

Book Discussion

Re-Invigorating Ubuntu Through Water: A Human Right to Water Under the Namibian Constitution

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[#UbuntuThroughWater](#)



Prolegomenon

- **Contemporary water needs and debates**
 - Okavango River crocodile incidences
 - Water disconnections for non-payment
 - Indignity of water scarcity (dying while digging wells)
 - Water for-profit debate
- **Water potential**
 - Ohangwena II Aquifer, Desalination prospects, Water catchment (Neckartal dam)
- **Book aims to be solutions-centric and forward looking to bring dignity to all**
- ❖ **Anthropocentric approach with focus on personal and domestic use rather than commercial interests**
 - ❖ *Namib Plains Farming v Valencia Uranium (water for commercial farming versus mining)*
 - ❖ *NamWater v Aussenkehr Farms (breach of contract - water for wine)*
 - ❖ *Kamanja v Smith (borehole drilling for farming)*

THE ABRIDGED ARGUMENT

- *To whet your appetite*
- **A court-enforceable human right to water**
- **Implied from Article 6 right to life in the Constitution**
- **Implying requires robust constitutional interpretation**
- **Alongside originalism (drafting history and 1982 Principles), textualism, purposivism, transformative constitutionalism**
- **Novel conception – Re-energizing Constitutionalism (RC)**
- **RC – Invites the re-energization of African values in the legal culture**

- **Decoloniality theory in substance**
- **Viability and value in human rights**
- **Cultural legitimacy of knowledge and human rights (p.63)**
 - “The lack of cultural legitimacy – actual or perceived – of human rights among its intended (African) beneficiaries is often cited and recognized as one of the foremost challenges to enforcing human rights in Africa. Scholars have exposed the continuing incongruence between those values that have come to underpin the dominant Euro-American human rights paradigm and ‘alien’ notions of justice that have come to entrench themselves in the societies of formerly colonised peoples, including Africans. Moreover, top-down transplantations of legal approaches have rarely rooted themselves. At best, they yield poor results”

The Normative Anchor: Ubuntu

- *Ubuntu ngumntu ngambantu* – I am because we are
- Value / concept / philosophy of ubuntu (riparian doctrine)
- Reliance on African anthropological literature and various linguistic renditions
- Four principles of *legal* ubuntu
 - Solidarity
 - Community
 - Interdependence
 - Dignity
- Duties imposed on the Namibian State
 - Respect
 - Protect
 - Fulfil
- Negative and positive duties

Namibian socio-economic context

- **Constitutional focus on civil and political rights in Chapter 3 of the Constitution**
 - **Life, dignity, free speech, torture, political activity, voting etc.**
- **Limited reference to social and economic rights**
 - **Water + housing, food, healthcare, sanitation (and even the right to electricity and the internet)**
 - **Erode the view that social-economic matters are outside the enforcement by, and accountability of government to, the courts.**

COMPARATIVE CASE STUDIES

- **South Africa (*Mazibuko v JHB* – express constitutional right to water)**
- **Botswana**
 - **Similar climate and no express constitutional right to water**
 - ***Mosetlhanyane v Attorney General***
 - Baswara community deprived of the use of a borehole government of Botswana
 - Court found a violation of the right to not be subject to cruel, inhumane and degrading treatment
- **India**
 - **Implied right to water interpreted by Indian Courts**
 - ***Hamid Khan***
 - State violation of duty to fulfil implied right to water where water had excessive fluoride

The human right of water under International law

- **71% of Earth's surface is water. 3% of the 71% is freshwater**
- **World Economic Forum Global Risk Report – Water security risks**
- **Climate change**
- **Increasing legal arguments for a binding right to water in both domestic and international spheres (Michigan Journal of International Law paper)**
- **Regional and international law treaties include express and implied right to water**
- **Transboundary water concerns (Angola / South Africa)**
- **International law as a Namibian source of law**
- **Privatisation of Water (ICSID disputes – Tanzania / Argentina / Bolivia)**

Framing Water Scarcity *qua* Justiciability

- Justiciability – simply the ability of a court to adjudicating a matter
- Many parts with little or no rain. Courts cannot induce rain (*lex non cogit ad impossibilia*)
- HOWEVER (OHLSSON)
 - First-order scarcity of water: physical limited availability
 - Second-order scarcity of water: adaptive capacity of societies facing natural resources scarcity to manage first order scarcity – through building and strengthening institutions and facilitating institutional change as appropriate to the scarcity at hand.
- Beyond hydro-politics: water not political, charity, benevolence, goodwill (Nairobi Principles)
- Courts for legal accountability

Technical Justiciability Concerns

- **Institutional Justiciability**
 - **Legitimacy of courts**
 - **Capacity and competence of courts**
 - **Polycentric – policy – resource allocation**
 - **Bounded Deliberative democracy model advanced**

Avoiding the Mirage of Justiciability



- **Optical illusion of a court-enforceable right to water**
 - × **Access prohibitive legal costs**
 - × **isosteric court procedures**
 - × **adversarial model in socio-economic adjudication**
 - × **Legal standing to facilitate public interest litigation and class action**

THE CONTENT OF THE RIGHT TO WATER

- **Sources:**
 - WHO Drinking Water Guidelines
 - UN CESCR General Comment 15
 - African Commission's Nairobi Principles
- **AQuA**
 - Available – Quality – Accessible
- **The State as the Primary Duty Bearer**
- **Essential Content / Minimum Core**
 - Immediate
- **General Obligations**
 - Programmatic but subject to judicial accountability

THANK YOU - DISCUSSION

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