namibia Water Corporation Act 12 of 1997**

This Act establishes “NamWater” and provides for its powers, duties and functions. It came into force on 20 November 1997 (GN 234/1997, GG 1732.

- **Water Resources Management Act 24 of 2004**

This Act, although approved and published in the Government Gazette<sup>106</sup> has not yet come into force. The act concerns the National Water Policy and provides for the management, development, protection, conservation and use of water resources. It establishes a Water Advisory Council, a Water Regulatory Board and a Water Tribunal. This Act replaces the Water Act 54 of 1956. It will come into force on a date set by the minister. The objective of the Act is to ensure that Namibia’s water resources are managed, developed, protected, conserved and used in ways which are consistent with or conducive to certain fundamental principles set out in section 3 of the Act.<sup>107</sup> It must be consistent with and promote-

- Equitable access to water resources by every citizen, in support of a healthy and productive life;
- Access by every citizen, within a reasonable distance from their place of abode, to a quantity of water sufficient to maintain life, health and productive activities;
- Essentiality of water in life, and safe drinking water a basic human right... etc.

It is clear from the wording of this Act, that the Namibian government has seen the water problems such as people who cannot afford water and therefore has to get by without it; the expenses pertaining to water pipes to household; close by water points and meters etc. for this reason it is emphasized in the new act that every citizen should have access to safe drinking water as it is a basic human right in order to protect the less fortunate and financially disabled.

As it can be seen, it must be consistent with and promote equitable access to water resources by every citizen, in support of a healthy and productive life; access by every citizen, within a reasonable distance from their place of abode, to a quantity of water sufficient to maintain life,

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<sup>106</sup> GG 3357/2004.

<sup>107</sup> Supra at p 49.

health, and productive activities; and essentiality of water in life, and safe drinking water a basic human right etc.

### **3.7 MARGINALISED GROUPS: MANAGING WATER POINTS IN NAMIBIA**

The commercialization of water services in Namibia is not an isolated phenomenon; rather it is a process consistent with international developments and takes place within the context of the intertwined processes of globalization, liberalization and privatization.<sup>108</sup>

In essence the water question concentrates and reflects within itself all the elements of exploitation, oppression and discrimination that characterize our society.<sup>109</sup>

Vulnerable groups are those, such as children, that require special attention due to their developmental or physical limitations. Marginalized groups are those, for example women, that require special attention due to their traditional and/or current exclusion from political power.<sup>110</sup>

In rural areas, many people collect water of dubious quality, which includes water from unprotected wells or surface water sources; often at a great distance from their homes, deterring them from collecting sufficient quantities. Toilets are often seen as unnecessary or unaffordable. In urban areas, low-income groups- particularly those living in informal settlements often lack access to adequate water supply and sanitation. Piped water supplies and sewers seldom cover informal areas, which mean that people living there access water from a variety of generally inadequate water supply options, such as wells built close to latrines or from small-scale water providers, such as door-to-door water vendors, whose water supplies may not be of good quality.<sup>111</sup>

The current water and sanitation crisis is caused by issues related to poverty, inequality and unequal power relationships. Water and sanitation policies and programmes all too often exclude

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<sup>108</sup> LARRI, *Water privatization in Namibia: Creating a new Apartheid*. (2004). At p.5.

<sup>109</sup> *ibid.*

<sup>110</sup> (*ibid.*).

<sup>111</sup> COHRE, AAAS, SDC and UN-HABITAT, *Manual on the Right to Water and Sanitation*. (2007), at p. xiv.

marginalized groups and areas such as informal settlements and arid areas. Nationally and internationally, the allocation of resources to water and sanitation is insufficient. The lack of access is exacerbated by a challenging social and environmental context: accelerating urbanization, increasing pollution and depletion of water resources and climate change. In addition, institutional changes, such as shifts in land ownership, decentralization and delegation of responsibilities of public services are in some circumstances reducing the accessibility of water and sanitation.<sup>112</sup>

A crucial aspect of the human rights framework is that everybody is ensured access to water and sanitation, including the most vulnerable marginalized groups, without discrimination. Non-discrimination means that there is no distinction, exclusion, restriction or preference, which is based on any ground (e.g. race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) that differentiates without legitimate reason. Non-discrimination also includes proactive measures to ensure that government policies and programmes do not exclude particular groups by failing to address the particular needs of vulnerable or marginalized groups.<sup>113</sup>

The question now is, how can the government act to prevent discrimination and exclusion of vulnerable and marginalized groups? This can be achieved by

- Ensuring that a comprehensive anti-discrimination law is in place, with an institution to investigate and provide remedies for discrimination against individuals or groups.
- Revising existing water and sanitation laws, regulations, policies and operating procedures to ensure that they refrain from discrimination.
- Reviewing public water and sanitation budgets to ensure that they address the needs of vulnerable and marginalized groups, including those living in informal settlements and arid and semi-arid areas.
- Collecting data on access to water that takes into account ethnicity, age, disability, gender, religion, income and other related grounds so as to identify discrepancies and set priorities for government assistance.

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<sup>112</sup> (ibid.).

<sup>113</sup> (ibid.).

- Establish requirements for water and sanitation institutions to ensure that representatives of vulnerable and marginalized groups effectively participate and have a genuine influence on decision-making processes.
- Ensuring that the needs of institutions utilized by vulnerable and marginalized groups are adequately addressed in policies relating to issues such as priorities relating to extension of services, tariffs and subsidy plans. Such institutions include schools, hospitals, prisons and refugee camps.

It would seem that the government of Namibia is currently not taking into account the reality of the marginalized groups, as there are so many poor and vulnerable people struggling. This will be illustrated when we look at the living conditions of the Swakopmund residents in the continuation of this sub- heading.

Poor people and members of vulnerable or marginalized groups are frequently excluded from decision making regarding water and sanitation, and hence their needs are seldom prioritized. This results in their inequitable access to water and sanitation facilities and services. Information regarding how to access water and sanitation services is often not publically available in an easily understood format. Where services are provided, the lack of adequate participation can lead to inappropriate technical solutions, prohibitive financial costs or unrealistic payment options.

For these reasons we need to afford extra attention to vulnerable and marginalized groups, for they form part of our valuable human existence and needs the basic necessities of life to get by day by day.

If we take one example of a marginalized group suffering in Namibia. For purposes of this academic paper, it is essential to examine the position of the Democratic Resettlement Community (DRC), in Swakopmund. Swakopmund is one of Namibia's richest coastal towns with wealthy inhabitants and affluent tourists on the bench-front areas. Less than 5 kilometers to the north east, on the other side of the town, merely a kilometer beyond the Mondesa graveyard, unbeknown to many of the town's residents, stands a tin-town breathing in the dust. To the north-west, less than a kilometer from the furthest reach of this

shantytown lays the town's rubbish dump. In this place some of the poorest people live, on the fringe of the Namib dessert.<sup>114</sup>

The DRC, on the north-east outskirts of Swakopmund, was formally declared an informal settlement area in 2003, five years after it had started growing. Municipal services are basically non-existent there.<sup>115</sup> There are no sanitation or ablution facilities and no supply to individual households as in the rest of Swakopmund and there is no electricity for the household use.<sup>116</sup>

The Town Council decided to introduce pre-paid water meters in the informal settlement of the DRC to recover debts on outstanding ground rent from the residents.

### 3.7.1 What is a prepaid-water meter?

The prepaid meters do not have conventional taps, but work with a card that cuts out when you remove it from the apparatus or when the credits on it have been used up. Instead of a regular tap that can be turned open, the pre-payment meter box has a slot for a plastic credit card with a tap below. Consumers have to pay before consuming water by purchasing a card, or else recharging the card. One can then draw water from the meter by inserting the card and collecting the water in a portable container. As water is drawn, the balance on the card is adjusted automatically and the remaining credit is displayed. It is in a sense a self-disconnection device.<sup>117</sup>

Some of the DRC's residents, who were interviewed, admitted in shame that they are used to getting water from the graveyard.<sup>118</sup> They could not quite understand why these meters were installed in their neighborhoods. Problems were recorded with the functioning of the cards and water machines and in no time the meters were damaged. There were many complaints

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<sup>114</sup> supra

<sup>115</sup> supra

<sup>116</sup> Swakop's DRC declared informal settlement area- The Namibian, 8 May 2003.

<sup>117</sup> *Is This What Efficiency Looks Like? Prepayment Water Meters*. Non paper, available at [www.citizen.org/cmep/Water/cmep/Water/reports/southafrica/articles.cfm](http://www.citizen.org/cmep/Water/cmep/Water/reports/southafrica/articles.cfm)? ID=8183.

<sup>118</sup> Interview with Gumbo Timotheus, a member of the DRC Residents Committee, 21 October 2003.

and the system had to be replaced. The meters crashed time and again and time after time the people were left without any water in proximity.<sup>119</sup>

### **3.7.2. Fetching water:**

At all times of the day and even late into the night women, children, the aged and even handicapped people can be seen going to fetch water either from the prepaid standpipes (several hundred meters apart) or from the local cemetery (which is more than a kilometer away.) on bicycles, with shopping wagons, wheelbarrows, even on crutches maneuver in 25 liter barrels, people can be seen late into the night and early in the morning, making their way to the graveyard:

“This road to the DRC is very dangerous to them (the children), for there is a very dangerous slope there between the DRC and the cemetery and the children around the age of five are the very ones to fetch the water with these shopping trolleys. And they can easily be involved in an accident because there is a lot of traffic there.”<sup>120</sup>

### **Basic Hygiene:**

The impact on personal hygiene is severe. The children and adults of this vicinity are in a health hazard, because of the water. Some children have been seen to fall into the pit latrines; others are drinking the water running on the ground because they are thirsty. Sometimes children can stay even a week without a bath. This is a very big problem for the children and they are not even getting enough food because there is not enough water. There is also a danger of malnutrition.<sup>121</sup>

The Erongo Region has the highest Tuberculosis rate in the country and the DRC in particular also has a very high incidence of HIV/AIDS. People in the DRC are unable to garden or grow foodstuffs today on account of those costs and method of water supply. People are forced to decide whether to buy food or water. The lack of nutrition is so widespread and visible in the particular community that in January 2002 that when the production of the multi-million dollar Hollywood film *Beyond Borders*, started, the casting

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<sup>119</sup> Water privatization in Namibia supra at p. 8.

<sup>120</sup> Josef Shiningayamwe, interviewed 21 October 2003 at the DRC, in Water privatization in Namibia supra at p. 10.

<sup>121</sup> supra

agents came to select hundreds of people from the DRC to work as ‘extras’. The reason being that the firm dealt with the situation in a refugee camp in Ethiopia in 1985. The great tragedy is that in reality, here on the outskirts of the world-renowned holiday resort of Swakopmund, so many people actually resemble the Ethiopians starving in a refugee camp during the great drought of 1985.

The obvious lack of nutrition undermines and challenges the immune system of the poor and so further exposes them to diseases that could have been prevented.

### **3.7.3 Prepaid Water and the “New Apartheid”**

The reason this policy of the ‘new apartheid’ is becoming known amongst the poor communities as the ‘new apartheid’, is that the prepaid meters are only being installed in the townships and shantytowns. Prepaid meters are not being installed in the rich suburbs nor in the industrial areas where vast amounts of water are being consumed. They are only being installed in the working class areas where most of the black population lives. The result is that those who are able to pay are able to use as much as they please whereas those without means are often left without water and must pay in advance for any water they might use.<sup>122</sup>

From this it can be seen that the simple and brutal fact is, that on the outskirts of Swakopmund thousands of people continue to languish daily without sufficient water for personal hygiene, nutritional health or childcare. The pricing and method of prepaid water supply inhibits consumption by the poor in a drastic way.

The argument can be made that the prepaid system of water delivery effectively works against the efforts of other ministries such as Health and Social services and Regional, Local Government and Housing which are responsible for maintaining a high standard of public health. The prepaid meters constitute an objective threat to public health and a violation of the Local Authorities Act of 1992 which obliges Council to provide basic services to the ‘benefit of the community’.<sup>123</sup>

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<sup>122</sup> Water Privatization in Namibia supra at p 20.

<sup>123</sup> Supra at p. 21

In conclusion, the evidence presented here suggest that the prepaid system of water supply being enforce on the poor is dangerous environmentally, socially, politically and questionable morally.

## **CHAPTER 4**

### **THE OTHER SIDE: THE POSITION OF THE MUNICIPALITY WITH REGARD TO THE RIGHT TO WATER IN NAMIBIA:**

This is to establish whether or not the right to water is actually a basic human right or rather a commodity on the part of the Council of Windhoek.

When dealing with the issue of clean and easily accessible water, or any question pertaining to the right to water it is important to consider the side of the water suppliers in Namibia. It is clear that the Council of Windhoek is the sole provider of water sources and they operate on a purely business principle in order to make sure that they exercise or fulfill their obligations towards every Namibian citizen.

The council has Water Supply Regulations and a Credit Control Policy which regulates all questions and situations pertaining to water distribution, usage, measurements and pricing in Namibia.

In terms of the Water Supply Regulations which is the council's most important source, the council enjoys the sole right to supply water within Namibia. Section 2 of the regulation states as follows:

“No person shall obtain the supply of water or take any water from a water main other than by means of a water connection provided by the Council pursuant to a contract of supply concluded in accordance with the provisions of these regulations”.

From this it is clear that this right is exclusively afforded to the council.

There are certain prerequisites that need to be satisfied in order for water to be supplied to anyone.

#### **Application for the supply of water**

Section 4 to the Regulations deals with the application for the supply of water. According to this section the following must be in order before the supply of water to any person or persons.

Application may be made to the Council by or on behalf of the owner or occupier of any premises-

- (a) for the initial connection of any premises to a water main; or
- (b) for a reconnection of the supply of water where a previous contract of supply in respect of the premises has been terminated, whether for the supply of water to the previous consumer or to any subsequent owner or occupier of the premises.

The supply of water by the Council to the premises of a consumer shall be subject to the provisions of these regulations and the conditions contained in the relevant contract of supply.

Where a contract of supply has been concluded, the Council shall, subject to regulation 4(2) -

- (a) in the case of an initial connection, provide and install from the water main a water connection pipe to the premises at such position on the water main as the Engineer may determine;
- (b) in the case of a reconnection of the supply of water, cause such reconnection to be made.

Where a water connection is provided by the Council to any premises, it shall be the responsibility of the consumer concerned, and not of the Council, to provide and install and maintain, in accordance with the provisions of these regulations, and at his or her own cost, the water installation on the premises.

The charges payable for -

- (a) the provision of a water connection, including a water connection pipe, isolating valve and water meter;
- (b) the alteration of the position of a water connection on the water main at the request of a consumer, shall, subject to sub regulation (5), be as determined in the water tariff.

Any charge payable in terms of sub regulation (4) shall be paid to the Council in advance and, in a case contemplated in sub regulation (5), an amount estimated by the Engineer to cover the sum payable in terms thereof shall be deposited by the consumer with the Council before the work is commenced by the Council.

Section 21 deals with the suspension of water supply if not paid in due course. This is where our legal issue comes in. Whether this is allowed or not and if allowed, what steps can we take when facing a situation as difficult as this one? Section 21 states that “If an account rendered by the Council in respect of –

- (i) The supply of water;
- (ii) Rates leviable in respect of such premises in terms of the Act; or
- (iii) The fees, charges or other monies due to the Council in respect of any services, amenity or facility supplied to the premises in terms of the Act, inclusive of any availability charge or minimum charge leviable under Section 30 (1) (u) of the Act, whether it relates to a service rendered in terms of these regulations or not,  
Is not paid by the consumer before the expiry of the last date of such payment specified in the account, the Council may forthwith suspend the supply of water to such consumer until the amount due is paid by the consumer, together with the charges referred to in sub regulation 3.<sup>124</sup>

Apart from these regulations the City of Windhoek also has a Credit Control Policy. The scope of this policy applies to all administrations within the defined boundaries of the City of Windhoek and all debtors of these administrations. This policy shall be enshrined in a Municipal –by-law in terms of the Local Authorities Act 23 of 1992 and that such policy will be binding on the public, officials and Councillors of the City of Windhoek and that no interference in the process will be permitted.

The objectives of the Policy, amongst others include;

- The focus on all outstanding debt as raised in the customer’s account.

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<sup>124</sup> As per GG3708, No 294, 25 Sept 2006

- Provide for a common credit control and debt collection policy throughout the City of Windhoek etc.

The policy also supports the principles of human dignity that must be upheld at all times, and the policy must be implemented with equality, fairness and consistency.

Section 6 of the Policy deals with negotiable amounts. This relates to discretion in terms of negotiable amounts as per this policy. This is delegated to the Strategic Executive Finance with the right to sub-delegate.

Negotiation amounts come in where for example a debtor cannot afford to pay his entire debt and therefore has the option to negotiate with municipality with a way to pay down this debt. This discretion lies with the municipality on what their decision is going to entail.

On this basis the council justifies their reasons for water payments and the fact that they are also taking into consideration those who experience difficulties in making payments in order to settle their debts, hence they have the Credit Control Policy, to assist where assistance is needed.

Is this however enough in terms of international law standards and the rights guaranteed in the Bill of Rights of the Namibian Constitution? It seems from all of these regulations that water is rather seen as a commodity instead of a basic essential for living.

## CHAPTER 5:

### CONCLUSION:

Before concluding, and giving recommendations, let's consider the changing role of government firstly.

The perspective and role of central government in the provision of water is changing and this happens in line with the dictates of the World Bank, an organization that has actively sought to redefine the role of central government. The role of government is now seen as that of a 'facilitator' for the private sector and as a 'regulator' of services. Government responsibility in service provision is focused on the creation of a legal and institutional framework conducive to privatization. Increasingly the core function of government is no longer understood as that of being the provider of basic services. Instead, government's task is increasingly viewed as that of creating an 'enabling environment' for the entrance of big business into the service sector.<sup>125</sup>

"The enabling environment is a term that has arisen to describe the creation of the general conditions necessary for encouraging the more economically rational use of resources such as water."<sup>126</sup>

With respect to water services, one view being put forward by those in position of power and authority is that:

The role of government in the water sector is a purely regulatory role with the actual supply portion open for operation by the private sector as either a privatized entity or as an operator under public sector ownership.<sup>127</sup>

Under these new terms government and the public sector will no longer be tasked with the actual function of water supply but would concern itself only with:

- Regulation
- Planning and co-ordination

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<sup>125</sup> Water Privatization in Namibia supra at p 28.

<sup>126</sup> Namibia Water Resources Management Review, Financial and Socio-Economic Issues Theme Report, MAWRD, 2000, p.1.

<sup>127</sup> NWRMR, Financial Issues, p.91.

- Policy-making
- Setting standards

The dominant view, the government is no longer directly responsible for water services provision is reiterated in the officially commissioned study of Namibia's water resources published in 2000:

In the light of the recommendations for increased private sector involvement in the Water sector, the role of the government becomes an enabling one. The role would include the removal of significant barriers to entry, the de-politicization of water as a Commodity and the reduction in the potential risk borne by private sector that may arise there from.<sup>128</sup>

This route undertaken by central government is no straight course however, for there are many obstacles: the National Union of Namibia Workers for example, opposed the sale of public property to private entities and called for a halt to the further privatization of state-owned enterprises in 2001.<sup>129</sup>

Clearly the ability of the local authorities, particularly the poorer ones, to effectively carry out these functions is severely curtailed by the lack of funds, by their indebtedness and by the withdrawal of government subsidies over the last few years. Early in 2001 Dr Nickey Iyambo announced the removal of subsidies on urban water supply. This had severe repercussions for all municipal authorities as they struggle to relieve the budgetary constraints under which they operate.

The local authorities in Namibia have responded to the crunch in a number of ways the measures taken to enforce the policy of full cost recovery include:

- The periodical adjustment of tariffs to correspond to NamWater commercialized cost and pricing structure
- Subsidization and cross-subsidization of services within municipal zones

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<sup>128</sup> NWRMR, Financial issues, p. 91.

<sup>129</sup> See NUNW 2001.

- The instillation of prepaid water meters in poor households
- Outsourcing the water supply and sanitation functions.
- Retrenchments

Is these steps however effective and will it be in the best interest of the public? It is important to note that the reason for the escalating tendency of non-payment of water bills is not merely due to the ‘culture of non-payment’ as many would have it. This trend must be related to the economic conditions within the country, the conditions of the working class and the official policy of increasing the water prices by between 10-20% annually, which is steadily improving the poorest section of the population.

The non-payment of water and electricity bills is not simply a fault of selfish residents, but also a sorry reflection of the economic state in which the nation find itself.

This makes us wonder as Namibians, whether;

1. Water is perceived as a fundamental right or a commodity in the Namibian Society? As the former Minister of Regional and Local Government and Housing stated the following in this regard:<sup>130</sup>

We cannot provide water free of charge. Manna has only fallen from heaven once. It does not fall every month.

So, is the human right to water part of the body of fundamental human rights or is it a commodity only accessed by those who can afford it. From the various legal instruments both nationally and internationally it is crystal clear that water is an inalienable right.<sup>131</sup>

2. Do the statutes that regulate water, its consumption and payment methods not violate an inalienable right? As mentioned above water is a human right necessary for everyday living, and as can be inferred from the Council’s many rules and policy regulations no one can have access to water without complying with the enlisted regulations mentioned above. Thus it is clear that

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<sup>130</sup> Dr Nickey Iyambo, the Minister of Regional and Local Government and Housing, cited in *The Namibian* in 2000.

<sup>131</sup> Mungunda, N supra at p. 84.

this is a grave violation of the right of every citizen to water and consequently to life and dignity as the one cannot be separated from the other.

3. The fact that Namibians have to pay for water consumption is indeed a violation of their socio-economic rights, and it is clear that these rights are indeed justiciable when one follows the right channels. Both nationally and internationally.

4. How many rights are violated, when one violates this essential right? It is clear from the outskirts that the right to life is dependent on access to water. They depend on each other. The one cannot be realized without the other. It is however not only the right to life that is being violated, but also the right to health; the right to dignity and inhuman degrading treatment and also children's rights. Very importantly as this created a 'new apartheid' article 10 of the Namibian constitution is therefore also in violation. All of these leads to article 25 of the Namibian Constitution. Where an aggrieved party has the right to appear before a competent court or tribunal should they fees any of the rights enshrined in the Namibian Constitution are in violation in any way.

### **Recommendations:**

With regard to the Namibian situation, it is recommended that the right of access to water be explicitly recognized and, consequently, protected in the framework of regional or community integration on the level of basin management.<sup>132</sup>

In terms of Namibian national legislation and international law, it is recommendable that this right becomes justiciable in our courts, for water is the essence of everyday living. Perhaps it is time for some amendments to the Constitution, in order to add the right to water to be part of the fundamental Bill of Rights.

Water need not be free, but there can be compromises in terms of price reductions for certain groups who are really struggling to get by on a day to day basis.

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<sup>132</sup> Mungunda, N supra at p. 99.

As stated by Carlos P. Romulo "Nations will rise and fall, but equality remains the ideal. The universal aim is to achieve respect for the entire human race, not just for the dominant few".

In conclusion, access to water should be considered a human right and legislation ought to be promulgated to recognize it as such. This will be in line with the various international instruments discussed above, and will bring Namibia in line with its international obligations.<sup>133</sup>

As Namibians we have suffered enough under apartheid regimes, let us live as human beings in peace and give us our afforded rights in order to live a healthy living every day of our lives. Give us our inherent right as human beings, our basic essential right to water.

The basis of this recognition of the right of access to water is primarily that no person should ever be placed in a situation of having no water, as this is not in line with the values enumerated in the Constitution.<sup>134</sup>

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<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

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