RE-INVIGORATING UBUNTU THROUGH WATER

A Human Right to Water under the Namibian Constitution

NDJODI NDEUNYEMA

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Re-invigorating ubuntu through water: A human right to water under the Namibian Constitution

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Foreword

This book contributes to the increasing discourse on the challenges presented by water scarcity. Located in the Namibian context, the book argues for the existence of a court enforceable human right to water that is implied from the right to life in Article 6 of the Namibian Constitution. The book achieves this through an elaborate interpretative examination and comparative analysis, principally invoking the African value of ubuntu. Ubuntu – which is legally developed through its four key principles of community, interdependence, dignity and solidarity – is anchored in a novel approach to Namibian constitutional interpretation that is coined and substantively conceptualised as 're-invigorative constitutionalism'.

The book advances the '*AQuA*' (*a*dequacy – *qu*ality – *a*ccessibility) content of water and articulates the various correlative duties within the context of the respect – protect – fulfil trilogy, duties that are imposed upon the Namibian state as the primary duty bearer for the right to water. These duties include irreducible essential content duties that are argued to be immediate when compared to general obligations. In giving substance to these duties, critical recourse is had to the international law interpretative resources including General Comment No.15 by the United Nations Committee on Social, Economic and Cultural Rights on the human right to water, the African Commission's Principles and Guidelines on Social and Economic Rights in the African Charter on Human and Peoples' Rights (the Nairobi Principles), and the World Health Organisation's Drinking-water Quality Guidelines.

Moreover, the book addresses the various justiciability concerns that may arise, arguing that Namibian courts are indeed institutionally competent and legitimate in enforcing right to water claims through the application of the bounded deliberation model. It also argues that, because the Principles of State Policy (PSPs) in Article 95 are rendered court unenforceable by Article 101, this does not undermine the claim that the right to water, anchored in the right to life, can be enforced in the courts. This is considering the PSP in Article 95(j) for the State to raise and maintain an acceptable standard of living, which would include water as a

socio-economic good. The book additionally demonstrates the normative merits in courts' affirming the justiciability of water as a human right.

NML
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About the author

Ndjodi Ndeunyema was a *Modern Law Review* Early Career Research Fellow at University of Oxford from 2020 to 2021. He completed his Doctor of Philosophy in Law, awarded without corrections, at Linacre College, University of Oxford, where he also obtained a Master of Philosophy in Law (Research), a Bachelor of Civil Law (BCL), and Master's of Science in Criminology and Criminal Justice, while studying as a Rhodes Scholar. His undergraduate BJuris and LLB degrees were obtained from the University of Namibia. From 2017 to 2021, he was also Research Director at the Oxford Human Rights Hub and a founding editor of the *University of Oxford Human Rights Hub Journal* and an editor of the *Oxford University Commonwealth Law Journal* from 2016 to 2019. His scholarship has been published in leading journals including the *Journal of African Law*, *Michigan Journal of International Law*, and the *Global Journal of Comparative Law*. His research interests include international human rights law, public international law, constitutional law, competition law, sentencing, and criminal procedure. In 2018, he also served as a legal fellow in the Legal Division of the African Court of Human and Peoples' Rights in Arusha, Tanzania.

Dedication

To the memory of Kuku, Professor Effa Okupa (1935 - 2018†)*

'Over my dead body', you caringly counselled.

Abbreviations and acronyms

African Charter	African Charter on Human and Peoples' Rights
African Children's Charter	African Charter on the Rights and Welfare of the Child
African Commission	African Commission on Human and Peoples' Rights
African Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
AJA	Acting Judge of Appeal
AQuA	Availability, quality, accessibility (of water)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJ	Chief Justice
CKGR	Central Kalahari Game Reserve
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CUP	Cambridge University Press
DCJ	Deputy Chief Justice
DPSP	Directive Principles of Social/State Policy
ESCR Committee	Committee on Economic Social and Cultural Rights
European Convention	European Convention on Human Rights
European Court	European Court of Human Rights
GC	General Comment
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
LRDC	Law Reform and Development Commission (of Namibia)
Nairobi Principles	African Commission Principles and Guidelines on Social and Economic Rights in the African Charter on Human and Peoples' Rights
NAMWater	Namibia Water Corporation
NHIE	Namibia Household Income and Expenditure Survey
OUP	Oxford University Press

PCIJ	Permanent Court of International Justice
PIL	Public interest litigation
PSP	Principles of State Policy
SCOTUS	Supreme Court of the United States
SDG	Sustainable Development Goal(s)
SWAPO	South West Africa People's Organisation
TWAIL	Third World Approaches to International Law
Universal Declaration	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
UNTAG	United Nations Transitional Assistance Group
VCLT	Vienna Convention on the Law Treaties
WHO	World Health Organisation

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UNGA 'Question of Namibia' (13 December 1985) UN Doc A/RES/40/97
UNGA 'The human right to water and sanitation' (3 August 2010) UN Doc A/RES/64/292
United Nations CESCR, General Comment 15: The Right to Water (Articles 11 and 12 of the Covenant) (20 January 2003) UN Doc E/C 12/2002/11
Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948
UNSC Resolution 435 (29 September 1978) UN Doc S/RES/435
UNSC Resolution 632 (16 February 1989) UN Doc S/RES/632
UNSC 'Principles for a Constituent Assembly and for the Constitution of an independent Namibia' Resolution 435 Annexure
Vienna Convention on the Law of Treaties (23 May 1969) UNTS, Vol 1155

1 Introduction

1.1 Introducing water

Water scarcity, inaccessibility and insecurity are some of the most pressing global challenges. The African continent and Namibia are no exceptions. Against this backdrop, this book centres on Namibia by assessing the legal status of water, which is understood at the basic level of personal and domestic use, as a court-enforceable human right.[1] The book advances that a human right to water may be implied from the right to life in article 6 of the Namibian Constitution. This is despite the absence of a right to water from the text of the Constitution. The book achieves this by applying the value of ubuntu as part of the re-invigorative constitutionalism approach that is advanced. To sustain this argument, the book addresses significant legal issues that include constitutional interpretation and socio-economic rights justiciability so as to establish a constitutional basis for interpreting a right to water as a court-enforceable right. This also requires a close examination of the various approaches to constitutional interpretation. Further, the potential legal objections that must be addressed include water as non-justiciable owing to the court-unenforceable Principles of State Policy in the Constitution, and the institutional and legitimacy limitations of courts to adjudicate right to water claims, particularly in light of the difficulties in advancing the normative and substantive content of water.

Water access is but one of many socio-economic challenges that Namibians face. While Namibia is well-endowed with natural resources, the country faces significant socio-economic challenges that manifest through, among others, landlessness, inequality, corruption and high unemployment rates.[2] On the inequality front, Namibia has the unenviable

1 The reference to a 'right to water' throughout this book should thus be understood in the *anthropocentric* sense of a *human* right to water, unless the context suggests otherwise.

2 National Planning Commission of Namibia 'The root causes of poverty in Namibia', https://www.npc.gov.na/?wpfb_dl=303#:~:text=Rated%20as%20a%20high%20middle,%25)%20than%20man%20(26%25) (accessed 16 June 2021).

claim of being among the most unequal countries in the world.[3] Many Namibians continue to live below the poverty line.[4] The physical limits on water supply are indeed widely acknowledged by authorities, including the United Nations Development Programme (UNDP), as amongst the root causes of poverty, inequality and unequal power relations.[5]

This book converges on water accessibility as a particularly seminal socio-economic concern. Without water, a dignified life with meaningful and feasible opportunities for self-actualisation would not be possible. Indeed, without water, other human rights, whether civil-political or socio-economic, cannot be fully realised. This assertion is made without necessarily laying claim to a right to water as the 'right of rights'[6] or as a meta right.

This prolegomenon chapter will outline the arguments advanced in the subsequent chapters, situate the water controversies, and clarify the methodological approach. It will set out the law in the context of water challenges in Namibia and globally.

1.2 Water as a global and local concern

Approximately 71 per cent of the earth's surface area is covered by water. Of this, only approximately 3 per cent is freshwater, with the majority being seawater or forming part of the cryosphere (solid water). Access to water is increasingly recognised as of universal concern.[7] The annual

3 UNDP 'Income inequality trends in sub-Saharan Africa: Divergence, determinants and consequences' 2017 3, http://www.africa.undp.org/content/dam/rba/docs/Reports/Overview-Income%20inequality%20Trends%20SSA-EN-web.pdf?download (accessed 14 January 2020).

4 World Bank 'World development indicators' 2016, http://databank.worldbank.org/data/reports.aspx?source=2&series=SI.POV.GINI&country= (accessed 29 July 2017); Office of the Ombudsman 'A baseline study and household survey on human rights in Namibia' 2012, https://www.ombudsman.org.na/wp-content/uploads/2016/09/Baseline_Strudy_Human_Rights_2013.pdf (accessed 11 November 2016); see specifically Part 4 140-209. For a critical take on indicators as human rights measures, see S Merry 'Measuring the world: Indicators, human rights, and global governance' (2011) 53 *Current Anthropology* 583.

5 UNDP 'Human development report 2019: Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century' (2019) 191.

6 J Waldron *Law and disagreement* (1999) 232.

7 Illustratively, in 2017 water scarcity already affects four out of every ten people, while 2,1 billion people lack access to safely-managed drinking water services. See UN 'Water', https://www.un.org/en/sections/issues-depth/water/ (accessed 9 May 2019).

World Economic Forum's Global Risk Report[8] has identified water crises as among the top five risks in terms of impact for eight consecutive years. Water remains entrenched among a cluster of other risks that are rated as having both a very high *likelihood* of the risk occurring globally within the next 10 years, and negative *impact* for several countries over the same timeframe.[9] This worldwide recognition has moved the debate from the traditional assumption that water is only of concern to the Global South (developing countries) to that of a universal challenge that also confronts the Global North (developed countries). As such, Sustainable Development Goal (SDG) 6 of the United Nations (UN) endeavours to pursue the global aim to 'ensure availability and sustainable management of water … for all',[10] while appreciating that water challenges manifest differently depending on the context.

In response to water challenges across different geographies, the legal arguments that assert a binding right to water in both the domestic and international spheres have garnered significant attention.[11] In the domestic context, from physical geography and climatic perspectives alone, the Namibian water situation is dire. Ninety-two per cent of Namibia's land area is defined as hyper-arid, arid, or semi-arid with two major deserts – the Namib and the Kalahari to the east and west – while only the north-eastern strip is sub-tropical. Rainfall is variable and seasonal with some 83 per cent of rainfall estimated to evaporate.[12]

While the coastline stretches 1 572 kilometres, there is a limited supply of freshwater.[13] Most of the rivers are ephemeral, while all the perennial rivers are located along the national boundaries of Namibia, the use of which is subject to watercourse agreements with neighbouring countries. There thus is a significant reliance on rainwater that collects in lakes, *oshanas* (lakes periodically filled with water) and earth dams, as well as subterranean water sources of boreholes and hand-dug wells.[14]

8 World Economic Forum 'The global risks report' 2019 5, http://www3.weforum.org/docs/WEF_Global_Risks_Report_2019.pdf (accessed 8 November 2019).

9 As above.

10 UN 'Transforming our world: The 2030 agenda for sustainable development', https://sustainabledevelopment.un.org/sdg6 (accessed 20 April 2019).

11 See ch 4.

12 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Addendum: Mission to Namibia, HRC (28 June 2012) UN Doc A/HRC/21/42/Add.3. (2012) paras 14-15.

13 E Bird et al 'Namibia' in E Bird (ed) *Encyclopedia of the world's coastal landforms* (2010) 968.

14 As above.

The only desalination plant that exists in the country is privately owned and is mainly used for industrial uranium production.[15]

Although there is limited up-to-date data available on water access, the 2009/2010 Namibia Household Income and Expenditure (NHIE) Survey reports that 75 per cent of all households had piped water as their main source of drinking water, while 12 per cent had boreholes or protected wells, 8 per cent had only stagnant water and 5 per cent used flowing water/rivers.[16] A large percentage of urban households use piped water: 99 per cent compared to 58 per cent in rural households.[17] The NHIE survey further revealed that 72 per cent of the households in the country were situated less than 1 kilometre from their source of drinking water. A small percentage of households had up to 2 kilometres in distance between household and the source of drinking water.[18] Out of all households, 7 per cent had a distance of 3 kilometres or more from their water source. Among urban households, 96 per cent had a distance of less than 1 kilometre to a source of drinking water. In the central regions of Khomas, Erongo and Otjozondjupa, 97 per cent, 95 per cent and 91 per cent of households respectively had a distance of less than 1 kilometre between the homestead and the source of drinking water. In the largely rural north-central regions of Kavango, Ohangwena and Oshikoto, the distance to the source of drinking water was 3 kilometres or more.[19] Access to water has also been cited as a significant challenge in urban areas as a result of the rapid growth in informal settlements due to high rates of urbanisation.[20]

Significantly, there has been a recent discovery of the underground Ohangwena Aquifer II in the north-central parts of Namibia. These are the most densely-populated areas, and thus where the greatest demand for water for domestic and personal use lies.[21] The Ohangwena Aquifer

15 NAMWater 'Sea desalination', https://www.namwater.com.na/index.php/services/56-hydrological-services?start=5#:~:text=SEA%20DESALINATION&text=Currently%2C%20Namibia%20has%20a%20desalination,meters%20of%20water%20a%20year (accessed 20 June 2021).

16 Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Initial Reports of States Parties Due in 1997 – Namibia, CESCR (13 February 2015) UN Doc E/C.12/NAM/1 (2014) para 283.

17 Consideration of reports (n 16) para 283.

18 Consideration of reports (n 16) para 284.

19 As above.

20 R Marenga & J Amupanda 'The Coronavirus and social justice in Namibia' (2021) 48 *Politikon, South African Journal of Political Studies* 206 214.

21 P Sorensen 'The massive Ohangwena II aquifer in Northern Namibia' (2013) 70

II, which is recharged by mountains in Southern Angola, is estimated to retain a stored volume of 5 billion cubic metres of water. Even without a recharge, hydrologists estimate that the resource could supply the entire population of Northern Namibia – numbering some 800 000 – for 400 years.[22] This profile of freshwater complicates the 'water-scarce' label of Namibia as water often is available in reasonably sufficient quantities and quality, but remains inaccessible to communities owing to (an alleged) lack of resources, particularly at the local and regional council level.[23]

Nevertheless, given the low rainfall received over most of Namibia, water stress has been an increasing challenge. The last five years saw a succession of drought periods,[24] with the 2019 drought being claimed as the worst drought in 40 years.[25] The Namibian President thus declared a drought-related state of emergency under article 26 of the Constitution.[26]

The 2019 drought and the ongoing impact of climate change have further exacerbated water insecurity. Indeed, different communities are affected differently depending on factors including geography and socio-economic resources. Some suffer more water precariousness than others, as can be seen in the frequent media reports on the lack of potable water for basic needs.[27] Although there are few reports of death by dehydration, in certain extreme circumstances there have been reports such as death

International Journal of Environmental Studies 173.

22 As above.

23 New Era 'Lack of budget hinders water provision in Ohangwena' 10 April 2019, https://reliefweb.int/report/namibia/lack-budget-hinders-water-provision-ohangwena (accessed 10 November 2019).

24 'More than 500 000 at risk in drought-hit Namibia' *BBC* 7 May 2019, https://www.bbc.co.uk/news/48185946#:~:targetText=Namibia%20is%20facing%20a%20%22natural,rains%2C%20President%20Hage%20Geingob%20says.&targetText=The%20lack%20of%20rain%20has,succession%20of%20droughts%20since%202013 (accessed 9 November 2019).

25 African Development Bank 'Namibia – Humanitarian emergency assistance to mitigate effects of the 2018-2019 drought – Emergency and special assistance grants' 13 August 2019, https://www.afdb.org/en/documents/namibia-humanitarian-emergency-assistance-mitigate-effects-2018-2019-drought-emergency-and-special-assistance-grants (accessed 9 November 2019).

26 Proclamation 14 'Declaration of State of Emergency: National Disaster (Drought): Namibian Constitution' 6 May 2019, read with the Disaster Risk Management Act 10 of 2012 sec 30(3).

27 Namibian Broadcasting Corporation 'Namwater to stop free water provision to residents of Otjimbingwe and surrounding', https://www.youtube.com/watch?v=jKVmpRd6UPo (accessed 9 November 2019); Namibian Broadcasting Corporation 'Potable water', https://www.nbc.na/potable-water (accessed 9 November 2019).

by being buried alive after a well collapsed during digging[28] and crocodile attacks when accessing rivers for domestic use.[29] In a harrowing video circulated widely on social media, testimonies were shared of some drought-stricken Ohangwena region households collecting their own urinal 'water' and those of their animals for domestic use of preparing the *oshipale,* the area used for thrashing the staple harvest of *omahangu* (millet).[30] The urgency of water access for many communities is self-evident.

1.3 Situating the book

With the above context of the water situation in Namibia, this book considers the various issues through the prism of constitutional law, human rights and, specifically, socio-economic rights claims before the Namibian courts. The Namibian context is one where there is a dearth in express mention of socio-economic rights in the Constitution's Bill of Rights. Chapter 3 of the Constitution advances rights protection that on the face of it is predominantly of a civil-political nature.

The foundational legal argument of the book is the interpretative existence of a constitutional human right to water and one that can feasibly be enforced in Namibian courts. The book seeks to both develop new legal ideas and escape from old ideas. In so doing, it will develop the various sub-issues to be analysed in the various chapters of the book. Including this introductory chapter, the book is organised through seven chapters.

Chapter 2, 'Interpreting the Namibian Constitution', considers the legal interpretative basis for a human right to water under the Constitution. It advances that a right to water can be claimed through the courts, notwithstanding the textual omission of water as an express right in chapter 3 of the Constitution. Chapter 3, 'Interpreting life to imply a right to water from ubuntu', builds on chapter 2 by developing ubuntu as an African value and normative concept under the idea of 're-invigorative constitutionalism', which is coined as an interpretative approach to imply a right to water from the article 6 right to life. Ubuntu will therefore feature

28 'Two men buried alive after well caves in' *The Namibian* 17 June 2019, https://www.namibian.com.na/79674/read/Two-men-buried-alive-after-well-caves-in (accessed 9 November 2019).

29 'Woman saves hubby from jaws of crocodile' *New Era* 26 February 2016, https://neweralive.na/2016/02/29/woman-saves-hubby-jaws-crocodile/ (accessed 10 July 2019); 'Crocodile kills mother and child' *New Era* 27 March 2018, https://neweralive.na/posts/crocodile-kills-mother-and-child (accessed 10 July 2019).

30 Video on record with the author.

throughout the book in aiding the analysis of various issues relating to a right to water and the corollary duties arising.

Chapter 4, 'A right to water under international law', draws on international law broadly by examining a right to water as both a binding source and interpretative resource. This discussion is located in the Namibian approach to the domestic application of international law sources. Chapter 5, 'Addressing the justiciability concerns', sets out to resolve the various justiciability objections that may arise where a right to water is claimed through the courts. The justiciability analysis will relate to normative considerations (the desirability of courts to adjudicate a right to water and the corollary duties of the state), institutional considerations (the institutional competence and capacity of courts) and textual considerations (the implication of court-unenforceable Principles of State Policy that includes the policy objective for the state to raise and maintain adequate standards of living, including water). The penultimate chapter 6, 'The content of a right to water and the Namibian state's obligations', advances an analysis of the 'AQuA' (*A*vailable, of *Qu*ality and *A*ccessible) content of a right to water that is claimed in the Namibian courts with an emphasis on the adjudication of the various state obligations. Chapter 7, 'Conclusion: *Omeya ogo omwenyo*',[31] draws the book to a close by bringing together the interlocking arguments made in the book and offers some reflections on the COVID-19 pandemic's lessons and implications for water access.

This book considers a right to water from the perspective of the constitutional right primarily, and under international law, to the extent that the Constitution ordains such international law as part of Namibian law. It will thus exclude the analysis of a right to water as a statutory right or common law right. A statute such as the Water Resource Management Act of 2013[32] includes a reference to fundamental principles such as equitable access to safe drinking water as an essential basic human right to support a healthy productive life, and access by all people to a sufficient quantity of safe water within a reasonable distance from their place of abode to maintain life and productive activities. Legislative prescriptions such as the Act's fundamental principles may well be the basis of a *statutory* right to water that can be claimed before the courts. The importance of national legislation is also to be heeded in light of the potential application of a principle of subsidiarity where courts are faced with right to water claims. However, this book constructs its argument at the *constitutional* level. This

31 An Oshindonga language expression translating to 'water is life'.

32 Water Resource Management Act 11 of 2013 secs 3(a) & (b).

is with a view to offering a solid normative basis that can subsist beyond a given legislative majority that affirms water as a human right.

Moreover, this book primarily considers a right to water from an *anthropocentric* perspective, and insofar as a right extends to *personal* and *domestic* use rather than *commercial* use. While this delimitation certainly is complicated in a Namibian context, where a significant cross-section of society relies on the land directly for their subsistence through horticultural activities and animal husbandry, this book is *not* a socio-legal study, but rather a doctrinal and normative examination of the actionability of a right to water. Further, the book exclusively locates a right to water in claims by individuals or communities as against the Namibian state – the vertical application of the right. While reference is made to non-state actors through a horizontal application (and third states' duties) who would invariably bear right to water duties under certain circumstances, the duty-bearer primacy of the Namibian state is the enduring concern of the book.

1.4 A note on comparativism

This book is the result of qualitative research and principally invokes doctrinal and normative research methods. The doctrinal method draws on legal concepts and principles of all types, including cases, statutes and rules.[33] It provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, and explains areas of legal difficulty.[34] In theorising the doctrinal method, I follow the normal two-part process: first, locating the sources of the law; and, second, interpreting and analysing the relevant text.[35]

The book is also a normative research endeavour as it does not simply attempt a description of the law as it exists, but seeks to make the best sense of the law with a view to offering more coherence and more justifiable interpretations and suggesting alternative approaches.[36] This is to foster 'a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'.[37] Pertinently, in

33 T Hutchinson & N Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 83.

34 Hutchinson & Duncan (n 33) 101.

35 As above.

36 D Hellman & S Moreau 'Introduction' in D Hellman & S Moreau (eds) *Philosophical foundations of discrimination law* (2013) 1.

37 Hutchinson & Duncan (n 33) 101.

applying these methods, the book endeavours throughout to embrace an *emic approach*[38] by demonstrating an acute awareness of the legal, cultural, political, and social context of Namibia and majestic Africa. In this light, the book considers the text of the Constitution as well as judicial decisions drawn principally from the Supreme Court. Scholarly literature is also considered. International law methods also receive attention in chapter 4 of the book. Throughout the book, comparative material, mainly in the form of judicial decisions of foreign jurisdictions, is relied upon.[39]

The Constitution is silent on comparative law.[40] A brief clarification on why comparative law is relied on in this book, therefore, is appropriate. The role of comparativism in constitutional and human rights law in Namibia remains under-theorised.[41] The relevance and utility of comparative material generally lie in the dearth of Namibian jurisprudence that adjudicates claims of socio-economic rights, including water rights. A right to water claim before Namibian courts, thus, would likely give rise to various unchartered and under-studied legal questions. This necessitates familiarity with 'new' substantive rights developments, and with hermeneutic approaches that may find a genesis in foreign experiences and legal cultures.

38 Ninnemann concisely explains the emic approach as follows: 'The term "emic" originates in linguistics, and is used regularly within the fields of anthropology and other social and behavioral sciences. The word emic can be used to describe perspectives, constructs, data, or methodology, and in all uses serves a descriptor of positionality. Sometimes referred to as the insider's view, emic perspectives strive to recognize and understand the meaning of a concept from within the cultural framework in which it is being observed. An emic approach attempts to assess and convey conceptual schemes, categories, and/or culture in terms of members' own indigenous and meaningful criteria. Intensive longitudinal, qualitative, and ethnographic methods are touted generally as the most effective means of gleaning an emic perspective of cultural phenomena.' K Ninnemann 'Etic' in S Loue & M Sajatovic (eds) *Encyclopedia of immigrant health* (2012).

39 See K Kariseb 'Reflections on judicial cross-fertilisation in the adjudication of human rights and constitutional disputes in Africa: The case of Namibia' (2021) 35 *Speculum Juris* 19.

40 On comparative law theory, see W Kamba 'Comparative law: A theoretical framework' (1974) 23 *International and Comparative Law Quarterly* 489; I Cram 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' (2009) 68 *Cambridge Law Journal* 118 121; R Leckey 'Thick instrumentalism and comparative constitutionalism' (2009) 40 *Columbia Human Rights Law Review* 425 433; H Gutteridge *Comparative law: An introduction to the comparative method of legal study and research* (2015).

41 See I Spigno 'Namibia: The Supreme Court as a foreign law importer' in T Groppi & M Ponthoreau (eds) *The use of foreign precedents by constitutional judges* (2013) 154; R Hirsch *Comparative matters: The renaissance of comparative constitutional law* (2014).

Nevertheless, I approach comparative methods with caution. First, comparative law is prone to being *unprincipled* with the consequence of the illegitimacy of the resulting judgments.[42] Related to this, comparativism can give rise to *selectivity* with foreign law being 'simply results-driven' to support particular outcomes.[43] Selectivity is metaphorically likened to courts 'looking over the crowd to find [its] friends'[44] in the judicial reasoning process. While acknowledging the difficulty in refuting selectivity, Fredman offers a theoretical method to mitigate this risk of 'cherry-picking' as, instead of abandoning it, comparativism is to be applied through a bounded deliberation model that holds foreign law as a deliberative resource in human rights and constitutional law decision making.[45] Bounded deliberation will be fully developed in chapter 5 and applied in chapter 6.

A second argument against comparativism concerns personal predilections. Although related to selectivity, the charge here is that only those 'like-minded foreigners'[46] whose decisions conform with a judge's own 'personal predilections',[47] or their personal, intellectual or moral preconceptions',[48] are likely to be invoked. This results in the use of foreign law as confirmatory, simply buttressing one's value judgments, thereby lending apparent legitimacy to their political decisions. The selection of comparative materials, the argument goes, is results-driven, a view concisely captured by late US Supreme Court Justice Antonin Scalia as a pretext to impose a judge's subjective values, invoked 'when it agrees with one's thinking' and therefore 'not reasoned decision making, but sophistry'.[49]

In response to the selectivity concern, former South African Chief Justice Pius Langa retorts with a healthy sense of judicial candour by not

42 A Dodek 'Complementary comparativism: A jurisprudence of justification' unpublished PhD thesis, University of Toronto, 2008 12; Leckey (n 40) 433.

43 C McCrudden 'Common law of human rights? Transnational judicial conversations on constitutional rights' (2000) 20 *Oxford Journal of Legal Studies* 527; S Fredman 'Foreign fads and fashions? The role of comparativism in human rights law' (2015) 64 *International and Comparative Law Quarterly* 631 648; Cram (n 40) 123.

44 Quote attributed to US Supreme Court Justice Harold Leventhal. See P Wald 'Some observations on the use of legislative history in the 1981 Supreme Court term' (1982) 68 *Iowa Law Review* 195 214.

45 Fredman (n 43) 647.

46 *Roper v Simmons* 543 US 551 (2005).

47 *Planned Parenthood of Southeastern Pa v Casey* 505 US 833 (1992) 984 (Scalia J).

48 D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 317.

49 *Roper v Simmons* (n 46).

altogether denying the inevitable influence of a judge's personal views in decision making, particularly in the transformative adjudicative setting.[50] For Langa, 'constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions'.[51] Langa holds this to be 'vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given'.[52] Comparativism allows us to consider the often ignored 'sociopolitical context within which constitutional courts and judges operate, and how this affects whether and where the judicial mind travels in its search for pertinent foreign sources to reference'.[53] This emic sentiment is particularly brought to the fore in this book's consideration of re-invigorative constitutionalism and ubuntu.

A third criticism of comparativism is that it is *anti-democracy, anti-sovereignty* and, consequently, *illegitimate*. Judges, it is asserted, are not bound by any law other than domestic law and international law that binds their jurisdiction.[54] The reliance upon foreign law thus is deemed an assault upon the democratic underpinnings of the state by allowing the subversion of domestic representatives and a decline in democratic decision making.[55] As such, the concern is that judges take a 'kingly role for themselves'[56] by surrendering national sovereignty to a foreign legal system with no democratic accountability.[57]

The debate on the role of comparative material in Namibian constitutional adjudication has been largely settled since the *Reverse Onus* case[58] in which the Supreme Court, per Shivute CJ, observed that while foreign decisions may be persuasive under certain circumstances, Namibian courts 'have developed a reservoir of distinctly Namibian jurisprudence based on the Constitution and Namibian law' since

50 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 4.

51 As above.

52 As above.

53 Hirsch (n 41) 9.

54 T Graziano 'Is it legitimate and beneficial for judges to compare?' in M Andenas & D Fairgrieve *Courts and comparative law* (2015) 27. For further criticisms of comparativism, see A Thiruvengadam 'Forswearing "foreign moods, fads or fashions"? Contextualising the refusal of Koushal to engage with foreign law' (2014) 6 *National University of Juridical Sciences Law Review* 595.

55 McCrudden (n 43) 530.

56 F Easterbrook 'Foreign sources and the American Constitution' (2006) 30 *Harvard Journal of Law and Public Policy* 223 242.

57 Fredman (n 43) 649.

58 *Attorney-General of Namibia v Minister of Justice & Others* 2013 (3) NR 806 (SC) (Reverse Onus case) para 8 (Shivute CJ concurring).

independence.[59] Namibian courts may thus follow only those decisions that they found persuasive due to the similarity of applicable principles, provisions, issues, and other circumstances relevant to matters at hand on principle rather than precedent.[60] Shivute CJ affirmed that '[u]ltimately the meaning and import of a particular provision of the Constitution must be ascertained *with due regard* to the express or implicit intention of the founders of the Constitution'.[61] Shivute CJ proceeded to state that the value judgment that a Namibian court has to make in interpreting the provisions of the Constitution must be based on the values and aspirations of Namibian society.[62]

This book thus relies on comparative perspectives throughout, drawing on African jurisdictions, including those of Kenya, Lesotho, Uganda, Botswana and South Africa.[63] It will also tap into jurisdictions beyond the continent, including those of Ireland, Canada, India and the US, as well as regional comparatives from the Inter-American and European human rights institutions.

In order to ensure the application of principled comparativism in the book, I provide justifications for any comparative material upon which

59 See also *In Re Ex Parte Attorney-General: Corporal Punishment by Organs of State* 1991 NR 178 (SC) 188 paras 2-3, where Berker CJ, commenting on the limited utility of foreign precedents in determining the constitutionality of corporal punishment by state organs, observed that comparative analysis could be 'extremely instructive and useful'. He qualified it by stating that 'the Namibian people are now in the position to determine their values free from such foreign values imposed by their former colonial rulers'.

60 As above.

61 *Reverse Onus* case (n 58) para 8 (my emphasis); internal footnotes omitted. A similar caveat to the reliance on foreign authorities has been adopted in South African jurisprudence because, as the South African Constitutional Court observed in *S v Makwanyane* 1995 (3) SA 391 (CC) para 37, 'our society and criminal justice system differ', while Kriegler J in *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) para 133 expressed himself strongly: 'I wish to discourage the frequent – and I suspect – often facile resort to foreign "authorities". Far too often one sees citation by counsel … in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point … (the) blithe adoption of alien concepts or inapposite precedents.'

62 *Reverse Onus* case (n 58) para 8.

63 As above.

I rely and demarcate any distinguishing features from the Namibian context.

1.5 Conclusion

This chapter has identified the contours of the book. The book represents an effort to contribute to the pursuit of a project of socio-economic justice for the majority who remain marginalised. The book thus is a project anchored in the promises and possibilities offered by the Constitution. As a decolonial and re-invigorative endeavour, the book thus stands to empower Namibians to recognise and claim water as an entrenched constitutional right. Water is not merely a welfare policy 'good' within the exclusive remit of often unfulfilled political promises and benevolence. All Namibians must enjoy a life that fully realises their shared sense of ubuntu, thereby allowing the courts to give substance to the reality that *omeya ogo omwenyo:* 'water is life'.

2 Interpreting the Namibian Constitution

2.1 Introduction

The kernel of the argument that the book will develop in this chapter and in chapter 3 is that, while no express fundamental right to water exists under the Constitution, a judicially enforceable right to water can be *read in* or *implied from* the article 6 right to life. This conclusion can only be arrived at after evaluating, determining and applying legally cogent and legitimate interpretative approach(es) to constitutional interpretation in Namibia. This chapter will engage in a detailed analysis of the various approaches to constitutional interpretation generally and as applied primarily by the Namibian Supreme Court. In so doing, the book takes a critical view of the Supreme Court's jurisprudence on the interpretation of the Constitution's Bill of Rights provisions, which will be evaluated with the aid of scholarly debates around the various interpretative approaches.

Absent from the Constitution is an express internal interpretative clause, whether general or specific to the Bill of Rights.[1] I will adopt an eclectic methodology in considering the application of original intent, textualism, and purposivism in chapter 3's argument for implying a right to water. To clarify, this book is not specifically aimed at proving that any given interpretative approach or judicial decision is right or wrong. I will thus not engage in a 'full-blown' analysis of the interpretative approaches or case law but will limit myself to a concise and analytical engagement of what these approaches represent, as well as their respective strengths and weaknesses in implying a right to water.

This chapter lays the foundation for subsequently applying the methods of constitutional interpretation to the argument of implying a right to water from the right to life. While the original intent, textualism and purposivism approaches that I will engage lie on well-trodden ground, they remain contentious and will be conceptualised in the Namibian

1 Compare 2010 Kenyan Constitution arts 20(4) and 259(1); 1996 Constitution of the Republic of South Africa, 1996 sec 39(1).

context. I will also argue that the Constitution is a *transformative* document within the meaning of 'transformative constitutionalism'. This is a neologism that has come to the fore in the last two decades to characterise and conceptualise the advent of constitutionalism in jurisdictions such as those of South Africa and Kenya.

In the same breath, I will develop a further normative argument: A plausible reading of the Constitution *also* supports what I term as the 're-invigorative constitutionalism' method. Re-invigorative constitutionalism is an approach that I uniquely coin and conceptualise within this chapter. This builds up to chapter 3 which will employ transformative constitutionalism and re-invigorative constitutionalism approaches – in addition to original intent, textualism and purposivism – to assert the normative basis of reading a right to water into the right to life which will be rooted in the value premise of ubuntu.

At this stage of the analysis, this chapter refrains from substantively applying the different interpretative approaches to my argument of reading a right to water into the right to life in article 6 of the Constitution. Rather, this chapter focuses on setting up the interpretative resources that will be invoked to argue for an implied right to water in later chapters of the book.

2.2 Original intent

One approach to constitutional interpretation is that of original intent. Original intent is a species of the broader category of originalism, which seeks to prioritise determining and applying the meaning of a provision based on the intention of those who drafted a given text. As there is no single approach to originalism, figure 1 below by Brink is a useful graphic representation of the many forms that originalism takes.[2]

2 See D Brink 'Originalism and constructive interpretation' in W Waluchow & S Sciaraffa (eds) *The legacy of Ronald Dworkin* (2016) 273.

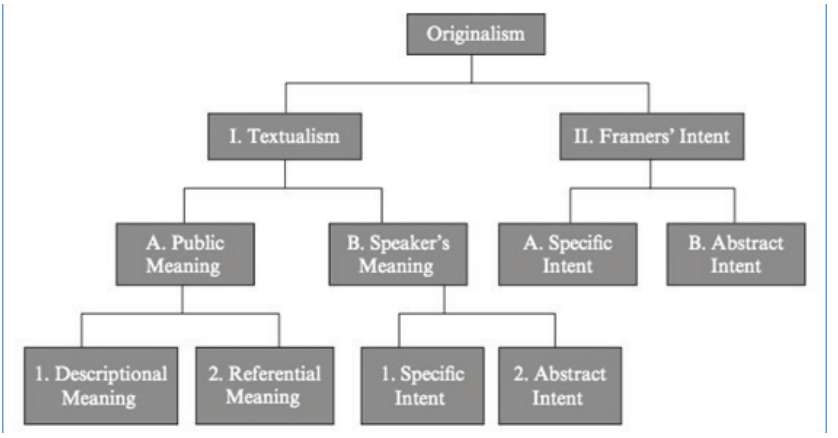

Figure 1: Varieties of originalism[3]

My analysis of constitutional interpretation will focus on originalism as the original intent of the framers.[4] This is distinct from the genre of originalism of the textualist form that claims that interpretation must be faithful to the original meaning of the language of legal provisions.[5] These parameters are set with the aim of focusing the analysis within a dense area of jurisprudential debate and on the premise that original intent of the framers often is asserted in Namibian case law, as will be seen below. The book will consider textualism in more depth in the next part.

An original intent approach is one that enquires into what the drafters of a constitution intended to include (and exclude) within the scope of the relevant provision in the manner that they have framed it. Therefore, original intent can generally be described as an interpretative exercise in historicism, one that limits the eligible interpretations to the principles that express the historical intentions of the drafters of a constitution.[6]

3 Brink (n 2) 288.

4 R Dworkin *Law's empire* (1989) 360.

5 Brink (n 2) 282; M Berman & K Toh 'On what distinguishes new originalism from old: A jurisprudential take' (2013) 82 *Fordham Law Review* 545; K Thomas *Selected theories of constitutional interpretation* (2011).

6 Dworkin (n 4) 360.

2.2.1 Critiquing the justifications

Two principal reasons for adopting original intent in constitutional interpretation are identified.[7] First, the approach claims *legitimacy* by allowing the law to reflect the original values that the drafters of a constitution had adopted. This is an argument put forward by one of originalism's main adherents, Antonin Scalia,[8] who argues for originalism as an approach that is more compatible with the nature and purpose of a constitution in a democratic system. Scalia argues that constitutional human rights should not aim to mimic contemporary values, which is a function to be performed by elections and the elected.[9]

The second advantage is that original intent can *avoid personal predilections* of judges from creeping into their judicial decision making. The judge's role thus is confined to 'a matter of discovery rather than invention'.[10] This circumvents what Scalia calls the 'judicial personalisation of the law'.[11] Thus, as Ronald Dworkin frames it, judges do not make substantive choices themselves but only enforce the choices made by a constitution's drafters.[12]

Original intent, however, is problematic in interpreting the Namibian Constitution. First, the advantage of legitimacy that original intent may bring is undercut because, while the elected representatives of the people – the Constituent Assembly members – did indeed draft the Constitution, there was limited wider popular public participation in determining its substantive provisions.[13] It is a truism that human rights exist and are

7 Discussion in S Fredman *Comparative human rights law* (2018); S Fredman 'Living trees of deadwood: The interpretive challenges of the ECHR' in N Barber et al (eds) *Lord Sumption and the limits of the law* (2016) 5.

8 A Scalia 'Originalism: The lesser evil' (1988-1989) 57 *University of Cincinnati Law Review* 849 852.

9 Fredman *Comparative human rights law* (n 7) 118.

10 A Kavanagh 'The idea of a living constitution' (2002) 47 *America Journal of Jurisprudence* 255 260.

11 As above.

12 R Dworkin *A matter of principle* (1985) 34.

13 Cottrell in her empirical study of constitution-making and public participation in the Nepalese and Kenyan context makes unique observations on socio-economic rights by concluding: 'Extensive public input through consultation is likely to lead to strong demands for the inclusion in the constitution of issues that are closely related to the daily concerns of the people, such as schooling, water, health, and roads, which traditionally either had no place in constitutions or were included only as policy directives or guidelines.' 'Ordinary citizens may be prepared to accept imprecise language that promises a great deal in terms of life improvements for the people but that has little in the way of legal teeth.' 'Popular input through a referendum is likely to

formulated for the benefit of *all* people. Yet, an originalist interpretation would effectively prioritise, hegemonise and staticise the views of founders (and their technical advisors) in establishing the meaning of constitutional rights.

Further, the relatively 'hasty' drafting process of the Namibian Constitution undermines the claim of the drafter's legitimacy as irreproachable. It is a matter of historical record that the Constituent Assembly first sat on 21 November 1989 and within three months agreed on the text of the Constitution on 9 February 1990 without demur.[14] The Constitution subsequently came into force on the date of independence – 21 March 1990 – as the supreme law of Namibia.[15] While the adoption of the Constitution within such a comparatively short timeframe can be politically heralded, it has (inadvertently or otherwise) resulted in limited debate and meaningful engagement with all of the provisions of the then draft Constitution.

The difficulty in discerning the intention of the drafters is revealed in the Constituent Assembly Debates.[16] Even though the Constitution is relatively recent, the Constituent Assembly Debates lack substantive content as they span only two volumes that total 470 pages – yet with generous line spacing. Beyond the abolition of the death penalty, the minutes of the Constituent Assembly Debates record no discussion on what was meant by 'life' or the reasons behind the laconic phraseology adopted in article 6 of the Constitution, for instance.[17] Comparatively, constituent assembly debates from countries such as India, Kenya and South Africa run into volumes with thousands of pages; yet, even in those jurisdictions, the courts have hesitated over attaching significant weight upon the views contained therein.[18]

turn on issues of political power and on those that are the concerns of leaders, rather than on those of the people at the grass roots, including [economic, social, and cultural rights].' See J Cottrell 'Ensuring equal rights in constitutions: Public participation in drafting economic, social and cultural rights' in J Heymann & A Cassola (eds) *Making equal rights real* (2012) 80-81.

14 Namibia National Archives *Namibia Constituent Assembly Debates 21 November 1989-21 January 1990* Vol 1 and 2 (1990) (Constituent Assembly Debates).

15 Constitution art 1(6).

16 The Constituent Assembly Debates are only available as hard copies at the National Archives of Namibia, although a digital version is now on record with this author.

17 While the right to life's meaning may have been discussed by the Standing Committee mandated to produce a draft Constitution, the said Committee's deliberations were confidential and there is no record that can be relied upon.

18 See also *S v Makwanyane* 1995 (3) SA 391 (CC) (*Makwanyane*) para 18. The legislature in Botswana has even gone as far as proscribing the interpretative recourse to the debates in the National Assembly of Botswana. Botswana Interpretation Act sec 24(1).

Second, in response to the justification for originalism as avoiding the 'personal predilections' of judges from informing their judicial decisions, this may be counteracted by the argument that the recourse to original intention is 'mischievous' as it can cover up the subjective decisions that judges inevitably make and yet may pretend have not occurred.[19] Furthermore, polyvocality in perspectives is revealed in the Constituent Assembly Debates which, by and large, reflect the comments of individuals or, at best, the collective position of a given political formation that participated in the drafting. Considering that there were numerous parties and positions, one ought to be abundantly cautious with the role that such views are to play and the weight to be attached to them in determining the original intent of the framers.[20]

Third, a recourse to determining and applying the intention of the drafters gives rise to the so-phrased 'dead hands of the past' argument.[21] The essence of this argument opposes an interpretation that is wedded to the views of people who have long departed and who lived in radically different societies and social environments. While the 'dead hands' argument is most prominently asserted in comparative constitutional contexts such as the US, it is not necessarily fatal, so to speak, when applied to a Namibian context: The Constitution was drafted less than three decades ago; all of the founding drafters are alive or are in living memory. This is unlike older constitutions such as that of the US where there is an entrenched pre-occupation with originalism (in both the textualist and framer's intent moulds) in constitutional interpretation. In the US, the 'dead hands' that drafted the US Constitution were indeed sex, race, and class homogeneous, at the exclusion of women, racial minorities, the enslaved and the poor.[22]

Nevertheless, the core of the problem identified by the 'dead hands' argument not only applies to 'old' constitutions; one should be mindful that the Namibian Constitution will not be 'young' forever. This is well-illustrated in the Canadian Charter of Fundamental Rights and Freedoms, which is a relatively recent document adopted in 1982. Yet, the Canadian Supreme Court has not held itself to be bound by the founder's original intention and has preferred a purposive approach to Canadian

19 Fredman *Comparative human rights law* (n 7) citing Dworkin (n 12) 34.

20 *Makwanyane* (n 18) para 18.

21 Kavanagh (n 10) 291; M McConnell 'Textualism and the dead hand of the past' (1997) 66 *George Washington Law Review* 1127.

22 Fredman *Comparative human rights* (n 7).

constitutional interpretation.[23] The book will return to comprehensively consider purposivism later in this chapter.

At this stage of the analysis it is of persuasive value to draw on the wisdom of the Kenyan Supreme Court in *Speaker of the Senate & Another v Attorney-Genera*l (*Speaker of the Senate*)[24] which rejected a binding recourse to, and finality of, the original intention of the drafters of the Kenyan Constitution. It clarified that in interpreting the 2010 Kenyan Constitution, the Kenyan Supreme Court exercises its constitutional powers to 'provide high-yielding interpretive guidance on the Constitution', which must be done in a manner that advances the Kenyan Constitution's 'purposes, gives effect to its intents, and illuminates its contents'.[25] The Kenyan Supreme Court pointed out that it must also remain conscious that 'constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilise vagueness in phraseology and draftsmanship'.[26] The Court's role is to 'resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes'.[27] The Kenyan Supreme Court further proceeded to state:[28]

> Constitution-making does not end with its *promulgation*; it continues with its *interpretation*. It is the duty of the Court to illuminate legal penumbras that constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine [sic] the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

Related to the 'dead hands of the past' argument, even if one is to have recourse to the original intention of the drafters of the Namibian Constitution, the reality is that such intention may (i) not factually exist; or (ii) be ambiguous and indeterminate. In the Namibian context, this is further complicated by the reality that even where the drafting intention

23 S Beaulac 'Constitutional interpretation: On issues of ontology and of interlegality' in P Oliver et al (eds) *Oxford handbook of the Canadian Constitution* (2017) 867.

24 [2013] eKLR para 156.

25 As above.

26 As above.

27 As above.

28 As above (emphasis in original).

does exist, for the most part it is confidential and privileged, and thus not recorded anywhere.[29]

Again, I turn to Canada to best illustrate this problem. In *Re BC Motor Vehicle Act*[30] the Canadian Supreme Court was faced with the challenge of determining the intention behind the phrase 'principles of fundamental justice' in section 7 of the 1981 Canadian Charter of Rights and Freedoms, which states: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. One of the main sources relied upon to support the argument that 'fundamental justice' was simply synonymous with natural justice was the minutes of Procedure of the Special Joint Committee that drafted the Canadian Charter. Although the Court considered this as evidence of the intent of the legislative bodies that adopted the Canadian Charter, it took the view that it would be 'erroneous to give these materials anything but minimal weight'[31] given the unreliability of such speeches and statements. The Court also avoided an approach that would effectively render the Canadian Charter 'frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs'.[32]

It is not a foregone conclusion that the founders of the Namibian Constitution, wise and gallant as many of them were, had expressed an opinion or intention on *all* the issues addressed in the Constitution. Dworkin captures the essence of the 'frozen in time' concern by cautioning that interpreting a constitution from the perspective of historical intent as exhaustive 'is tantamount to denying that the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman's time, imagination, and interest stopped'.[33] Thus, Dworkin aptly concludes that '[t]he Constitution takes rights seriously; historicism does not'.[34]

29 Both the technical advisors and the Standing Committee of 21 Constituent Assembly members tasked to prepare the draft of Constitution were bound by confidentiality as to their drafting deliberations. See Constituent Assembly Debates (n 16) 158-160.

30 *Re BC Motor Vehicle Act* [1985] 2 SCR 486 para 52.

31 *Re BC Motor Vehicle Act* (n 30) para 53.

32 As above.

33 Dworkin (n 4) 368-369, commenting in the context of historicism as the express historical intention of the framers. Compare discussion in R Ekins *The nature of legislative intent* (2013) 16, for a summation of Dworkin's scepticism to legislative intent.

34 As above.

2.2.2 Original intent in Namibian courts

While I have complicated the recourse to original intent in constitutional interpretation, the Namibian Supreme Court has variously asserted the relevance of original intent in interpretating the provision of the Constitution. Here, I consider three decisions that affirm this: *Cultura 2000*, the *Reverse Onus* case and *Kashela*.[35] These decisions reveal that the Supreme Court holds the intention of the Constitution's founders to be *relevant* to the interpretative enquiry, although such an intention is *not determinative* in and of itself.

In *Cultura 2000* the issue was the constitutionality of a piece of legislation enacted to repudiate the actions of the pre-independence South West African administration to donate monies and property to an organisation established for the promotion and preservation of the cultures of persons of European descent. The Supreme Court expressly referred to and relied upon the original intention behind the founders' inclusion of article 144 on international law.[36]

Again, in the *Reverse Onus* case[37] the Supreme Court was directly petitioned as a court of first and final instance by the Attorney-General to determine whether certain provisions of the Criminal Procedure Act that had cast a reverse onus on an accused person were in conflict with the presumption of innocence, the privilege against self-incrimination and fair trial rights in the Constitution. The Supreme Court stated that '[u]ltimately the meaning and import of a particular provision of the Constitution must be ascertained with due regard to the express or implicit intention of the founders of the Constitution'.[38]

Further, in *Kashela* – a case concerning the fundamental right to property in article 16 of the Constitution – Damaseb DCJ asserted that '[i]t could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts; for where there is

35 See also *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC); *Hendricks & Others v Attorney-General, Namibia & Others* 2002 NR 353 (HC) 358; *S v Van den Berg* 1995 NR 23 (HC) 39H-J.

36 *Government of the Republic of Namibia & Another v Cultura* 2000 1993 NR 328 (SC) 333 (*Cultura 2000*).

37 *Attorney-General of Namibia v Minister of Justice & Others* 2013 (3) NR 806 (SC) (*Reverse Onus* case).

38 *Reverse Onus* case (n 37) 817.

a right, there must be a remedy to be fashioned by the court seized with the matter'.[39]

In light of the Supreme Court's determination that the founders' intention is *relevant* to the interpretative enquiry, the constitutional analysis to be pursued in subsequent chapters will include recourse to the original intent of the founders. This is to the extent that original intent is practically relevant, bearing in mind that, as argued above, original intention may be difficult to ascertain, ambiguous or even non-existent. Thus, this inherently limits the relevance of original intent in practice, especially in light of the normative challenge as to the extent to which founders' intent should continue to be binding upon the interpreter.

2.3 Textualism

The textualist approach to constitutional interpretation focuses on the plain meaning of the language of the Constitution. Although I consider it independently in this analysis, textualism is often conceptualised as a species of originalism where one seeks to determine the original meaning (either the public meaning or the speaker's meaning) that the text of the provision under interpretation was accorded.[40] Fredman observes that textualism's closeness to originalism ensues because its rationale is often stated to be in originalist terms: The text is the surest guide to the intention of those who frame it.[41]

Textualism emphasises the meaning of words or phrases used by the constitutional provision in question. Textualism requires a somewhat sequential engagement with the text of the Constitution which, as a general methodology, is pithily captured by Calabresi and Prakash[42] as embodying the following four stages:

(1) Consider the plain meaning of the words, while construing them holistically in light of the entire Constitution.
(2) If the original meaning of the words remains ambiguous after consulting a dictionary or grammar book, consider next any widely read explanatory statements made about them in public contemporaneously with their

39 *Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) para 70, where the Supreme Court appears to adopt an inductive method of inferring the intention of the founders without citation. This inductive approach to the founders' intention is frequently seen in the literature.

40 Brink (n 2) 288.

41 Fredman *Comparative human rights law* (n 7) 125.

42 S Calabresi & S Prakash 'The President's power to execute the laws' (1994) 104 *Yale Law Journal* 541 553.

ratification. These might shed light on the original meaning that the text had to the drafters.

(3) If ambiguity persists, consider any privately-made statements about the meaning of the text that were uttered or written prior to or contemporaneously with ratification into law. These statements might be relevant if, and only if, they reveal something about the original public meaning that the text had to the drafters.

(4) If ambiguity still persists, consider lastly any post-enactment history or practice that might shed light on the original meaning the constitutional text had to those who wrote it into law. Such history is the least reliable source for recovering the original meaning of the law, but may in some instances help us recover the original understanding of an otherwise unfathomable and obscure text.

From the above the 'plain meaning of words' would constitute the guiding light in interpretation as it is assumed that the founders must have intended words to have the plain meaning that words bear.[43] Textualism arguably may also permit the interpreter to go beyond some of the strictures of originalism as a textualist would not necessarily be concerned with the subjective intentions of the framers nor with the idiosyncratic use of language. Rather, they aim to understand how language is understood.[44] While it may be accepted that, to the extent that one can discern meaning from the text, one *should* give effect to it, the meaning is not easily discernible from the text.

As noted earlier, there is some overlap between textualism and originalism, which is revealed in that various originalists are co-identified as textualists, including Scalia.[45] As such, it is not surprising that the shortcomings of the textual approach mirror those found in original intent. I will examine the most prominent drawbacks, although it is not within the province of the book to exhaustively consider the same.[46]

First, textualism, like original intent, may require judges to masquerade as historians; yet this too is not certain to provide a sufficiently determinate result.[47] Second, to establish the 'plain meaning' of words, dictionaries are frequently used as interpretative resources. However, rarely do dictionaries

43 Fredman *Comparative human rights law* (n 7) 125. Note Waldron's different account of textualism: J Waldron 'Partly laws common to all mankind' in J Waldron (ed) *Foreign law in American courts* (2012) 155.

44 Fredman *Comparative human rights law* (n 7) 125.

45 Calabresi & Prakash (n 42) 983.

46 Discussion in Fredman *Comparative human rights law* (n 7) 125.

47 Critique in Fredman *Comparative human rights law* (n 7) 125.

provide us with a conclusive answer on the interpretation of a word, even less so for the often technical, legalistic and context-sensitive phrases used in constitutions. This is the inherent limitation in the interpretive recourse to dictionaries. They are difficult to be effectively utilised without giving rise to the risk of judicial manipulation in light of the reality that dictionaries do not offer a single, true meaning of a word. Rather, they often offer multiple, sometimes obscure, meanings that are intended to capture a wide range of possible usages.[48] Third, even if we were to seek to establish the plain meaning of the words that the framers intended, this is likely to be indeterminate from the historical sources of the Constitution. This is assuming and to the extent that the drafting history is available for critical consultation in the first place.

Turning to case law, the Namibian Supreme Court has recognised the role of the Constitution's text in interpretation but has rejected the strict construal of words and phrases in the narrow and precise manner that some textualists advocate. While the Supreme Court has largely adopted a purposive approach – which is expanded upon below – it has not rendered the language used in a given text irrelevant to the interpretative enquiry. The Supreme Court stated in the *Reverse Onus* case that 'in interpreting constitutional rights, close scrutiny should be given *to the language of the Constitution itself* in ascertaining the underlying meaning and purpose of the provision in question'.[49] Further, it is arguable that the Namibian High Court in *Kauesa*[50] endorsed textualist considerations when it comes to reconciling the position dictated by international law with the provisions of the Constitution.[51] *Kauesa* determined that an international law position will only be overridden where the Constitution's provisions are 'equivocal or uncertain'.[52]

48 For a critique of dictionaries in constitutional interpretation, see P Rubin 'War of the words: How courts can use dictionaries in accordance with textualist principles' (2010) 60 *Duke Law Journal* 167.

49 *Reverse Onus* case (n 37) 816-817 (my emphasis).

50 *Kauesa v Minister of Home Affairs* 1994 NR 135 (HC) (*Kausea*). *Kauesa* concerned the constitutionality of a provision in the Regulations to the Police Act that prohibited police officers from commenting unfavourably against the government and its conformity with the freedom of expression in the African Charter.

51 *Kauesa* (n 50) is discussed in the context of international law in ch 4.

52 *Kauesa* (n 50) 141.

2.4 Purposive or 'living tree' interpretation

2.4.1 A historical and theoretical account

Purposive interpretation aims to identify the purposes, core values and principles that a constitution seeks to achieve. As such, it gives effect to them, protects them and promotes them.[53] The process of interpretation thus is geared to unearthing the purpose of the provision and not merely the meaning of the words used to communicate such purpose.[54]

Purposivism is said to retain its epistemic origins in Canadian statutory interpretation, specifically in the 1930 decision of *Edwards v Attorney-General for Canada*,[55] widely known as the *Persons* case. There, the dispute centred around whether the word 'persons' in a statute was to be understood as meaning only men to the exclusion of women, in the context of voting rights and women's eligibility to hold public office. In interpreting the legislation in question, the Privy Council rejected an originalist approach that would render the word 'persons' susceptible to a narrow and technical construction. Rather, the Court determined that the relevant statute was a 'living tree capable of growth and expansion within its natural limits'.[56] It was thus held that there was no present reason to exclude women from the meaning of 'persons'. Purposivism is often expressed metaphorically as 'living tree' interpretation. In this vein, the Constitutional Court of Uganda in *Tinyefuza v Attorney-General* aptly captures the essence of a 'living' constitution which embraces purposivism in the context of fundamental rights thus:[57]

> Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible,

53 Fredman *Comparative human rights law* (n 7) 125.

54 A Barak & S Bashi *Purposive interpretation in law* (2007).

55 *Edwards v Attorney-General for Canada* [1930] AC 124 (Judicial Committee of the Privy Council (Canada)) (*Persons* case).

56 *Persons* case (n 55) 107.

57 *Tinyefuza v Attorney-General* [1997] UGCC 3. See also M Ssenyonjo 'The domestic protection and promotion of human rights under the 1995 Ugandan Constitution' (2002) 20 *Netherlands Quarterly of Human Rights* 445 457.

> keeping in view ideals of the people, socio-economic and politico-cultural values so as to extend the benefit of the same to the maximum possible.

With the *Persons* case establishing purposive interpretation in Canada, it has since been transplanted to other jurisdictions.[58] Indeed, since the advent of constitutional supremacy, purposivism has now been well-entrenched in Namibian constitutional interpretation. In the process, it upended the previous tradition characterised as 'extreme legal positivism'[59] that was rooted in parliamentary sovereignty[60] and that ultimately informed the strict textualist approach to interpretation.

What follows is a critique of Namibian jurisprudence which Amoo terms 'a natural law cum realist or a purposive approach'.[61]

2.4.2 Purposive interpretation in Namibian courts

The Namibian High Court in *Acheson* asserted that although the Constitution is enacted in the form of a statute, it is *sui generis*.[62] In *Acheson* Mahomed J[63] had to reconcile the bail provisions of the Criminal Procedure Act of 1977 with the then newly-entrenched right to personal liberty in article 7 of the Constitution. Mahomed J in a famous passage recalled the nature of a constitution as not merely mechanically defining the government and the relations between the government and the governed. Rather, a constitution is

> 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 the tenor of the constitution must

58 B Miller 'Origin myth: The *Persons* case, the living tree, and the new originalism' in G Huscroft & B Miller (eds) *The challenge of originalism* (2013) 120.

59 S Schulz '*In dubio pro libertate*: The general freedom right and the Namibian Constitution' in A Bösl et al (eds) *Constitutional democracy in Namibia: A critical analysis after two decades* (2012) 169 174.

60 See also M Hinz 'Justice: Beyond the limits of law and the Namibian Constitution' in Bösl et al (n 59) 159.

61 S Amoo *An introduction to Namibian law: Materials and cases* (2008) 41, citing J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181.

62 *S v Acheson* 1991 NR 1 (HC) 10.

63 This part will reference the jurisprudence of Justice Ismail Mahomed at length given his prominent role in the incipient stages of constitutional interpretation jurisprudence. Justice Mahomed served as a Namibian High Court judge (Mahomed J), then as a Namibian Supreme Court Judge of Appeal (Mahomed JA) and finally as Namibian Chief Justice (Mahomed CJ) before retiring to join the South African Constitutional Court as Chief Justice.

> therefore preside over and permeate the processes of judicial interpretation and judicial discretion.[64]

Although decided in the High Court, *Acheson* is the pioneering decision that has set the tone for constitutional interpretation. The *Acheson* dictum has been ubiquitously quoted, endorsed and applied by the Supreme Court, perhaps most prominently in *Minister of Defence v Mwandinghi* (*Mwandinghi*),[65] where the Supreme Court had to decide on whether the post-independence Namibian Minister of Defence could be substituted for the pre-independence South African Minister of Defence. The factual context was a delictual claim for damages arising out of an injury caused to the respondent, Mr Mwandinghi, by South African forces operating in Namibia before independence. The Supreme Court declined to employ a narrow and mechanical interpretation of the phrase 'anything done' in article 140(3) of the Constitution which would have limited the application of the provisions to lawful actions. While approvingly citing the *Acheson* dictum, Mahomed JA[66] elaborated upon the substance of purposivism in the following terms:[67]

> A constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must *broadly*, *liberally* and *purposively* be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the *articulation of the values* bonding its people and in disciplining its government.

Since the adoption of the Constitution, Namibian courts, by and large, have followed this purposive approach to constitutional interpretation.[68] Moreover, the 'organic instrument' nature of the Constitution that Mahomed CJ describes in *Cultura 2000*[69] justifies the analogy of the Constitution as a 'living tree' that allows for an evolutionary interpretation.

64 *Acheson* (n 62) para 10.

65 *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) 69. See also *Minister of Defence v Mwandinghi* 1993 NR 263 (HC) 273; *Cultura 2000* (n 36); *S v Van Wyk* 1993 NR 426 (SC) 456; *S v Kandovazu* 1998 NR 1 (SC) 3; *Alexander v Minister of Justice & Others* 2010 (1) NR 328 (SC); *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) 719.

66 Mahomed subsequently became a justice of the Namibian Supreme Court.

67 *Mwandinghi* (n 65) 69 (my emphasis); *Cultura 2000* (n 36).

68 *Kauesa* (HC) (n 50) 118; *Rally for Democracy and Progress v Electoral Commission of Namibia* 2013 (3) NR 664 (SC).

69 *Cultura 2000* (n 36) 340.

In the 2013 *Reverse Onus* case, Shivute CJ approvingly cites the dicta in *Mwandinghi* and *Acheson* in asserting the two general principles on how the Constitution should be interpreted: The *first principle* is in a broad, liberal and purposive manner; where generous and purposive interpretations do not coincide, generous interpretations are to yield to purposive interpretation.[70] Shivute CJ identifies the *second principle* in the following terms: 'In interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.'[71]

This second principle thus demonstrates that while purposivism constitutes the *primary* approach to constitutional interpretation, textual considerations remain relevant as a *secondary* recourse. While Shivute CJ's dictum in the *Reverse Onus* case is one of the more lucid accounts of the Supreme Court's approach to constitutional interpretation, ambiguity remains as to how the different interpretative approaches are to be reconciled given the suggestion that purposive interpretation applies alongside original intent and textualism.

2.4.3 Purposivism as value judgments

An analysis of the Supreme Court's jurisprudence further evinces that, in adopting purposivism, the Supreme Court has followed a value-oriented approach that emphasises an interpretative recourse to value judgments. These value judgments must be objectively articulated and identified.[72] Value judgments, however, raise various pertinent methodological and evidentiary questions which include the following:[73] How are these values to be identified and what is their authoritative source? How do judges overcome the inherent subjectivity in making value judgments? What is the binding effect of these values? I will not attempt to address these questions exhaustively but will tackle some of the most prominent concerns below insofar as relevant to the ubuntu discussion in chapter 3.

70 *Reverse Onus* case (n 37) 816. While the Supreme Court does not expressly define a 'generous' interpretation, we can glean from Botswana's Court of Appeal, where generous construction means that one 'must interpret the constitution in such a way as not to whittle down any of the rights of freedom unless by very clear and unambiguous words such interpretation is compelling'. *Unity Dow v Attorney-General of Botswana* 1992 BLR 119 (CA) 165 (Aguda JA).

71 *Reverse Onus* case (n 37) 817.

72 *In Re Ex parte Attorney-General: Corporal Punishment by Organs of State* 1991 NR 178 (SC) 188 (*Corporal Punishment*).

73 S Amoo 'The constitutional jurisprudential development in Namibia since 1985' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2010) 49.

I consider the two approaches to value identification that can be traced in the Supreme Court's jurisprudence: (a) constitutionally expressed values; and (b) values as identified by 'national institutions'. Both these approaches, however, are caught on the horns of a dilemma, as revealed below.

Purposivism through constitutional values

The first approach of identifying values from the Constitution[74] finds support in the *Corporal Punishment*[75] decision. However, using the Constitution's provisions as a reference point is insufficiently conclusive in identifying values: The possibilities are simply endless. Also, those very provisions in the Constitution that often are invoked for value identification (such as equality, dignity, non-discrimination, the rule of law, and so forth) are couched in inherently broad and vague language that would themselves require a judicial interpretation that has recourse to values;[76] in other words, a determination of the *values within the values*. The utility of ubuntu in overcoming this challenge will be revealed in chapter 3.

Purposivism through national institutions

The second approach would be to use 'national institutions' to identify values. This was also the approach of the Supreme Court in *Corporal Punishment*[77] where Mahomed AJA offers national institutions as an '*objective*' source with due regard to the values of the 'civilised international community'.[78] The claim here is that national institutions are an objective source for the determination of values. However, this needs further interrogation. As Fiss sets out, objectivity (in the legal sense rather than the scientific sense) connotes standards and implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation.[79]

74 Amoo (n 73) 49. Amoo derives this approach from the former Namibian Chief Justice Johan Strydom in an extra-judicial address that Amoo cites.

75 *Corporal Punishment* (n 72) 188, where the Supreme Court had to determine whether a particular form of corporal punishment that was administered by or on the authority of a state organ constituted cruel or inhumane treatment which is prohibited under the right to dignity in art 8 of the Constitution.

76 Amoo (n 73) 50.

77 *Corporal Punishment* (n 72).

78 *Corporal Punishment* (n 72) 188.

79 O Fiss 'Objectivity and interpretations' (1982) 34 *Stanford Law Review* 739 744.

One can appreciate the attractiveness of asserting values through recourse to objective sources: Courts must guard against the temptation of judges to introduce their preferences or – to invoke US Chief Justice Warren Burger's famous phraseology – their 'personal predilections' to inform their judicial choices in constitutional interpretation.[80] However, even assuming that national institutions indeed are an objective source, the norms, values and aspirations that are asserted by national institutions may well be those of the majority but may equally run contrary to the values of the Constitution, which is the ultimate touchstone. A classic example is in the context of sexual minorities where the majority may be in favour of discrimination based on 'sex', yet 'sex' is a protected category under the aegis of the Constitution[81] (assuming 'sex' includes 'sexual orientation').[82]

The quandary persists: What constitutes national institutions and how objective are these sources of values? One possible answer is that the appropriate national institution is Parliament as the Supreme Court determined in *Namunjepo v Commanding Officer, Windhoek Prison* concerning the constitutionality of placing prisoners in chains: 'Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people.'[83]

The use of Parliament as a values benchmark may indeed be 'objectively' justified if we consider that Parliament is constituted of the National Assembly (96 of the 102 members with voting rights are periodically elected through party political lists) and the National Council (all members are periodically elected as representatives from all the regions of Namibia through their respective regional councils). As such, Parliament may be deemed appropriate because of its representative nature and thus is the 'voice of the people'.

Nevertheless, recourse to Parliament for values determination remains problematic for various reasons. First, the *Namunjepo* guidance is inadequate as it is imprecise as to whether the contemporary values or norms of Namibian peoples are those that have been articulated and enacted in the form of legislation, or whether they are those that constitute

80 *Furman v Georgia* 408 US 238 (1972) 376.

81 The Constitution, art 10(2).

82 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC) (*Frank*); *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia & Others* 2009 (2) NR 596 (SC); see Amoo (n 73) 49.

83 *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another* 1999 NR 271 (SC) 284.

the expressed – verbal or written – opinions of parliamentarians in the form of parliamentary debates, or even extra-parliamentary speeches. Indeed, politicians are not known to be non-capricious with the views they hold. Moreover, drawing on national institutions alone would fail to protect potentially silent majorities (or minorities) against an assertion of values by those minorities (or majorities) who may hold greater influence through the institutional offices they retain.

Second, it is often difficult, sometimes impossible, to discern from parliamentary debates (such as those drawn from Hansard) what the singular view of Parliament is on a specific issue. The reality is that some parliamentarians' voices may be more vocal than others. For legislation, this is equally problematic as, in addition to the potential nebulosity of what the relevant values they embody, this approach runs the risk of subordinating the Constitution to the views expressed in legislation in determining values whereas constitutional supremacy prevails in Namibia.[84] In this vein, a departure from the constitutional values in the process of constitutional interpretation can be seen in *Mushwena*. Here, the Supreme Court's majority held that the High Court could exercise its criminal jurisdiction under the Criminal Procedure Act of 1977, notwithstanding the illegal refoulement of the accused persons (the respondents) from Namibia – contrary to the specifications of the extradition agreements in force between Namibia, and Zambia and Botswana, respectively.[85] *Mushwena* was thus a departure from the constitutional value of upholding the rule of law.[86]

Thirdly, if we are to have recourse to Parliament – whether through the views it expresses in legislation or through debates – this risks reducing the court's role to one of *norm-reflector* rather than *norm-setter*, as Fredman has explained.[87] The challenge with a court being a norm-reflector is that it risks relegating the court's role to a populist endeavour of what the majority deems appropriate at a given time (considering that views are inherently liable to change), which alone is insufficient to ascertain values that determine the existence, or otherwise, of a human right or a violation thereof.

84 K Mundia 'Ronald Dworkin and the Supreme Court of Namibia' unpublished PhD thesis, University of Pretoria, 2014 72.

85 *S v Mushwena* 2004 NR 276 (SC); see Mundia (n 84).

86 See also *S v Likanyi* 2017 (3) NR 771 (SC) (Shivute CJ concurring) para 8 where the Supreme Court, addressing the facts similar to those in *Mushwena*, re-affirmed the constitutional commitment to the rule of law.

87 Fredman *Comparative human rights law* (n 7).

Parliament is not the only institution (national or otherwise) that the Supreme Court has identified to source values. In *Frank*,[88] O'Linn AJA went further in stating that those institutions that can provide evidence of values include: 'Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organizations'.[89] The use of this miscellany of institutional sources to determine values can also be criticised for inviting an unprincipled approach and risking the displacement of constitutional values such as human dignity and equality. This renders the *Frank* approach vulnerable to the criticism of reducing value judgment-making to an unsystematic determination of what is the 'national popular opinion'. Even if we assume homogeneity in the public's perspective on a given issue, popular opinion is inherently vulnerable to the momentary whims and caprices of the public. The problematic nature of public opinion is appositely summed up when Chaskalson P cautioned in *Makwanyane* thus:[90]

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive there would be no need for constitutional adjudication.

Further, it is not hard to imagine a lack of consensus between and even within the dense plurality of institutions upon which O'Linn AJA relies to source values. For example, Namibian tribal authorities, churches, and community-based organisations may likely assert diametrically opposed values. Arguably, the use of these multiple sources as evidence of values had led the Supreme Court to apply a restrictive and narrow interpretation to 'sex' in *Frank*.

In this context, Kenneth Mundia has diligently studied the jurisprudence of the Supreme Court and identified glaring inconsistencies in the application of purposive interpretation and, as a corollary, the values that have been judicially asserted and applied.[91] Mundia finds that the Supreme Court's record in particularly 'hard cases' such as *Frank* and *Mushwena* is thus wanting because of 'myopic and pedantic'[92] approaches

88 *Frank* (n 82).

89 *Frank* (n 82) 137.

90 *Makwanyane* (n 18) para 88.

91 Mundia (n 84).

92 K Mundia 'A constructive interpretation of the Namibian Constitution: Transposing Dworkin to Namibia's constitutional jurisprudence' (2017) 31 *Southern African Public Law* 73 81.

to constitutional interpretation. While engaging in a full-blown critique of the value judgments jurisprudence of the Supreme Court is beyond the remit of this book, it is appropriate to conclude that the use of institutions, whether national or otherwise, risks leading one into the minefield of problems identified above.

2.4.4 Purposivism concluded

To sum up, I have argued in this section that the Supreme Court has adopted the purposive approach to constitutional interpretation with a principal recourse to value judgments. The *first principle* is for a broad, liberal, and purposive reading, with the Constitution being likened to a living tree. The *second principle* requires scrutiny of the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question. However, the Supreme Court's approach to purposivism has not been consistent. The earlier critique has exposed various flaws. In particular, there remains ambiguity in determining which values are to be engaged and the source of such values. Without entirely rejecting the relevance of the objective sources cited in various Supreme Court decisions, I will venture to offer an approach to purposivism that invokes African values as informed by the re-invigorative constitutionalism method and specifically ubuntu as advanced in chapter 3.

Before elaborating on re-invigorative constitutionalism, the book will substantiate my claim for the Namibian Constitution as 'transformative', in order to develop a framework for locating the values that inform constitutional rights interpretation appropriately.

2.5 A *transformative* constitution

The notion of 'transformative constitutionalism' is a method through which to understand purposive constitutional interpretation. While constitutions drafted in the context and mould of, for example, the 1996 South African Constitution and the 2010 Kenyan Constitution[93] are widely characterised as transformative, I will substantiate my claim that the Namibian Constitution, too, falls within this cluster of constitutions.

93 *Speaker of the Senate* (n 24) para 51: 'Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*' (emphasis in original).

By way of epistemological background, the neologism 'transformative constitutionalism' first found substantive coinage in the American scholar Karl Klare's seminal article in 1998 on 'Legal culture and transformative constitutionalism',[94] which was published against the backdrop of the 1996 South African Constitution and the early jurisprudence from the South African Constitutional Court. While transformative constitutionalism is rooted in the South African experience, the historic social, economic, political and legal context of South Africa is largely shared by Namibia although there are significant differences in the respective constitutional set-ups. The idea of transformative constitutionalism has further been carried forward in not only South Africa's jurisprudence[95] but also developed in scholarship, most notably by former Justices Langa[96] and Moseneke[97] writing extrajudicially.[98] Scholars such as Horn[99] and Mundia[100] have also characterised Namibia's Constitution as a transformative document. Importantly, transformative constitutionalism is not restricted to post-authoritarian or African contexts as various scholars have persuasively argued for transformative constitutionalism's relevance, application and manifestation in the broader Global South contexts of Latin America[101] and even in the Global North.[102] This examination of transformative

94 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. See also Roux whose central critique is that Klare's article defines the project of transformative constitutionalism in too exclusive a fashion: T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.

95 *Makwanyane* (n 18) para 262: 'What the [South African] Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting … future' (my emphasis); *Du Plessis & Others v De Klerk* 1996 (3) SA 850 (CC) para 157: '[The South African Constitution] is a document that seeks to *transform* the status quo ante into a new order' (my emphasis).

96 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

97 D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309.

98 See also sources cited in S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 25.

99 N Horn 'Interpreting the constitution: Is transformative constitutionalism a bridge too far?' (2014) 2 *University of Namibia Law Review* 1. For a critical take on transformative constitutionalism's application in Namibia, see D Zongwe 'The dangers of transplanting transformative constitutionalism into Namibia' in A Nhemachena et al (eds) *Governing universalism or a variant of apartheid particularism? Global jurisprudential apartheid and decolonisation as 21st century questions* (2021).

100 Mundia (n 92) 100.

101 A von Bogdandy et al (eds) *Transformative constitutionalism in Latin America: The emergence of a new ius commune* (2017).

102 M Hailbronner 'Transformative constitutionalism: Not only in the global south' (2017) 65 *American Journal of Comparative Law* 527; U Baxi 'Preliminary notes on transformative

constitutionalism thus is not rooted exclusively in Karl Klare's account, which has been significantly critiqued, but will draw on the strongest arguments that are appropriate for Namibia.

What transformative constitutions generally share is that they are a 'break from the past'. In the context of Namibia and South Africa's Constitutions specifically, they present 'framework[s] for a transformed society which can heal the scars of apartheid [and colonialism]', thereby being 'expressly value-driven'.[103] While one would rarely find an explicit description of the Constitution as 'transformative' in case law, transformative constitutionalism is a question of substance rather than mere affirmation. The Constitution's transformative character is indeed evident in the jurisprudence of Namibian courts, in particular, those early Supreme Court decisions on constitutional interpretation. For example, in *Cultura 2000* Mahomed CJ asserted that the Constitution 'articulates a jurisprudential philosophy which, in express and ringing tones, repudiates the legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia'.[104] Mahomed CJ affirmed earlier in *S v van Wyk*:[105]

> Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding 'revulsion' of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and protect the gains of our long struggle' against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity … That ethos must 'preside and permeate the processes of judicial interpretation and discretion'.

A transformative constitution does not present itself as 'timeless and metahistoric' or as being carried down and founded through the 'single magic moment of "social contract"'. Rather, it 'evinces an understanding that legal and political institutions are chosen, not given, that democracy must be periodically reinvented, and that the Constitution itself is the

constitutionalism' in O Vilhena et al (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 28.

103 Fredman *Comparative human rights law* (n 7).

104 *Cultura 2000* (n 36) 332-333.

105 *S v van Wyk* 1993 NR 426 (SC) 456G-H. Given that Justice Mahomed moved from the Namibian to the South African bench, it may be argued that South African jurisprudence on the substance of transformative constitutionalism was developed in his pioneering Namibian decisions.

contingent (even fragile) product of human agency'.[106] Klare proceeds to capture the essence of a transformative constitution as a long-term project rooted in a constitution's enactment, its interpretation and enforcement, with due regard to the historical context and political developments. What is to be 'transformed' is the country's political and social institutions and power relationships with the view to follow a democratic, participatory, and egalitarian direction.[107] Klare states that '[t]ransformative constitutionalism connotes an *enterprise of inducing large-scale social change* through nonviolent political processes grounded in law … a transformation vast enough to be inadequately captured by the phrase "reform", but something short of or different from "revolution" in any traditional sense of the word'.[108] Klare further identifies the core ideals of transformation: a society that is highly egalitarian, caring and multicultural, and one that is governed through participatory, democratic processes in both the polity (public) and private spheres.[109]

Like Klare, I advance the view that transformative constitutionalism necessarily entails a transformation in two senses: first, in the *operative legal culture* with the aim to reflect new values expressed; and, second, it is underpinned by the newly introduced constitutional democratic dispensation and the prevailing *socio-economic injustices* through distributive justice.[110] In expanding on transformative constitutionalism, Langa describes the idea of transformation as a change from 'a legal culture of authority to a culture of justification',[111] which is a conceptualisation that draws on what Mureinik seminally describes as a legal culture, where 'every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'[112]

106 Fredman *Comparative human rights law* (n 7).

107 Klare (n 94) 150.

108 As above (my emphasis). Klare has been quoted with approval in defining transformative constitutions in *Speaker of the Senate* (n 24) para 52.

109 Klare (n 94) 150.

110 One should note that the South African constitutional context within which Klare avers transformative constitutionalism is one where there is a strong and express commitment to social and economic justice through their inclusion as fundamental enforceable rights. They are largely absent expressly from the Namibian Constitution.

111 Langa (n 96) 353.

112 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 32.

In realising the culture of justification, the Constitution serves as the touchstone.[113] This shift in legal culture is one that was asserted by Damaseb DCJ in *Kashela*: 'The Constitution represents a fundamental break with the past and infuses a culture of rationality and fairness in the manner the state relates to and deals with the citizens over whom it holds sway.'[114]

Klare argues that transformative constitutionalism is 'transformation vast enough to be inadequately captured by the phrase "reform", but something short of or different from "revolution" in any traditional sense of the word'.[115] In contrast, Langa *does* invoke the language of 'revolution' by likening the transformation that is required of the South African Constitution to that of 'a social and an economic revolution',[116] and cites the prevailing unequal and insufficient access to housing, food, water, health care and electricity in South Africa. He points to the need to level economic provision that was previously skewed by apartheid as a central tenet of transformative constitutionalism.[117]

In considering other comparative constitutional contexts, the Kenyan Supreme Court has further clarified the pivotal role of a judiciary in 'midwifing transformative constitutionalism'.[118] Moreover, in a treatise dedicated to advocating the Indian Constitution as a transformative constitution – as distinguished from a 'conservative constitution' – Bhatia advances the view that transformative constitutionalism takes the text of the Constitution, its structure, and the historical moment of its framing seriously. [119] In the same breath, Bhatia points out that a constitution is

113 See also *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) 385I-J: 'By the adoption of the Constitution of Namibia, we have been propelled from a culture of authority to a culture of justification.'

114 *Kashela* (n 39) para 65.

115 Klare (n 94) 150.

116 Langa (n 96) 352.

117 As above. I recognise the predominantly South African literature rooted in jurisprudence and political theory that questions whether a constitution, and by extension the law, can bring about a truly transformed society. See, eg, A Kok 'Is law able to transform society' (2010) 127 *South African Law Journal* 58; J Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 223. While interesting and meritorious, this book will not engage these critiques.

118 *Communications Commission of Kenya & Others v Royal Media Services & Others* [2014] eKLR para 377; W Mutunga 'The 2010 Constitution of Kenya and its interpretation: reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 6.

119 Transformative constitutions can be contrasted with conservative constitutions; the Indian Constitution of 1950 has been characterised by some quarters as conservative, owing to the transfer of power at the moment of independence rather than the transformation of power. See G Bhatia *The transformative constitution* (2019) and sources

'not *frozen* at the moment of framing. While taking text, structure, and history as crucial building blocks of constitutional meaning, it does not accord an overriding veto power to any of them.'[120]

At the heart of this book's right to water focus is the creation of a strong nexus between the pursuits of socio-economic equality and progression, catalysed by constitutional interpretations that enhance transformation in the substantive sense and not merely the formal sense. As such, a constitutional commitment to a socially and economically just society would imply that there is a need to restructure the underlying institutional arrangements that generate various forms of political, economic, social and cultural injustice.[121] Whether a transformative constitutionalism approach can truly remedy gross structural inequality and pervasive poverty has been the subject of rigorous debate.[122] Enriching and important as it may be, this is a debate that is outside the purview of this book. Further, at an institutional level at least, transformative constitutionalism arguably is consonant with what has been conceptualised by Barber as *positive* constitutionalism, distinguishable from the traditional *negative* dimensions of constitutionalism.[123]

In subscribing to a transformative constitutionalism approach, I align with the essence of the constructive interpretation approach of

cited therein; R West 'Progressive and conservative constitutionalism' (1989/90) 88 *Michigan Law Review* 641.

120 Bhatia (n 119) (emphasis in original).

121 Liebenberg (n 98) 27.

122 Sibanda critiques transformative constitutionalism as the preferred approach to reading and understanding the (South African) Constitution as inadequate to deliver poverty eradication given its claim to post-liberalism yet remaining deeply embedded in liberal discourse. S Sibanda 'Not fit for purpose: Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482.

123 N Barber 'Constitutionalism: Negative and positive' (2015) 38 *Dublin University Law Journal* 249. Barber argues that the negative model of constitutionalism endeavours to regulate the political (government) through recourse to democratic means and the application of principles such as the separation of powers doctrine. Negative constitutionalism thus stands in opposition to arbitrary rule; law, applied by judges through judicial review mechanisms, is used as a tool to control and constrain state power. In contrast, the positive (modern) model of constitutionalism requires more than the mere application of law to the state institutions. Positive constitutionalism creates institutions that do not merely limit the power of the state, but also ensure that the state must be able to act pursuant to its 'role in advancing the wellbeing of its people'. As such, positive constitutionalism acknowledges 'the need for constitutional structures to guard against abuses of power' but is not utopian as it is 'focused on creating a strong state able to work for the good of its people'.

Ronald Dworkin:[124] Transformative constitutionalism is one of the *plausible* methods to interpret the Namibian Constitution, but it is not the *only* method. Therefore, in order to both address the deficiencies of transformative constitutionalism and respond to the peculiarities of the Namibian context, I advance an approach of re-invigorative constitutionalism, to which this chapter turns next.

2.6 A re-invigorative constitution

2.6.1 Introducing re-invigorative constitutionalism

What follows is my original conception of the Constitution as a re-invigorative document. Re-invigorative constitutionalism is located within the purposivism approach discussed earlier and draws on the core premises of transformative constitutionalism: The role of the Constitution is to induce large-scale social change through non-violent and legally-grounded political processes with judicial oversight. As such, re-invigorative constitutionalism follows the articulate and inarticulate objects and core values of a transformative constitution, including egalitarianism, care, multicultural community and participatory democracy, as Klare explicates.

Distinctively, however, re-invigorative constitutionalism responds to what I view as transformative constitutionalism's incompleteness and inadequate sensitivity to context, particularly in the identification and application of values in constitutional interpretation. It advocates a more grounded and pan-African imbued understanding of 'transformation', particularly concerning socio-economic status and the legal culture.

Re-invigorative constitutionalism breaks from the past of state oppression, domination, and social and economic deprivation of the African masses perpetuated through the imposed foreign legal culture. As such, in undoing the past and realising the Constitution's ideals, re-invigorative constitutionalism advances – as the phrase suggests – the re-invigoration of African values to create a new legal culture that also emphasises the achievement of social and economic redistributive justice.

Thus, my conception of re-invigorative constitutionalism does not seek to 'renovate [the] legal infrastructure',[125] as transformative constitutionalism may be understood as being conceptually conceived

124 Dworkin (n 12) 52.

125 D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal of Human Rights* 410.

to pursue. Rather, what re-invigorative constitutionalism advances is an attitudinal reorientation away from the legal infrastructure that was operative during apartheid and colonialism and before the Constitution.[126]

In my view, fully achieving socio-economic transformation through the Constitution requires critical engagement with and rethinking of legal culture. Problematic colonial values must be rejected while purposefully infusing the legal culture with positive Afrocentric values. For the purpose of this book, I adopted Klare's definition of legal culture as 'professional sensibilities, habits of mind, and intellectual reflexes [and the] inarticulate premises culturally and historically ingrained in the professional discourse and outlook'.[127]

From the sources that I have cited, we can observe that South Africa and Kenya[128] are two prominent examples of jurisdictions that continue to grapple with redefining their legal cultures under their new constitutional dispensations after long periods of insidious legal and political practices. In Namibia, similarly, it is counter-intuitive to pursue a transformation agenda through recourse to *only* those sources rooted in a legal culture that largely remains the product of colonial and apartheid legal thinking which had actively facilitated the gross negation of human rights – whereas human rights are at the heart of the Constitution's transformative aspirations.

Re-invigorative constitutionalism thus is advanced to usher in the re-orientation of the legal culture to allow for the reconstruction and transformation of the state and society. Transformation ought to encapsulate, as Goldblatt and Albertyn understand it, a deliberate redistribution of power and resources along egalitarian lines.[129] I propose that this be achieved through vigorously pursuing the rebirth, renewal and revitalisation of an *Afrocentric* legal culture to co-exist within Namibia's legally pluralistic society.[130]

126 C Odinkalu 'Back to the future – The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1 2.

127 Klare (n 94) 166-167.

128 See V Miyandazi 'Competing and interrelated conceptions of equality in Kenya's 2010 Constitution' unpublished DPhil thesis, University of Oxford, 2018 28, and sources cited therein.

129 B Goldblatt & C Albertyn 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 249.

130 C Mapaure 'Reinvigorating African values for SADC' (2011) 1 *SADC Law Journal* 148.

To clarify, in line with the ethos of the Dworkinian plausible reading theory, my conception of re-invigorative constitutionalism does not seek to displace transformative constitutionalism. This may give rise to the question: Why then an additional approach? My response is that re-invigorative constitutionalism is advanced based on two overarching premises: (i) prescriptions of the Constitution: textual, structural, and contextual; and (ii) the Africanisation of the legal culture imperative, which is drawn from the observed theoretical neglect of transformative constitutionalism to recognise and appropriately respond to the reality that the South African-cum-Namibian legal culture was – and largely remains – one that is predicated upon the superimposed common law and exogenous values at the expense of customary laws and indigenous values.[131] The chapter will elaborate upon these overarching premises below.

A legal culture that has the prospect of realising the transformation described earlier must be contextually sensitive, responsive and, crucially, rooted in African legal thought. This pursuit of Afrocentricity is to be advanced without entirely jettisoning that legal culture, which is anchored in the common law, although one ought to accept that the common law's dethronement from its former pedestal of dominance is constitutionally recognised, necessary, desirable, and even inevitable. This requires us to reject an ahistorical approach to constitutional interpretation as we pursue more responsive, imaginative and novel approaches. We can, I argue, envisage this through the prism of re-invigorative constitutionalism.

2.6.2 The case for re-invigorative constitutionalism

In this part the chapter will establish the legal, theoretical and philosophical pillars of the argument for re-invigorative constitutionalism. Re-invigorative constitutionalism invites us to critique our normative foundations for the conception of rights in the Constitution, in this context a right to water's normative basis. As mentioned, the book grounds this on the Constitution's text and the ideological need to pursue the Africanisation of legal culture in Namibia. These grounds should be considered as mutually reinforcing.

131 Notably, common law in the Namibian context is to be understood as the legal system that is an amalgamation of Roman-Dutch and English common law. See *S v Hangue* 2016 (1) NR 258 (SC) para 17 (Maritz JA): '[Namibian] common law and that of South Africa are both rooted in Roman-Dutch law and, by and large, the development thereof in the two countries prior to independence was the same. The Roman-Dutch law, as it existed and was applied in the Province of the Cape of Good Hope at the time, was introduced by' the provisions of sec 1(1) of the Administration of Justice Proclamation, 1919 (Proclamation 21 of 1919); S Amoo *Introduction to Namibian law* (2008) 62.

Text-based justifications

The text of the Constitution is the anchor for a re-invigoration of African legal culture. There is specific textual anchorage in at least three composite provisions of the Constitution: the Preamble's repudiation of colonialism and its assertion of Namibian peoples as sovereign; the right to culture in article 19; and the 'redemption' of customary law in article 66. These provisions are to be cumulatively understood in the drafting context and architecture of the Constitution. I address these seriatim.

The Preamble

First, there is express preambular recognition that Namibian peoples of African ancestry have historically been denied their agency, sovereignty and rights through, most prominently, colonialism and apartheid.[132] These denials took imperialist forms including social, political, military, economic and legal domination.[133] While all these forms of domination intersected to create the perfect storm of colonialism and apartheid, legal imperialism is of particular interest here as this manifested in the rejection and subservience of those norms, cultures, customs and values that were indigenously African in their pedigree. Drawing attention to and exposing this reality allow us to understand the Constitution not only as reflecting transformative aspirations, but also as a document that embodies decoloniality. This responds to the reality that, insofar as the common law is concerned, the legal culture 'mostly remains intellectually colonised … still functioning within the domain of Western legal values'.[134]

The Constitution's repudiation of colonialism thus implicitly enjoins the judiciary – as a postcolonial and constitutionally entrenched institution – to be wary of, and refrain from, (even inadvertently) perpetuating colonialism through the inherited legal culture.[135] A reading

132 The Constitution, Preamble paras 4-5: '*Whereas* these rights [to inherent dignity and alienable rights to life, liberty and the pursuit of happiness] have for so long been denied to the people of Namibia by colonialism, racism and apartheid; Whereas we the people of Namibia – have finally emerged victorious in our struggle against colonialism, racism and apartheid'.

133 P Glenn *Legal traditions of the world* (2007) 248.

134 J Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* 177.

135 Note the function of Cabinet and National Assembly members in arts 40(l) and 63(2)(i) respectively, to 'remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies'.

of the Constitution's text and the Constituent Assembly Debates does not suggest an indifference to the (continued) manifestation of neo-colonial vices within the legal culture. Sachs J's ratio decidendi on the sources of values to apply in assessing the constitutionality of capital punishment under the 1996 South African Constitution in *Makwanyane* concisely captures this obligation towards African legal culture:[136]

> The secure and progressive development of our legal system demands that it draws the best from all the streams of justice in our country [which above all] means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot unfortunately extend the equality principle backwards in time to remove the humiliations and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalised.

Sachs J refers to the legal system as drawing from all streams of justice; indeed, legal systems are defined by the legal culture that they embrace.

Constitutional scholars have correctly cautioned against placing excessive weight and logic on a constitution's preamble to ground an interpretative approach as this, by itself, is inadequate. Preambular formulations, for Waldron, are 'intended as prefatory pieces of rhetoric; they are not noted for their philosophical rigour; they probably represent political compromises; and they are not always consistent, at least not to the eye of a pedant'.[137]

However, the Constituent Assembly Debates suggest that the drafters did not see the Preamble to the Namibian Constitution as 'rhetorical', 'empty' and 'inconsistent'. In fact, the drafters of the Constitution deliberately and diligently considered certain nuances in the Preamble by expressing their views with explicit references to colonialism, racism and apartheid, for example, in a context where little debate of other parts of the draft Constitution is on record, as I have discussed.[138] Hence, the Preamble's pronouncements and central spirit, read in light of other provisions, are to convey the overarching new decolonial legal order that the Constitution ushered in.

136 *Makwanyane* (n 18) paras 364-365 (my emphasis).

137 J Waldron 'Is dignity the foundation of human rights?' in R Cruft (ed) *Philosophical foundations of human rights* (2013) 118.

138 Constituent Assembly Debates (n 16) 191, where there is a fair degree of debate driven by Fanuel Kozonguizi on the 'isms' of colonialism, apartheid and racism, which language was debated, and agreement arrived at on their specification and ordering in the Preamble. The Constitution can thus be described as 'colour-conscious'.

Drawing further on comparative perspectives, Sachs J in Mhlungu emphasised the value of preambular provisions in stating that 'the Preamble in particular should not be dismissed as a mere aspirational and throat clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.'[139]

The right to culture

The second textual anchor is the right to culture. Article 19 of the Namibian Constitution guarantees that '[e]very person shall be entitled to enjoy, practise, profess, maintain and promote any culture, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest'.

The African Charter on Human and Peoples' Rights (African Charter),[140] which Namibia has also ratified, under article 17(2) and (3) protects the individual's right to freely take part in the cultural life of their community, and places a duty on the state to promote and protect the morals and traditional values recognised by the community.[141] The state is the primary duty bearer for chapter 3 rights in the Constitution. The African Charter also duty binds the individual to 'preserve and strengthen *positive* African cultural values'[142] under article 29(7). I will return to assessing the meaning of 'positive' in this expression at a later stage in the book.

While no definition for 'culture' is offered by the Namibian Constitution or the article 19 jurisprudence,[143] we can draw on the persuasive authority of the African Commission on Human and Peoples' Rights (African Commission) in *Endorois*.[144] The Commission stated that 'culture' under article 17 of the African Charter is understood to mean

139 *S v Mhlungu & Others* 1995 (3) SA 867 (CC) para 112.

140 African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), discussed in ch 4.

141 African Charter arts 17(2) and (3).

142 My emphasis.

143 *Cultura 2000* (n 36); *Cultura 2000 v Government of the Republic of Namibia & Another* 1992 NR 110 (HC).

144 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (Endorois). See also M Ssenyonjo 'The protection of economic, social and cultural rights under the African Charter' in D Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 114-15.

> that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.[145]

This definition exposes the collective underpinnings of culture which, as I put forward, would include a prominent role for, and reflection of, Namibia's particularly unique socio-cultural diversity[146] within the prevailing legal culture.[147] This challenges the reality that the contemporary legal culture remains one that is firmly anchored in the common law principles, values and traditions, as will be unpacked below. This untenable *status quo* has had the effect of rendering 'legally illiterate' many Namibians of African indigeneity who are learned primarily in their customary laws, values and norms, which are scarcely reflected in the prevailing mainstream legal culture.

Notable, too, is the relationship between culture and customary law. Customary law has been explained as 'customs and usages traditionally observed among the indigenous African peoples ... and which form part of the culture of those people'.[148] From this, it is apparent that customary law is derived from unique and significant long-established cultural practices of a group, which solidify and give rise to rules that are then considered customary law.

Therefore, what re-invigorative constitutionalism responds to and facilitates is that it allows for the lived experiences and knowledge of

145 *Endorois* (n 144) para 241.

146 Namibia's cultural diversity is revealed in that there are 13 distinct ethnic groups and 52 traditional authorities, each with their own customs and laws, for a Namibian population of approximately 2,5 million.

147 M Hinz 'Traditional governance and African customary law' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008) 67; M Hinz 'Legal pluralism in jurisprudential perspective' in M Hinz (ed) *The shade of new leaves* (2006) 29; O Ruppel & K Ruppel-Schlichting 'Legal and judicial pluralism in Namibia and beyond: A modern approach to African legal architecture?' (2011) 64 *Journal of Legal Pluralism* 33 36, stating that the law in place in Namibia today is 'the product of different sources: firstly, Roman law; secondly, the fusion of Roman law and Roman-Dutch customary law – hence the term Roman-Dutch law – which came in the wake of Dutch colonisation at the Cape of Good Hope; thirdly, from the early 19th century onwards English law asserted itself, leaving deep traces in Roman-Dutch law, after British hegemony in southern Africa had been established; and fourthly, indigenous customary law from time immemorial'.

148 See T Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 27.

communities to percolate back into the legal system.[149] This invites a constitutional interpretative approach that legitimates, ascribes value and credence to, and borrows from, the ultra-heterogeneity found in Namibia in the process of asserting values.

Redeeming customary law (and deprivileging common law)

The third, and perhaps most authoritative and compelling, textual anchor is the Constitution's *validation* of customary law, and its jurisprudential equity and equality within the legal culture. Article 66(1) of the Constitution, a provision that falls outside chapter 3 Bill of Rights, states: 'Both the customary and common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'

Customary law now is not only constitutionally *valid* within the legal system, but is also *equal to* the common law.[150] What requires further elaboration is that customary laws had long existed throughout the history of the African indigenous justice systems of those peoples who inhabited the territory that is present-day Namibia before and during contact with European settlers and imposed colonial administrations which were characterised by the co-existence of multiple normative systems. During the colonial period, although customary law was recognised and applied, this was limited and remained largely displaced to the socio-judicial periphery in favour of the common law.[151] Since this imposition, an unequal relationship within the legal culture arose: Common law was centralised and upheld as of presumed normative superiority, while customary law played second fiddle, particularly where its prescriptions were deemed to be at odds with the underlying rules, values or ethos of common law.[152]

What should be clarified here is that this 'oppositionalisation' of customary law *vis-à-vis* common law is ordinarily unnatural; different legal systems have co-existed (albeit not without tension) throughout

149 Faris (n 134) 177.

150 Compare the South African constitutional approach that arguably subordinates African customary law to both the common law and the South African Constitution. See E Zitzke 'A decolonial critique of private law and human rights' (2018) 34 *South African Journal on Human Rights* 14.

151 For a history of the common law, see Ruppel & Ruppel-Schlichting (n 147) 38-39.

152 Prior to independence, customary law was 'jurisprudentially classified as a second-class type of law'. Hinz *The shade of new leaves* (n 147) 19; V Palmer & M Mattar *Mixed legal systems, east and west* (2015) 226.

human history.[153] However, the confrontation between customary law and common law arises mainly out of the latter's historic superimposition upon Africans at the expense of the former. This was further perpetuated by attempts to codify customary law,[154] which usurped and distorted its organic development.[155] Absent this 'rivalry' there would ostensibly be no need to re-invigorate the values, traditions and norms of an African inheritance and, indeed, no need to indict the common law's validity and encroaching dominance.

Article 66 of the Constitution recognises both customary law and common law as remaining in force as at the date of independence, subject to the 'superiority clause' that qualifies this where customary law and common law conflict with the supreme Constitution or other statutory law.[156] Article 66 can thus be regarded as *redeeming* customary law from its previously infantilised and subservient status, forcefulness and effect, representing a constitutional acknowledgment of Namibia's previously ignored, denied and violated multicultural fabric in the legal culture.

At the same time, the point is rarely made that article 66 is also an *expiation* provision for the common law. Article 66 is a recognition of the need to avoid creating a 'black hole' in the legal culture that would likely have arisen had an absolute repudiation of the common law been pursued by the framers of the Constitution. In other words, article 66 can be read as atoning for the common law's historical 'wrongs' by placing it on par with customary law while allowing for its continued validity and de-monopolising it.

153 Compare Oyowe's concise contrasting (different form oppositionalisation) of law in African societies with European societies: O Oyowe 'What is law? I: positivism and traditional African societies' in D Bilchitz et al (eds) *Jurisprudence in an African context* (2017) 19.

154 Codification has rightly been lamented as 'necessarily antithetical to customary law … because of the social distance between the legislator and the people, [and] the possibility that the views of the two will not coincide is increased'. W Bennett & R Vermeulen 'Codification of African law' (1980) 24 *Journal of African Law* 206 219.

155 Namibia's post-1990 development of customary law at the state level has thus rejected codification in favour of the 'ascertainment' approach which is the process of the 'self-statement' of customary law 'by the owners of the law to be ascertained, namely the people and the traditional leaders as the custodians of customary law'. M Hinz 'The ascertainment of customary law: What is ascertainment of customary law and what is it for? The experience of the customary law ascertainment project in Namibia' (2012) 2 *Oñati Socio-Legal Series* 85, http://ssrn.com/abstract=2100337 (accessed 17 February 2019); M Hinz *Customary law ascertained: Volume I* (2010).

156 The Constitution art 66(2).

Significantly, article 66 does not create an express hierarchy between customary law and common law, as may be intuitively expected in the de-colonial constitutional context explored earlier. It thus is open to the argument that because article 66 refers to customary law in the first instance, whereas common law would ordinarily come first if the alphabetical order were followed at drafting, this may suggest an intentional hierarchy or preference, perhaps akin to customary law being the first among equals. However, this assertion, based on the conventions of legal drafting technique alone, is insufficient to establish a hierarchy between customary law and common law as even the Constituent Assembly Debates are silent on the rationale behind this ordering.

Courts and commentators alike have interpreted article 66 as placing customary and common law on 'equal footing',[157] thereby renouncing customary law's previous subordination as facilitated by various repugnancy clauses that had nullified customary law that was repugnant to justice or morality or inconsistent with common law or codified law during colonialism. This is despite the tainted genesis and iniquitous use of common law in Anglophone Africa and the ensuing legitimacy deficiency attributable to its role in perpetuating pre-constitutional injustices through subjugation, deprivation and conquest, as argued at greater length below.

It can further be discerned that article 66 also represents the founders' resigned acceptance of the enduring fact of European influence – as institutionalised in the common law – on post-colonial Africans. While the article 66 compromise may be a hard pill to swallow in light of the desire to achieve complete sovereignty for Africa, this is necessitated by the reality that African identities, ways of life and trajectories have been irreversibly changed and shaped – for better or for worse – by their interactions with Europeans and their legal systems.[158] African customary law can thus shed new and autochthonous light on the understanding of the values that underpin the legal culture in Namibia, particularly within the constitutional Bill of Rights provisions.

157 Hinz *The shade of new leaves* (n 147) 186; Faris (n 134) 175. As was stated by Strydom CJ in *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) 261: 'The language of [art 66] means what it says namely that customary and common law in force on the day of independence only survive insofar as they are not in conflict with the Constitution.'

158 T Bennett *Human rights and African customary law* (1995) 10.

The Africanisation of legal culture imperative

In the following parts this chapter will build the normative and philosophical underpinnings for re-invigorative constitutionalism to inform the above-analysed textual provisions of the Constitution.

Developing an African legal culture for human rights

I commence on an obnoxious note: It was the historian Trevor-Roper who dismissively decreed that the entire history of Africa prior to the arrival of Europeans was nothing more than the 'unedifying gyrations of barbarous tribes in picturesque but irrelevant corners of the globe'.[159] While it requires minimum substantiation to disprove Trevor-Roper's assertions, it perhaps is only a slight hyperbole to affirm that these views were widely held of African peoples and their values, ways of life and practices by European settlors-cum-colonisers who came to define and dominate African legal culture.

Constitutional and human rights laws, like all laws, are social constructs, as Hart argued.[160] The transformative nature of Namibia's Constitution has been established earlier. I thus associate with what I hold to be Himonga's irrefutable proposition: Transformative constitutions in Africa demand the 'inclusion of African legal ideas and values in the legal order'.[161] The reference to customary law in article 66 of the Constitution is inherently African in both its origins and scope of application. As such, customary law intrinsically retains greater internal (or at the very least perceived) legitimacy and familiarity among the majority of Namibians. Indeed, it is a falsity to deem law and its interpretation, whether constitutional law, common law or customary law, as ostensibly value-neutral.[162] As Mokgoro J reflects in *Makwanyane*, the interpretation of a supreme constitution's entrenched rights provisions involves a balancing exercise that

> [c]an often only be done by *reference to a system of values extraneous to the constitutional text itself*, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text. The constitution makes it particularly imperative for courts to develop the

159 A Jackson *The British empire – A very short introduction* (2013) 104.

160 HLA Hart *The concept of law* (1994) 116.

161 C Himonga 'The right to health in an African cultural context: The role of ubuntu' (2013) 57 *Journal of African Law* 165; D Kuwali 'Decoding Afrocentrism: Decolonising legal theory' in O Onazi (ed) *African legal theory and contemporary problems* (2014) 72.

162 Klare (n 94) 178.

> entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society ... To achieve the *required balance will of necessity involve value judgments*. This is the nature of constitutional interpretation.[163]

In the earlier discussion of purposivism, we have already established that constitutional interpretation involves making value judgments. What Mokgoro J illuminates further is that the sources of these values need not be pronounced within the Constitution itself but can retain an extraneous origin. In this light, customary law, as 'a system of values to the constitutional text itself', is advanced. Customary law allows us to pursue a re-invigorative constitutionalism paradigm that assists in building a new society that is based on ideologies and philosophies that are fashioned within the cultural, political, social and historical experiences of Namibians and Africans.[164] Keeping a historical and constitutional context in mind allows one to identify values that are closer to objective (appreciating the difficulty in asserting absolute objectivity) and permits us to move towards the Africanisation of the legal culture by – in the context of human rights – having interpretative recourse to African indigenous values and world views, of course, without jettisoning the other traditional tools in the interpreter's arsenal.

Similarly, Faris, who opines from a South African perspective, advocates an 'African Renaissance'[165] (re-birth) that facilitates the achievement of jurisprudential parity between customary law and common law.[166] Achieving this demands deliberate interventions that are directed towards the revival, revitalisation and restoration of Afrocentric legal cultures. If we are to take seriously the assertion that the Constitution is a 'mirror reflecting the national soul', as Mahomed J famously put it, it follows that this soul is found within the African. Therefore, like transformative constitutionalism, what re-invigorative constitutionalism puts forward is not intended to be neutral; it is a concept that carries the 'positive valence'[167] of Africanness.

163 *Makwanyane* (n 18) paras 302-304 (my emphasis).

164 W Abraham *The mind of Africa* (2015).

165 The African Renaissance is largely attributed to former South African President Thabo Mbeki in his venerated 'I am an African' speech to the Constitutional Assembly of South Africa. He subsequently adopted it as his governing ideology during his presidency. See E Bongmba 'Reflections on Thabo Mbeki's African renaissance' (2004) 30 *Journal of Southern African Studies* 291.

166 Faris (n 134).

167 Klare (n 94) 150.

Borrowing from discrimination law theory, the historical and contemporary disadvantage that customary law has suffered is what necessitates an approach akin to 'affirmative action' to achieve the jurisprudential parity envisaged by article 66. Notably, however, re-invigoration goes beyond a mere re-introduction: it connotes a de-ossification, de-marginalisation and de-stagnation of African legal cultures in light of the reality of epistemic injustice. This is through 'strengthening it, and filling it with life and energy'.[168] Re-invigoration thus asserts that African legal cultures are profoundly – although not unequivocally[169] – just and worthy. This renders the values that underpin African legal cultures as invaluable in constitutional interpretation. As Mahomed J aptly illuminated *obiter* in *Makwanyane*: [170]

> In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: *it retains from the past only what is defensible* and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.

When applied to Namibia, Mahomed J's understanding of a constitution requires retaining from the past those 'defensible' aspects of African legal culture.[171] This implies that there is something in the past that was previously rejected but now requires *re*-invigoration. It is in this context that the re-invigoration that I advocate is preceded by the prefix 're-' to signify the recognition of the previous invigoration of such African principles, values and norms in the legal culture preceding the arrival and domination of European legal systems as perhaps most prominently institutionalised within the common law.

168 'Invigoration' *Shorter Oxford English dictionary* (2007).

169 I address the problematic aspects of African legal cultures below.

170 *Makwanyane* (n 18) para 261 (my emphasis).

171 The approach of drawing from the past is distinguishable from the backward-looking approach in transitional justice settings that is advanced by scholar Ruti Teitel, the normative originator of the concept 'transitional justice'. What transitional justice seeks to achieve is the self-conscious construction of a distinctive conception of justice associated with periods of radical political change following oppressive rule, characterised by legal responses to confront the wrongdoing. Compare R Teitel *Transitional justice* (2000) 123-124.

Dethroning the common law and its underlying value

There is much to be independently said of common law – both past and present – as the enduring foundational legal culture and the need to affirm alternatives. As Klare and Davis point out, 'the [South African Constitution's] drafters believed that transformation must build up from the legal substructure as well as flow downward from majestic constitutional heights'.[172] Indeed, a constitution's basic assumption is that society fails to progress towards social justice where the legal system 'rigs a transformative constitutional superstructure onto a common law base inherited from the past and indelibly stained by apartheid'.[173] Klare and Davis proceed to indict the common law in the following terms: [174]

> [T]he common law as it stands today largely reflects, constitutes, and sustains existing social relationships, power structures, and inequalities. *The common law's cherished value of individual autonomy remains meaningless and unfulfilled in a society as radically unequal as* South Africa, where millions live in conditions of absolute deprivation. Untransformed, the common law supports and shields this distributional status quo. Unless their legal foundations are transformed, social arrangements constituted (in part) by the common law will exercise a permanent inhibiting effect on the Constitution's transformative project, possibly subverting it altogether.

Liebenberg adds to this concern by exposing the 'classic liberalism' of the legal culture in South Africa (which also holds true for Namibia) such as formalism, deference to legislative choices, and various dichotomous conceptions: negative and positive rights, public and private law, law and politics.[175] Botha further cautions that one should resist the naive temptation that the post-constitutionalism legal culture is liberated from apartheid's yoke merely because of the process of constitutionalisation and the repeal of apartheid and other offensive laws. For Botha, '[i]t would be wrong to think of legislation and the common law (or public and private law) as two distinct entities (containers!), the one affected by apartheid's blemish, the other not. To do so would be to fail to see how apartheid law was complemented by the common law; *how the apartheid logic of separation and inequality was reinforced and normalised by the ostensibly neutral system of common law.*'[176]

172 Davis & Klare (n 125) 411.

173 As above.

174 As above (my emphasis) (internal footnotes omitted).

175 Liebenberg (n 98) 43.

176 H Botha 'Metaphoric reasoning and transformative constitutionalism (Part 1)' (2002) *Journal of South African Law* 624 (my emphasis).

Indeed, if it is accepted that the Namibian Constitution envisages an equipollence in the prevailing legal culture, the corollary is that courts are not only *permitted* to interpret constitutional rights in light of customary norms and values, but are also *obligated* to fully 'mainstream' customary law in the pursuit of societal transformation. As will be elaborated in chapter 3, I argue that customary law as recognised in article 66 of the Constitution is important as it embodies African values, particularly ubuntu.

The question nevertheless remains: How do we most effectively achieve a mainstreaming of customary law and African values?[177] Commenting on the re-introduction of African customary law, Bennett points out that in essence 'the issues go to the validity of existing knowledge as well as the introduction of new knowledge into the legal system'. Bennett thereby takes the view that the common law's deconstruction is preferable, without 'reject[ing] the exogenous source of law that is of a Western legal knowledge base'.[178] This progressive approach finds endorsement from the spirit of the Constitution's article 66(1) and is one that re-invigorative constitutionalism endeavours to observe.

What re-invigorative constitutionalism permits is the development of a new legal culture that in part simultaneously *retains* the reasonable parts of the common law, *breaks from* the iniquitous manifestations of the common law, and *re-invigorates* the positive yet neglected aspects of African customary law to create a novel, effective and legitimate legal culture for facilitating socio-economic transformation for all Namibian peoples.

2.6.3 Caveats and clarifications on re-invigorative constitutionalism

The notion of 'Africanising' the legal culture, as re-invigorative constitutionalism pursues, is one that is rooted in the need to, and value in, asserting 'Global South' theories[179] that seek to decolonise human rights understandings.[180] Nevertheless, in pursuing re-invigorative constitutionalism, three points are necessary.

177 This is a challenging question, one which evidently is beyond the scope of this book. However, South African and, by extension, Namibian legal history present useful lessons on the interaction of English law with the then resurgent Roman-Dutch law from 1910 through deliberate and concerted efforts aimed at deconstructing the English law and its values in order to achieve a semblance of this parity. At the time, English law 'was not discarded but rather retained in so far as Roman-Dutch law was given the capacity to develop and expand'. Bennett (n 158) 29.

178 As above.

179 J Comorofff & J Comoroff *Theory from the south* (2011).

180 S Jensen *The making of international human rights: The 1960s, decolonization and the*

First is a clarification on the implications for universal human rights that re-invigorative constitutionalism brings. My claim is that the values underpinning human rights are not all universal or to be drawn from a single source.[181] The development of the re-invigorative constitutionalism paradigm indeed is informed by the reality that legal imperialism can masquerade through claims to universalism,[182] aculturality, and neutrality of values and legal systems.[183] This formulation responds to Mutua's seminal critique that particular conceptions of human rights perpetuate problematic 'savage-victim-saviour' complexes that promote Eurocentric ideals to transform non-Western cultures that are deemed inferior to Eurocentric prototypes.[184]

Re-invigorative constitutionalism thus allows us to use African values to determine the substance or content of rights, their interpretation, and their form of implementation and enforcement.[185] Scott drives home the reality that legal interpretation, particularly in human rights, inherently is value-laden.[186] In this light, this project is both counter-colonial and a rejection of Western claims to a monopoly of 'positive' values.[187]

reconstruction of global values (2016) 4-6, whose overarching argument is to rebuff the myth that human rights are a Western invention, drawing attention to the work of actors from the Global South at the formative stages of human rights notions. In Jensen's own words: 'From within postcolonial studies, human rights have been strongly criticized, frequently linking human rights with Western essentialism and neo-colonialist agendas, but it may be that this critique has only been able to sustain itself through its amnesia about the postcolonial moment, that is, its own historical foundations. If a number of key countries from the Global South were the driving force behind the breakthrough of universal human rights, how Western, then, is the concept of human rights?'

181 Lord Hoffmann frames it thus: 'While human rights are universal at the level of abstraction, they are national at the level of application.' Lord Hoffmann 'The universality of human rights' Judicial Studies Board Annual Lecture 19 March 2009, https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf (accessed 27 August 2018).

182 C Josiah 'African values and the human rights debate' (1987) 9 *Human Rights Quarterly* 309; M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201.

183 Bennett (n 158) 29.

184 Mutua (n 182) 205.

185 J Donnelly 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* 400 401.

186 C Scott 'Interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769.

187 E Reichert 'Human rights: An examination of universalism and cultural relativism' (2006) 22 *Journal of Comparative Social Welfare* 23 28.

In relating re-invigorative constitutionalism to socio-economic provision such as water, one must pause to acknowledge that taking human suffering seriously through the institution of human rights means also taking seriously the reality that the poorest and most vulnerable members of all societies suffer deprivations that include a lack of socio-economic entitlements such as water.[188] Re-invigorative constitutionalism allows us to recognise fundamental yet generalisable differences in the philosophy of human rights as being Afro-communitarian[189] in the African-cum-Namibian world view.[190] The ubuntu analysis in the subsequent chapters will carry this forward.

This presents a rejoinder to the often strictly individualistic human rights conceptions that are advanced in Western or Eurocentric settings.[191] Notably, scholars such as Fredman persuasively argue against atomistic conceptions of the individual as 'prior to society'. These conceptions fail to appreciate the indispensability of social input to the individual, given that 'individual identity is essentially based on interpersonal recognition and relationships'.[192]

Moreover, the advancement of re-invigorative constitutionalism is not at the expense of the minimum standards of international human rights.[193] Indeed, as I develop and rely on international human rights law in this book, I accept that human rights and the values that underpin them should remain the subject of internal and external contestation in a deliberative process that allows rigorous and evidence-based assessment[194] but which, crucially, privileges the local that is rooted in Afrocentricity. The book will thus advance the bounded deliberativism model in chapter 5.

Second is a caveat: While re-invigorative constitutionalism stresses a greater prominence for customary law, norms and values and jurisprudential parity with the common law in the legal culture, re-

188 Scott (n 186) 778.

189 See A Wing 'Communitarianism vs individualism: Constitutionalism in Namibia and South Africa' (1993) 11 *Wisconsin International Law Journal* 295.

190 Josiah (n 182) 331: 'An Africentric approach is particularly suitable for taking economic [and social] rights seriously'; compare A Dundes 'Human rights and regionalism in Southeast Asia' unpublished PhD thesis, University of Sydney, 2014.

191 Donnelly (n 185) 411; E Brems 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse' (1997) 19 *Human Rights Quarterly* 136 142.

192 S Fredman *Human rights transformed* (2008) 18.

193 M Robinson 'Human rights at the dawn of the 21st century' (1993) 15 *Human Rights Quarterly* 629 632; R Howard *Human rights in commonwealth Africa* (1986) 17.

194 S Fredman 'Are human rights culturally determined? A riposte to Lord Hoffmann' in P Davies & J Pila (eds) *The jurisprudence of Lord Hoffmann* (2015).

invigorative constitutionalism should not be understood as a blanket, idyllic and uncritical endorsement of African customary law. As argued, article 66(1) is unambiguous as to the Constitution and statutory law's supremacy and primacy over customary (and common) law; the invocation of customary law derived values in constitutional interpretation must, therefore, concord with the Constitution's provisions.

It is also accepted that there are those underpinnings of customary law – however held in good faith – that are in tension with the Constitution itself, such as those rooted in heteronormativity and patriarchy that infract upon gender equality and women's property rights.[195] What is sought to be re-invigorated is only that which is defensible.[196] Comparative perspectives, when invoked as a deliberative reasoning resource, are particularly utile in responding to these drawbacks.

I have noted earlier that article 17(2) of the African Charter only affords protection to 'positive African values'. In this context, the African Commission has stated that this right to culture only protects 'positive African values consistent with human rights standards, and implies an obligation on the State to ensure the eradication of harmful practices that negatively affect human rights'.[197] No doubt, precisely which African cultural values would fall within the remit of 'positive' and how these are determined would raise many questions. The guidance of the African Commission nonetheless remains ambiguous, not least because of the challenge in defining 'positive African cultural values' given the heterogeneity of values across Africa.[198]

195 *Myburgh* (n 157); *Cultura 2000* (n 36); *Müller v President of the Republic of Namibia* 1999 NR 190 (SC). It is worth observing that there is growing evidence that some of the nefarious aspects of African customary law actually find a genesis in the commitments to patriarchy, homophobia, and heteronormativity that coloniser missionaries instilled in African communities. See E Zitzke 'A decolonial critique of private law and human rights' (2018) 34 *South African Journal on Human Rights* 1 15; S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150 155.

196 *Makwanyane* (n 18) para 261 (Mahomed J).

197 'African Commission Principles and Guidelines on Social and Economic Rights in the African Charter on Human and Peoples' Rights' (Nairobi Principles), adopted at the 47th ordinary session, Banjul, The Gambia, 12-26 May 2010, formally launched at the Commission's 50th ordinary session, Banjul, The Gambia, 24 October-7 November 2011, https://www.achpr.org/legalinstruments/detail?id=30 (accessed 17 September 2019) para 75.

198 N Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105 111.

While this question of which African cultural values to include under 'positive' is challenging, it certainly is not insurmountable. Ssenyonjo offers a potential solution as he argues, in the context of women's rights in Africa, for taking the totality of the African Charter into account so that positive African cultural values would be 'those that are consonant with principles of equality and non-discrimination', thereby applying a 'progressive and liberal construction of the [African] Charter seems to leave no room for the discriminatory treatment of women'.[199] Indeed, the 'living law' nature of African custom inherently allows one to adopt a 'severance' approach to African values by embracing its adaptation through internally and externally inspired shifts in values, norms and customs, although not without practical difficulties.[200] I will be deliberate in advancing those 'positive' aspects of the value of ubuntu to interpreting the right to life to imply a right to water in chapter 3 of the book.

The *third* is a clarification: Re-invigorative constitutionalism that is rooted in African customary law accepts that there is no singular notion but a plurality of customary laws within Namibia, which must be recognised and responded to appropriately. Heightened sensitivity and awareness are required to avoid biases in favour of those norms, values and customs of some majoritarian ethnic groups over others, particularly in light of a history where apartheid's architects and agents were responsible for perversely creating and stressing ethnocultural cleavages for systematic exploitation through corrupting the socio-economic and political order.[201] This legacy continues in contemporary Namibia and is a reality that the pursuit of re-invigorative constitutionalism must take into account.

2.7 Conclusion

This chapter has established the framework for interpreting the Bill of Rights provisions in the Constitution. The next chapter will turn to apply the various interpretative approaches to specifically interpret article 6 of the Constitution in order to imply a right to water from the express right to life. After the chapter's survey of the debate on original intent and textualism, the conclusion is that constitutional interpretation in Namibia is primarily guided by a purposive approach, one which at its core requires a broad, generous and purposive approach that is laden with

199 See M Ssenyonjo 'Culture and the human rights of women in Africa: Between light and shadow' (2007) 51 *Journal of African Law* 39 44.

200 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 54, where the South African Constitutional Court noted the 'adaptive' nature of African customary law. See also *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC) para 109.

201 Bennett (n 158) 7.

value judgments. As such, one's application of purposive constitutional interpretation must be alive to this reality.

In determining the Namibian Supreme Court's approach to purposivism, the shortcomings in the identification of values have been exposed. To partially remedy this, I have also applied the idea of transformative constitutionalism to Namibian constitutionalism. However, I further advanced a novel conception of the Namibian Constitution as re-invigorative of African values in constitutional adjudication, which values themselves are neglected within legal and human rights discourse in Namibia. Re-invigorative constitutionalism thus provides the conceptual infrastructure to advance African values in interpreting the provisions in the Bill of Rights. As such, the African value of ubuntu will be advanced in the next chapters to normatively ground a right to water as a socio-economic dimension of the right to life in article 6 of the Constitution, a right that the state is duty-bound to realise.

3 Interpreting the right to life to imply a right to water using ubuntu

3.1 Introduction

In this chapter the book moves on to argue for the existence of a right to water as a fundamental right implied from the article 6 right to life in the Constitution. I endeavour to affirm that a right to water imposes three correlative duties upon the state: to *respect*, to *protect* and, crucially, to *fulfil*. This is notwithstanding the textual absence of the *fulfil* duty from the text of article 6. In arriving at these conclusions, the chapter will principally apply the purposive interpretation approach as critiqued and advocated in the preceding chapter. To reiterate, purposive interpretation invites a broad, liberal, and generous reading of fundamental rights provisions, which are infused with values that are central to the Constitution, while maintaining fidelity to the text and history of the Constitution. In applying purposivism, the chapter embraces both transformative and re-invigorative constitutionalism ideals and will thus invoke the African value of ubuntu as an enriching, durable, and 'animating' value to build the normative basis for implying water from the right to life.

In so doing, I will unpack the etymology, origins, and meaning of ubuntu, in the process asserting its appositeness and applicability to Namibia. I will tease out what I consider to be the four pillar principles of ubuntu – community, interdependence, solidarity, and dignity – to establish the normative content of ubuntu and offer justifications for asserting the various correlative duties that are imposed upon the state in the context of water as a socio-economic right. The chapter will also rebut some of the objections to ubuntu while carving out an understanding of ubuntu that navigates around the more meritorious objections.

Having established that a right to water can be implied as a socio-economic dimension of the right to life with the use of ubuntu, the chapter will address the potential interpretative obstacles or objections that may arise in implying water from life. The first set of objections are rooted in original intent and enquire: Did the Constitution's drafters intentionally omit socio-economic rights such as water from being protected as

enforceable rights? To refute this objection, the analysis sharpens the focus to the *travaux préparatoires* of the Constitution, principally the 1982 Constitutional Principles and the Minutes of the Constituent Assembly Debates. It is argued that the 1982 Constitutional Principles that guided the Constitution's drafters expressly required that the Constitution's Bill of Rights be faithful to the Universal Declaration of Human Rights (Universal Declaration).[1] A reading of the Universal Declaration reveals the inclusion of socio-economic entailments as enforceable rights. This argument will assume the relevance of original intent approaches in Namibian constitutional interpretation, in full awareness of the drawbacks to original intent that was teased out in chapter 2.

The second objection is potentially more challenging and is rooted in the text of the Constitution: The omission of the 'fulfil' duty from the text of article 6 inhibits positive duties from accruing to the state in its realisation of an implied right to water. I will refute this argument by debunking the arguably orthodox conceptualisation of life in strictly the civil-political sense to the exclusion of any of its social and economic dimensions. For this, I will principally rely on Shue and Fredman's conceptualisation that every right attracts three correlative duties to protect, respect, and fulfil, as well as by drawing perspectives from international law, specifically the right to life provision of the International Covenant on Civil and Political Rights (ICCPR) as interpreted by the UN Human Rights Committee.

In the final part the chapter turns to comparative resources. From India, I consider the interpretation of the right to life in article 21 of the Indian Constitution, whose courts have variously interpreted the provision as including a right to water. I will, however, expose the limited utility of the Indian approach in light of the textual differences between the right to life provisions in the Namibian and Indian constitutions, respectively. From Botswana, I analyse right to water case law that has been developed. As in India, I will also lament the lack of a robust normative foundation to justify implying water. This deficiency results in problematic limitations in the judicial determination of the state's obligations – negative and, particularly, positive. In the process I will aver that normatively founding the Namibian constitutional right to water in ubuntu can equip courts with the ability to navigate potential competing rights claims. The principled approach grounded in ubuntu that is advanced in this chapter thus robustly affirms that a right to water finds a normative basis in the Constitution's article 6 right to life. Ubuntu will then become a resource to flesh out the

1 Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

normative content of water and to define the various obligations of the state concerning water.

A methodological point is worth stressing here: While the doctrinal method is strongly represented throughout the book, it is particularly asserted in this chapter, alongside other methods discussed in the first chapter. The doctrinal method is to be distinguished from 'empirical' or evidence-based methods that are directed at 'observing and/or measuring social phenomena'.[2] Thus, my analysis of ubuntu is rooted in doctrinalism rather than empiricism.

3.2 Purposively interpreting the right to life through ubuntu to imply a right to water

In this part I argue for the existence of an implied right to water using the purposive approach to constitutional interpretation. I have determined in chapter 2 that the Namibian Supreme Court's approach to the interpretation of constitutional fundamental rights is purposive which, by and large, has been informed by a value-judgment approach. I have critiqued the inconsistencies in the identification and application of values seen in the Supreme Court's jurisprudence. My argument has been to approach the interpretation of the Constitution's Bill of Rights through transformative constitutionalism and re-invigorative constitutionalism.

In this part I will apply these interpretative approaches to the right to life and invoke ubuntu as the normative basis to justify implying a right to water. In adopting a value-judgment approach, I align with Dworkin's 'constructive interpretation' approach with a view to ascertaining the best interpretation of the right to life by constructing the value behind the provision and describing the interests, goals, or principles that the provision can be taken to serve.[3] I thus invoke ubuntu as a value premise that is aptly motivated by the re-invigorative constitutionalism proposition put forward in chapter 2.

Ubuntu is a seminal meta-concept that is drawn from African indigenous justice systems[4] to normatively ground the interpretation of life in article 6 of the Constitution. But why ubuntu? I will comprehensively address this question at a later stage of this chapter, but I draw attention

2 T Hutchinson & N Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 83.

3 R Dworkin *Law's empire* (1989) 52.

4 O Elechi et al 'Restoring justice (ubuntu): An African perspective' (2010) 20 *International Criminal Justice Review* 73 75.

to the following pertinent normative justifications. Himonga has observed that enhancing human rights implementation in Africa is a prominent justification for, at least, investigating the role that African concepts can play in the realisation of human rights.[5]

The lack of cultural legitimacy – actual or perceived – of human rights among its intended (African) beneficiaries is often cited and recognised as one of the foremost challenges to enforcing human rights in Africa.[6] 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.[7] Moreover, top-down transplantations of legal approaches have rarely rooted themselves. At best, they yield poor results.[8] As Mahao explains:[9]

> [T]he values underpinning the dominant rights paradigm are, by and large, removed from notions of justice as understood and lived by the vast majority of people previously colonised in places such as Africa. Thus, mainstreaming indigenous juridical principles in the legal system holds the promise of going some distance towards legitimising the system. Inherently, however, this entails an epistemological shift in world outlook.

Taking a cue from Mahao, imbuing human rights with localised, participative approaches such as African values can enhance the legitimacy of the idea of human rights. In the forthcoming parts I advance the substantive justifications for ubuntu, its etymology, meaning and underlying principles, and engage with prominent objections to it. While ubuntu does not find express mention in the Namibian Constitution (or

5 C Himonga 'The right to health in an African cultural context: The role of ubuntu' (2013) 57 *Journal of African Law* 165; B Ibahwoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838.

6 Himonga (n 5) 165 and authorities cited.

7 Y Mokgoro & S Woolman 'Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in Drucilla Cornell's thoughts' (2010) 25 *Southern African Public Law* 400 406 and sources cited.

8 Lord Denning's comments regarding the English common law's transplantation are apt: 'Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England.' *Nyali Ltd v Attorney-General* (1955) 1 All ER 646 653.

9 N Mahao 'Can African juridical principles redeem and legitimise contemporary human rights jurisprudence?' (2016) 49 *Comparative and International Law Journal of Southern Africa* 455 456.

in any other African constitution),[10] it can, as an inexpress constitutional value, be asserted and grounded in the Constitution provided that such an ubuntu reading does no violence to the text or spirit of the Constitution.[11]

I thus advance ubuntu as an apposite value premise owing to its epistemology that exists within the various African indigenous justice systems of Namibia and given its wide acceptance as accurately capturing an overarching African world view, although ubuntu approaches are not without demur. There is also a comparatively advanced understanding of ubuntu, which may be attributed to its extensive application, deconstruction, and endorsement in African socio-cultural life, within the academic literature, and in leading judicial pronouncements drawn from African comparative perspectives.[12]

3.2.1 The etymological origins and definition of ubuntu[13]

In this part I introduce the substance of ubuntu and address its etymological origins as an African value. Significant energy is expended for this analysis with the principal aim of countering the potential assertion that ubuntu is *not* a Namibian value or that ubuntu is insufficiently ubiquitous to be determined as an African value. Ubuntu will be defined with its principles identified so as to comprehend ubuntu legally, principles that will be the premise for interpreting article 6 of the Constitution as implying a right to water. I will also evaluate and offer a retort to some objections raised by certain ubuntu sceptics.

10 The 1993 interim South African Constitution mentions ubuntu in its postamble/epilogue in the context of providing 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'. For a history of ubuntu in South Africa, see D Cornell & N Muvangua *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 7. For a viewpoint on the textual omission of ubuntu from the final 1996 South African Constitution, see S Motha 'Archiving colonial sovereignty: From ubuntu to a jurisprudence of sacrifice' (2009) 24 *South African Public Law* 305 306, who speculates that this may be attributed to the 'the North American "plain language" drafters', or ubuntu as 'merely an indigenous flourish that got people through hard times?' or '[w]as ubuntu's momentary appearance in the interim Constitution the excessive mark of an excessive demand for peace, forgiveness, and community?'

11 Mokgoro & Woolman (n 7) 402.

12 For a rich resource exploring ubuntu in Africa broadly through theory, judicial decisions and legislation, see C Rautenbach 'Exploring the contribution of ubuntu in constitutional adjudication: Towards indigenisation of constitutionalism in South Africa?' in C Fombad (ed) *Constitutional adjudication in Africa* (2017) 293.

13 N Ndeunyema 'Reforming the purposes of sentencing to affirm African values in Namibia' (2019) 63 *Journal of African Law* 329.

The etymological origins of ubuntu

When Achebe in his much-acclaimed novel *Things fall apart* asserted that 'proverbs are the palm-oil with which words are eaten',[14] he captured the essence that the tissue of African language is figurative. Therefore, it is not surprising that the etymological roots of ubuntu[15] are to be found in proverbial expressions. An etymological analysis is particularly apt in order to anticipate and counteract the potential difficulty claiming that ubuntu is insufficiently shared by Namibian-cum-African societies where the value may not be well understood. A more 'neutral' value, such as dignity, for example, the argument goes, would be more unifying in value-pluralist societies.[16]

Ubuntu's most common formulation is *umuntu ngumuntu ngabantu*, an isiZulu expression of the Nguni people of South Africa that proximately translates to the laconic phrase 'a human being is a human being through (the otherness of) other human beings'.[17] Nevertheless, ubuntu's essence remains an expression of African philosophy,[18] and has been described as a centuries-old African philosophy and way of life that has sustained African communities and continues to be 'a set of institutionalised ideals which guide and direct the patterns of life of Africans'.[19] I will return to defining ubuntu and elaborating its principles in the legal sense in the forthcoming parts of this chapter and thus focus on the etymological aspects here.

Although of Nguni extraction, Kamwangamalu[20] has comprehensively studied ubuntu's meaning from an African linguistic perspective.

14 C Achebe *Things fall apart* (1958) 6.

15 Scholars have employed linguistic and stylistic variations in their writings of ubuntu, including 'ubuntu', 'Botho' or 'ubuntu'. I will prefer a reference to 'ubuntu'.

16 D Blichitz 'How should judges adjudicate in an African constitutional democracy' in D Bilchitz et al (eds) *Jurisprudence in an African context* (2017) 67 94.

17 Ubuntu is often contradistinguished to René Descartes's *cogito ergo sum* or 'I think therefore I am', which is often said to have become a fundamental element of so-called Western individualism. See D Tutu 'Desmond Tutu Peace Foundation', http://www.tutufoundationusa.org/desmond-tutu-peace-foundation/ (accessed 3 December 2018).

18 MW Ngugi 'Africa is not a proverb' *Black Commentator* 23 April 2009, http://www.blackcommentator.com/321/321_africa_not_proverb_guest_wa_ngugi.html (accessed 10 June 2017).

19 G Sogolo *Foundations of African philosophy* (1993) 11; M Mluleki 'The African concept of ubuntu/Botho and its socio-moral significance' (2005) 3 *Black Theology* 215; see also VY Mudembi *The invention of Africa – Gnosis, philosophy and the order of knowledge* (1988).

20 N Kamwangamalu 'Ubuntu: A sociolinguistic perspective to a pan-African concept'

Kamwangamalu persuasively argues that ubuntu is pan-African and as a concept can be found in many other African languages. While not necessarily under a common name, ubuntu, Kamwangamalu determines, permeates across African societies through *Gimuntu* (giKwese, Angola); *Bomoto* (iBobangi, Congo); *Umundu* (Kikuyu, Kenya); *Vumuntu* (shiTsonga, Mozambique); and *Bumuntu* (kiSukuma, Tanzania), to mention a few.[21] Other similar concepts would include *ubumwe*[22] (Kinyarwanda, Rwanda) and *humwe*[23] (Shona, Zimbabwe).

In Namibia ubuntu finds equivalence in expressions such as *omundu menarovandu* among the OvaHerero; *uuntu wuuntu* or *omuntu omuntu omolwa aantu* among the aaNdonga, and *uuntu wamuntu* in Gciriku, to mention[24] only some Namibian ethnic groups.[25] Despite ubuntu's various renditions, the suffix *-ntu*, *-nhu* or *-ndu* found in many African language groups almost invariably connotes 'person' or 'people' or 'humanness'.[26]

Beyond linguistic intersections, scholars have identified expressions conveying the ethos of ubuntu in parts of East, West and Southern Africa such as *cieng* (pronounced 'cheng') of the Dinka peoples in South Sudan

(1990) 13 *Critical Arts* 24.

21 C Gade 'What is ubuntu? Different interpretations among South Africans of African descent' (2012) 31 *South African Journal of Philosophy* 486; D Louw 'The African concept of ubuntu and restorative justice' in D Sullivan & L Tifft (eds) *Handbook of restorative justice* (2008) 161.

22 A Purdeková *Making ubumwe: Power, state and camps in Rwanda's unity-building project* (2015) 147.

23 B Chigara 'The Humwe principle: A social ordering grundnorm for Zimbabwe and Africa?' in R Home (ed) *Essays in African land law* (2011) 113.

24 I have not established the existence of ubuntu in the non-Bantu language groups of Namibia such as the Khoisan peoples. However, this may be ascribed to the lack of research that traces the value rather than it being foreign to these groupings altogether. It is notable that ubuntu has been applied to other areas such as education in Namibia without there being an empirical claim as to the ubiquity of ubuntu as a value. Compare R Shanyanana 'Examining the potential of an ethics of care for inclusion of women in African higher education discourse' unpublished PhD thesis, University of Stellenbosch, 2014.

25 Given the ethnic and linguistic diversity of Namibia which is a unitary (as opposed to federal) state, for practical and legitimacy reasons, I will employ the term 'ubuntu' as opposed to any specific Namibian expression of the concept. This is to ensure that no one dominant group is linguistically privileged at the expense of others, resulting in the concept's rejection based on a perceived lack of local legitimacy. See also the reference to ubuntu as a principle of corporate governance in Namibia under the Corporate Governance Code of Namibia (Namcode).

26 S Lwanga-lunyiigo & J Vansina 'The Bantu-speaking peoples and their expansion' in M Fasi et al *The general history of Africa* (1993) 140-142.

and the Upper Nile region.[27] The Afrocentric philosopher Sheik Anta Diop has gone even further in demonstrating ubuntu's permeation of the Sahara-North Africa divide through the Egyptological concept of *Ma'at*.[28] However, I confine the claim and analysis to ubuntu as a sub-Saharan African value based on the strength of authority evaluated herein.

Ubuntu's ubiquity across sub-Saharan Africa deserves emphasis given the reality that Namibia – in its existing territorial sense at least – can be described as an accident of history, conceived through the political and economic self-interestedness of its former colonial powers.[29] Therefore, while a plurality of ethnicities, traditions, cultures, norms and values exists in Namibia, ubuntu remains a unifying and enduring value that cuts across Namibian communities of African indigeneity.

I hasten to provide the caveat that while the book proclaims 'Africa', it is done with ambivalence and caution that aims to avoid the problematic 'white gaze' of homogenising Africa or perpetuating the monolithisation of her people. This is in full appreciation of the reality that Africa is *not* a country. Africa's diversity is as voluminous as its geography, a truism that cuts across ethos, values, cultural, and social slants.[30]

Defining ubuntu

In African social-cultural life, the substance of philosophies, concepts and values such as ubuntu is often communicated creatively. This is because, as Ongyango and Mapaure both suggest, African indigenous justice systems and customary laws reflect those values enshrined over time by ancestors.[31] African customary laws and values such as ubuntu thus are generationally

27 M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339.

28 SA Diop *Pre-colonial black Africa* (1988) 141; cf Manden Charter of 13th century Malian empire, during the reign of Sunjata Keita, which was enacted in the Malian Empire and is considered one of the earliest human rights documents. The Manden Charter is often compared with the Magna Carta of 1215, although the Magna Carta was specifically focused on the freedom of privileged landlords to control their own property. L Quaynor 'Remembering West-African indigenous knowledges and practices in citizenship education research' (2018) 48 *Compare: A Journal of Comparative and International Education* 362.

29 See S Akweenda 'International law and the protection of Namibia's territorial integrity: Boundaries and territorial claims' (1997); E Okupa *Carrying the sun on our backs: Unfolding German colonialism in Namibia from Caprivi to Kasikili* (2006).

30 K Appiah 'The arts of Africa' (1997) 44 *New York Review of Books* 46.

31 P Ongyango *African customary law: An introduction* (2013) 153; C Mapaure 'Reinvigorating African values for SADC' (2011) 1 *SADC Law Journal* 148 152.

passed down by elders through oral traditions[32] that include idioms, musicology and folklore, in the process becoming binding on community members 'since time immemorial'.[33] The artistic communication of ubuntu sometimes results in varied interpretative renditions from one community to another. This reality may have invited the view by some scholars that ubuntu resists easy definition, being 'recognised when practised', existing 'only when people interact with each other', and 'cannot be neatly categorised and defined [as] any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea'.[34]

Some scholars such as Mokgoro assert that ubuntu's content becomes 'elusive' when discussed in a foreign language.[35] However, the more persuasive approach in my view is that advanced by Himonga et al who maintain that while it is not easy to define, one must nevertheless be able to discuss ubuntu and understand it in what many may regard as foreign languages.[36] The difficulty in expressing ubuntu should neither surprise nor delegitimise it as a value premise; expressive obtuseness is a norm that cuts across various abstract notions (including established concepts of dignity, equality, and liberty) that inform constitutional values, rules, and principles across societies. This reality must be grappled with and debated through language, even in colonial ones. Indeed, there is no plausible reason why ubuntu should be an exception; the challenge is to 'strive towards a shared and accepted understanding of ubuntu for communicating how to interpret the Bill of Rights'.[37] This, in my view, is a *sine qua non* for the acceptance and efficacy of ubuntu as a viable legal concept for re-invigoration. To this end, I will endeavour to grapple with defining ubuntu and teasing out its substance.

When defined through a socio-cultural lens, ubuntu represents multi-generational experiences. It is a multi-dimensional and relational worldview of African ontological values of interconnectedness,

32 E Okupa 'Is African customary law just?' in M Hinz (ed) *In search of justice and peace: Traditional and informal justice systems in Africa* (2010) 341.

33 The phrase 'since time immemorial' is the formulation widely used in an African traditional context to ascertain legitimacy. M Hinz 'Traditional governance and African customary law' in A Bösl *Human rights and the rule of law in Namibia* (2008) 59.

34 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1 2; J Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 177 178.

35 As above.

36 C Himonga et al 'Reflections on judicial views of ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 374.

37 Himonga (n 36) 378.

common humanity, collective sharing, obedience, humility, solidarity, communalism, dignity, and responsibility to one another.[38] Relatedly, ubuntu is a prescription for treating others as one would like to be treated. It also represents a command to care for one another and to embrace the principles of reciprocity and mutual support.[39]

While this definitional exposition of ubuntu is a good starting point, it is overly cross-cutting and unhelpfully dense, and thus will not suffice for purposes of ubuntu's legal conceptualisation. This is because the objective of this chapter is to establish a normative basis for a constitutional right to water. The normative basis will then inform the determination of the substantive content of a right to water through recourse to ubuntu as a non-textual constitutional value that can retain legal character.

Given the absence of Namibian jurisprudence that asserts African values including ubuntu, recourse is had to comparative perspectives – based on justifications articulated in chapter 1 – from other African jurisdictions. The celebrated *Makwanyane*[40] decision of the South African Constitutional Court had pioneered the judicial explication of ubuntu as a legal concept. While *Makwanyane* addressed ubuntu in relation to the constitutionality of capital punishment under the 1996 South African Constitution, the South African Constitutional Court's various concurring opinions were able to define and isolate the key features of ubuntu. These features can aid our understanding of the concept in the context of a right to water.

Ubuntu carries ideas of 'humaneness, social justice and fairness'[41] and places 'emphasis on communality and on the interdependence of the members of a community', thereby recognising a person's status as a human being who is entitled to unconditional respect, dignity, value, and acceptance from community members.[42] Mahomed J's *obiter* in *Makwanyane* that articulates the ethos of ubuntu is worth quoting:[43]

> [Ubuntu] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in

38 Elechi et al (n 4) 75; Kamwangamalu (n 20) 26; Mluleki (n 19) 215.

39 As above.

40 *S v Makwanyane & Another* 1995 (3) SA 391 (CC).

41 *Makwanyane* (n 40) (Madala J) para 237.

42 *Makwanyane* (n 40) para 224.

43 *Makwanyane* (n 40) (Mahomed J) para 263. Cf *Afri-Forum & Another v Malema & Others* 2011 (6) SA 240 (EqC) para 18, where the South African Equality Court identifies 12 salient features of ubuntu.

> recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

Mahomed J continues that ubuntu is personhood and morality, and describes the significance of group solidarity on survival issues so central to the survival of communities.[44] For her part, Mokgoro J asserts that ubuntu 'envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, [which] in its fundamental sense it denotes humanity and morality'.[45]

Moreover, beyond the South African judicial landscape, ubuntu has been judicially recognised and asserted in other African jurisdictions. The Lesotho High Court in *Mokoena v Mokoena*,[46] a case concerning succession under customary land rights, determined:[47]

> [T]he widow has a customary law right to expect her late husband's relatives to protect her and the property that her husband left her with … It is contrary to Basotho culture, good conscience and a sense of what is right in the African sense – that applicant should be attempting to deprive the widow of her house and arable lands (*masimo). It is not* botho *or* ubuntu *to dispossess a widow.*

Similarly, the Lesotho High Court in *Thabo Fuma*,[48] while not referring to ubuntu per se, quotes the South African Constitutional Court's *Hoffmann*[49] decision that linked dignity and ubuntu to conclude that the denial of employment to an HIV-positive soldier constituted unfair discrimination. In Uganda, the Constitutional Court in *Abuki* – a case concerning the constitutionality of the Ugandan Witchcraft Act – stated:[50]

44 *Makwanyane* (n 40) (Mahomed J) para 263.

45 *Makwanyane* (n 40) (Mokgoro J) para 307.

46 *Mokoena v Mokoena* [2007] LSHC 14 (Lesotho High Court).

47 *Mokoena* (n 46) paras 36-37 (my emphasis). Commenting on *Mokoena*'s recourse to ubuntu, Rautenbach remarks: 'The court did not explain the meaning of ubuntu, and it is evident that, being a native Sesotho speaker, he, and probably everyone else involved in the case, knew exactly what it meant from "experience".' Rautenbach (n 12) 300.

48 *Thabo Fuma v The Commander, Lesotho Defence Force* (2013) LSHC 68 (Lesotho High Court).

49 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

50 *Solvatori Abuki & Another v Attorney-General* [1997] UGCC 10 (my emphasis). Cf *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* (2013) eKLR para 26, where the Kenyan High Court in the context of the right to housing and forced evictions refers to the submission of Professor Yash Ghai on ubuntu where he refers to *Makwanyane*, one of the petitioners, but does not expressly accept or reject

> Of course, the concept of 'ubuntu', the idea that being human entails humaneness to other people, is not confined to South Africa or any particular ethnic group in Uganda. It is the whole mark [*sic] of civilised societies ... It will be recalled that the word 'ubuntu', though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda.*

Abuki's assertion is that ubuntu is not confined to South Africa. It also holds true for Namibia in light of the etymological analysis above.

In the same vein, it is essential to avoid 'oppositionalising' ubuntu as a value within African law and philosophy as opposed to, for example, Eurasian law and philosophy. Admittedly, the attraction towards oppositionalisation is a strong one given the replete nature of binarised approaches in legal conceptions. While one should be alive to the danger of seeking to legitimise the legal worth of knowledge from the Global South and perspectives such as ubuntu through the prism of Western sensibilities, drawing on non-African thought can also be helpful in imagining and understanding ubuntu as a relatively under-explored legal concept.

Letseka, for instance, invokes comparativism in the context of education to identify the shared traits between ubuntu and the Germanic notion of *bildung*. *Bildung* 'is about linking the self to the world in the most general, most animated and most unrestrained interplay … *bildung* as mimetic, that is, as non-teleological, undetermined and uncertain, and aimed at the reconciliation between outer historic-social and inner individual conditions'.[51] Additionally, the concept of 'recognition', as developed by Hegel and cited by Fredman, has a notable foundational view that retains ubuntu-esque features. Like ubuntu, 'recognition' holds that individual identity derives from inter-subjective recognition within the context of social relations which, again like ubuntu, allows an individual to only become an individual by recognising others and being recognised by them.[52]

the ubuntu reference.

51 M Letseka 'In defence of ubuntu' (2012) 31 *Studies in Philosophy and Education* 47-60 cites the German bildung scholar Wilhelm von Humboldt. Relatedly, the common law remedy of amende honourable (honourable amends) has been likened to ubuntu in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) (separate opinion of Sachs J) para 116; for a critique of this approach, see Rautenbach (n 12) 300.

52 G Hegel *Phenomenology of spirit* (1977) 104-109 cited in S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *South African Journal on Human Rights* 215.

3.2.2 Addressing the objections to ubuntu

Before turning to the principles of ubuntu, I first evaluate some of the most prominent objections to ubuntu as a constitutional value. I will compartmentalise these objections into three themes, namely, normative, redundancy and constitutionality objections.[53] While I will offer an evaluation of these objections, the main responses to counter or navigate the more meritorious arguments are embedded in the forthcoming analysis of ubuntu principles.

Normative objections

As far as normative objections are concerned, English is among those scholars who indict ubuntu's usefulness as a jurisprudential tool. She questions whether it 'simply means all things to all men' and claims that it serves only as a marketing device to give an 'African imprimatur' on Cartesian Western rights conceptions.[54] Another ubuntu sceptic, Kroeze, further finds that ubuntu is both a 'bloated' concept that tries to do too much but collapses under the weight of expectation while at the same time being 'empty'.[55] Curiously, others lament ubuntu's apparent density and susceptibility to abuse.[56]

In my assessment, these criticisms fail to meaningfully engage with and appreciate the jurisprudential wealth that ubuntu offers. At the least, it is no emptier than any other (Western) philosophical and values-based legal concept including dignity,[57] freedom, liberty and equality. The difficulty of explaining abstract concepts alone does not render them empty.[58] Indeed, a reasonable conclusion to be drawn from ubuntu's abstract and amorphous nature is that this suggests its under-elaboration

53 A concise summary is offered by Rautenbach (n 12) 306–307.

54 R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal on Human Rights* 641–648.

55 I Kroeze 'Doing things with values II: The case of ubuntu' (2002) 13 *Stellenbosch Law Review* 385.

56 J Hailey *Ubuntu: A literature review* (2008); W Binsbergen 'Ubuntu and the globalisation of Southern African thought and society' (2001) 15 *Quest - An African Journal of Philosophy*. See the rebuttal to V Bisbergen in J Bewaji & M Ramose 'The Bewaji, Van Binsbergen and Ramose debate on ubuntu' (2003) 22 *South African Journal of Philosophy* 378.

57 J Waldron 'Is dignity the foundation of human rights?' in R Cruft et al (eds) *Philosophical foundations of human rights* (2013) 121; M Bagaric & J Allan 'The vacuous concept of dignity' (2005) 5 *Journal of Human Rights* 257.

58 Himonga et al (n 36) 384-385.

and that it remains a work-in-progress.[59] Generality, imprecision and malleability are the inherent characteristics of constitutional values, yet this alone does not deprive such values of significance or the ability to retain substantive content. As the literature reviewed evinces, there are various interpretative understandings of ubuntu. Moreover, that ubuntu envelops various 'mainstream' legal values simultaneously ought not to disqualify its invocation. The principles of ubuntu that will be assessed below also offer a fuller retort to these normative objections.

Redundancy objections

It has been argued that ubuntu is redundant as it is not unique; it is simply glorified African communalism[60] and an African marketing tool for what essentially are Western human rights.[61] Further, ubuntu, the argument goes, is more easily lived out in smaller groups where people are not inevitably strangers to one another. This would cause difficulties in the operation of ubuntu as regards the relationship of individuals within the group or community.[62]

It is inaccurate to merely equate ubuntu to communalism, which itself retains a panoply of possible meanings. The two are not synonymous – as will be elaborated in the analysis of the community principle of ubuntu. A reading of ubuntu in this manner arguably is tendentious as it overlooks the fact that ubuntu allows us to at least attempt a harmonisation of African values with Western values that are deeply embedded in the prevailing legal culture using the Constitution's Bill of Rights as the forum.[63] Reducing ubuntu's worth to the small group setting is unimaginative and would be blind to the 'living' nature of African customary law that allows for the dynamic application of ubuntu.

Endogenous, autochthonous and pluralistic reasons are to be embraced to pursue the Africanisation of the legal culture imperative defended in my re-invigorative constitutionalism conceptualisation in chapter 2. Additionally, as Himonga observes, 'there is something very powerful about having one's judicial reasoning reinforced by two separate value systems',[64] particularly where one value system has systematically encroached upon the other, thereby providing force to the expression

59 Waldron (n 57) 122.

60 Himonga et al (n 36) 387.

61 English (n 54) 48.

62 Himonga (n 5) 171.

63 Himonga et al (n 36) 389.

64 As above.

of universal human rights. That ubuntu's Africanness finds no Western inheritance and is areligious is also significant. Perhaps most importantly, ubuntu's human-centredness, inclusiveness, accessibility, sense of socio-economic justice and aspirational nature make it an important concept to draw upon in normatively grounding human rights.[65]

Constitutionality objections

A further set of objections are those related to ubuntu's compatibility with constitutional touchstones. Like various African customary laws, values and norms, ubuntu can indeed retain interpretations that potentially counter other values that are pronounced by the Constitution. Patriarchal inequality is an illustrative exemplar with Kenyan theologian John Mbiti's account of ubuntu bringing this to bear:

> Only in terms of other people does the individual become conscious of his being, his own duties, his privileges and responsibilities towards himself and towards other people. When he suffers, he does not suffer alone but with the corporate group; when he rejoices, he rejoices not alone but with his kinsmen, his neighbours and his relatives whether dead or living. *When he gets married, he is not alone, neither does the wife 'belong' to him alone, so also the children belong to the corporate body of kinsmen, even if they bear only their father's name.*[66]

Mbiti's account of ubuntu indeed exposes its potential patriarchal underbelly. The language used demonstrates that ubuntu's manifestation may run counter to the Constitution's ethos and provisions on sex equality, for instance. Indeed, the conservativism in some highly-stratified African structures and patriarchal practices,[67] such as male primogeniture and women's limited land ownership and inheritance rights and, by extension, the exercise of water rights, in customary settings that may be in tension with the Constitution, remain embedded in society. Nevertheless, this should not justify the absolute rejection of ubuntu's re-invigoration so as to throw the proverbial baby out with the bath water. Rather, we should pursue a richer and more inclusive notion of ubuntu's meaning that develops its positive aspects.[68] The *Mokoena* decision from Lesotho, cited earlier in the context of household dispossession of widows, affirms how ubuntu can be invoked to counter problematic conceptions of customary

65 As above.

66 J Mbiti *African religions and philosophy* (1969) 108-110 (my emphasis).

67 Mokgoro & Woolman (n 7) 404.

68 In ruling that male primogeniture was unconstitutional, Langa DCJ in *Bhe* referred to ubuntu while elaborating on 'positive aspects of customary law [which] have been long neglected'. *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 45.

law. Indeed, a similarly moderate and incremental approach has been adopted in response to those problematic aspects of English and Roman-Dutch common law.[69]

Re-invigorative constitutionalism calls for building upon the positive in African values while confronting the negative. Fortunately, as a concept derived from customary law, ubuntu can be developed within the scope of the 'living law' nature of custom, thus being capable of evolution and adaptation to changing social conditions.[70] The African Charter on Human and Peoples' Rights (African Charter) in article 29(7) is candid as to the drawbacks inherent in certain African cultural values when it enjoins a duty on the individual to specifically 'preserve and strengthen *positive* African cultural values', as discussed in chapter 2. As Mokgoro argued, ubuntu's lack of specificity is a strength; the more open and flexible the concept, the greater its potential as a tool for aligning customary practices and conduct with human rights.[71]

I will thus develop a conceptual understanding of ubuntu that coheres with Namibian constitutional touchstones, particularly those within the Bill of Rights.

3.2.3 Principles encompassed by ubuntu

The preceding analysis demonstrates that ubuntu does indeed resist easy definition and attracts various objections. It may be argued that ubuntu's lack of precise meaning and abstractness makes it potentially consistent with the very nature of values in the Constitution.[72] As such, it is argued that we can best understand and apply ubuntu through identifying its central interrelated principles.[73]

Here, I depart from Himonga's characterisation of 'attributes' to 'principles' of ubuntu. I will thus unpack four central principles, namely, community, interdependence, dignity and solidarity.[74] This constellation

69 E Zitzke 'A decolonial critique of private law and human rights' (2018) *South African Journal on Human Rights 1*.

70 Himonga (n 5) 174.

71 Cited in Himonga (n 5) 171.

72 Himonga (n 5) 173. Important to highlight is the fact that Himonga's work on ubuntu is retrospective, looking at the right to health in South Africa and how ubuntu has impacted upon its interpretation.

73 As above.

74 Cf Himonga (n 5) 176, who identifies six interrelated attributes: community, interdependence, dignity, solidarity, responsibility and ideal.

of principles will be employed as tools in interpreting the normative basis for implying a right to water from the right to life in article 6 of the Constitution.

Community

Ubuntu includes the central idea of community whereby a relationship exists between the community and the individual. As Langa J describes ubuntu's communitarianism, 'we [Africans] are not islands unto ourselves'.[75] Here, I adopt Gyekye's concept of 'community' as a 'cultural community' which means 'a group of people with shared values and practices and a shared notion of common good, whether or not it has a shared language'.[76] Gyekye's definition of community allows us to conceptualise ubuntu communitarianism notwithstanding the differences in its linguistic formulation, focusing more on the shared 'habits, outlooks, practices, institutions, and cultural values' in these communities.[77] Thus, the idea of community as an element of ubuntu can apply to groups beyond the extended family.[78] As such, I argue that the ubuntu community would extend to the clan, village, tribe, neighbourhood, city and the nation-state, all as different kinds of 'communities'.[79] The construction of 'community' as including the nation-state – in this context the Namibian state – is coherent with the living law[80] nature of ubuntu as an African customary law value. This nation-state construction of community becomes particularly pertinent in ascribing correlative duties that accrue out of a right to water that arise in the context of the book.

Ubuntu communitarianism inevitably reveals tensions in the relationship between the individual and the community or the collective.

75 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) (Langa CJ) para 53, pointing out that the importance of community is not unique to African thought as community also cuts across Western philosophy, and points to various authorities in support in fn 30 of the opinion.

76 K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 43; Himonga (n 5) 174;

77 Himonga (n 5) 173.

78 As above.

79 Gyekye (n 76) 43.

80 The character of African customary law as 'living law' acknowledges its fluidity and adaptability to fit in with changed circumstances and that law emerges from the people. Customary law also emphasises oral traditions as sources which, as Himonga observes, 'this living customary law represents the unwritten practices observed, and vested with binding authority, by the people whose customary law is under consideration'. C Himonga 'The living customary law in African legal systems' in J Fenrich et al (eds) *The future of African customary law* (2011) 35. On living customary law, see also *Bhe* (n 68) para 87; M Hinz *Customary law ascertained* (2010).

In the context of rights, this requires a reconciliation of the rights of the individual in relation to those of the collective. There are generally two approaches to community: radical and moderate.[81] The radical view of community would require that the individual's rights and interests be sacrificed at the altar of those of the group. This approach to African communitarianism is embraced in the ideological perspectives of Kwame Nkrumah and Julius Nyerere. The individual can only say 'I am, because we are; and since we are, therefore I am'.[82]

In contrast, moderate communitarianism, which I endorse in light of my justification of moderate cultural relativism in chapter 2, rejects the approach that African communitarianism represents the idea that the traditional African social order was absolutely communal and blind to the 'status and relevance of individual rights'.[83] Gyekye, who cites the ideology of Senegalese founding President Leopold Senghor[84] and proverbs from the Akan people of Ghana, argues that the status of individuality and community are relative in the sense that 'no human society is absolutely individualistic, and that it is all a matter of emphasis or priority or basic concern with one or the other'. The gendered language notwithstanding, Steve Biko highlights the individual emphasis within the community by stating that 'the corner-stone of [African] society is man himself – not just his welfare, not his material well-being but just man with all his ramifications'.[85]

Moderate communitarianism would (arguably) assert the importance of both individual and collective rights. Where an irreconcilable tension between the two exists, it would place a greater, but not exclusive, emphasis on communal rights and interests rather than those of the individual.[86] Interpreting ubuntu communitarianism in its radical mould runs the risk of rendering ubuntu as unconstitutional; the Constitution retains a

81 Gyekye (n 76) 43.

82 J Mbiti *African religions and philosophy* (1969) 108-110 cited in *Himonga* (n 5) 175; Gyekye (n 76) 37.

83 Himonga (n 5) 175; Gyekye (n 76) 38.

84 It is worth noting that President Leopold Senghor was a driving force behind the adoption of the African Charter on Human and Peoples' Rights and had set the communitarian parameters for economic, social and cultural rights when he requested the drafting experts to 'keep constantly in mind our values of civilisation and the real needs of Africa'. Address of President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/X, reprinted in P Kunig et al (eds) *Regional protection of human rights by international law: The emerging African systems* (1985) 121.

85 S Biko *I write what I like* (1978) 46.

86 Himonga (n 5) 176.

sturdy individual rights outlook. Asserting a moderate communitarian interpretation would thus avoid transgressing the touchstone of constitutional supremacy over the customary law value that is ubuntu. Moreover, radical communitarianism may counterintuitively imply that African values would be apotheosised whenever value conflict arises. The prioritisation of collective rights over individual ones may also result in approaches that summarily exclude non-conforming individuals and minority groups.[87]

Here, it is worth reflecting on the central ethos of the African Charter to reveal the primordiality of community in Africa. While I comprehensively consider the African Charter in the chapter 4 analysis of a right to water under international law, it is material that the African Charter is distinctive from other human rights instruments (both national and supranational) as it incorporates all three traditional rights categories of civil-political, socio-economic, and group/solidarity rights as well as both individual and collective rights and duties, all of which are rendered justiciable.[88] This concept of rights indeed is informed by African communitarianism,[89] as summed up by Gyekye as 'a person is only partly constituted by the community'.[90]

Interdependence

The principle of interdependence can be seen in the various derivative phrases of ubuntu. Take, for example, the Oshindonga rendition *uunhu wuunhu* or 'personhood in people' or its isiZulu equivalent *umuntu ngumuntu ngabantu* or 'persons depend on persons to be persons'.[91] This emphasis upon interdependency between human beings is a tenet that Mbiti sums up appositely:[92]

87 O Oyowe 'An African conception of human rights? Comments on the challenges of relativism' (2014) 15 *Human Rights Review* 329 334.

88 M Ssenyonjo 'The influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 *Netherlands International Law Review* 259 262; C Odinkalu 'Analysis of paralysis or paralysis by analysis – Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.

89 Himonga (n 5) 170-171; O Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: Comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 148; R Howard 'Evaluating human rights in Africa: Some problems of implicit comparisons' (1984) 6 *Human Rights Quarterly* 160.

90 Gyekye (n 76) 59.

91 Himonga (n 5) 177.

92 *MEC for Education* (n 75) (Langa CJ) para 53; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; *Makwanyane* (n 40) para 308.

What happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. This demonstrates the strength of reciprocal duty between the individual and the group. The interdependence principle of ubuntu is also asserted in various decisions by South African courts.

Again, adopting a moderate form of communitarianism, I argue that 'interdependence should be understood to recognise the status of the individual as equal in moral terms to that of the community while emphasizing communal interests and rights'.[93] The crux nevertheless is that there is a shared responsibility to one another.

Solidarity

Ubuntu's solidarity requires that people should be able to count on those around them for support and thus they are obligated to assist society's needy in augmenting social solidarity.[94] It rejects selfish individual pursuits. Solidarity thereby sets down notions of what ties people together as mutual bonds of loyalty and protection. This is consistent with an outlook that does not hold a person as an isolated, abstract individual, but as 'an integral member of a group animated by a spirit of solidarity'.[95] This outlook informs the strong features of solidarity in African indigenous laws and African institutions.[96] The solidarity principle comes out strongly in the water management regimes operative in Namibian rural/communal areas, which have historically and presently been inhabited by people of African indigeneity. In this vein, Mapaure's quantitative and qualitative study on water provision in Namibian communities in the communal areas where customary law has asserted solidarity in that water rights and use could not be decoupled from land rights and use.[97]

93 Himonga (n 5) 178.

94 Himonga (n 5) 177; R Makgato 'Dignity and ubuntu: Epitome of South Africa's socio-economic transformation' (2016) 5 *Scientific Journal for Theory and Practice of Socio-economic Development* 68.

95 S Fredman *Human rights transformed* (2008) 18; *Okere* (n 89) 148.

96 Cf art 2(1)(a) Charter of the Organisation of African Unity of 1963; art 3(a) Constitutive Act of the African Union of 2000: 'The objectives of the Union shall be to (a) achieve greater unity and solidarity between the African countries and the peoples of Africa.'

97 C Mapaure '"Water wars": Legal pluralism and hydropolitics in Namibian water law' unpublished LLM dissertation, University of Namibia, 2010, http://repository.unam.na/bitstream/handle/11070/499/mapaure2009.pdf?sequence=1&isAllowed=y (accessed 18 February 2019) 40.

Dignity

The dignity principle of ubuntu requires the recognition of the worth of each individual in the community. This is captured through the notion of dignity that ubuntu advances as it requires human beings to be 'valued and respected for their own sake' without regard to their gender, ethnicity, race, intellectual, or mental capacities, and (an oft-neglected category that is critical to the water context) their socio-economic status.[98]

Defining ubuntu through the dignity principle inevitably leads to challenges related to contestations over the meaning of dignity in philosophical theory and as a constitutional value. Dignity, scholars observe, is often known to be a broad category that is overstretched, devoid of content, and vague.[99] It thus is of little surprise that leading ubuntu scholars such as Himonga and Metz have materially differed on the substance of dignity in the context of ubuntu.[100] Nevertheless, what ubuntu can facilitate are conceptions of dignity that are authentic, localised, de-colonial yet principled.

In my view, positive duties that arise out of rights can best be justified through an understanding of ubuntu as dignity. Where persons are in need of certain socio-economic goods for their subsistence, they would retain a positive right claim,[101] which gives rise to positive duties. Dignity in the ubuntu sense thus requires a concern for livelihood and socio-economic well-being, which is to be contrasted with dignity in the Western sense which has been found to emphasise negative liberty and individual personality issues generally.[102]

The Namibian Constitution variously mentions dignity, perhaps most prominently as an inviolable human right in article 8 and the inherent dignity of all members of the human family recognised in the opening clause of the Preamble. The substantive meaning of dignity has further been developed in Namibian jurisprudence.[103] I do not propose displacing

98 Himonga (n 5) 179.

99 C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 655.

100 Himonga (n 5) 182.

101 Himonga 183.

102 S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 9.

103 *In Re Ex parte Attorney-General: Corporal Punishment by Organs of State* 1991 NR 178 (SC); *Trustco International v Shikongo* 2010 (2) NR 377 (SC). Cf *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC) para 35 (O'Regan J).

these conceptions of dignity. Nevertheless, I hold that the novelty and utility in considering dignity through the value of ubuntu allow us to adopt purposive, transformative and re-invigorative interpretative approaches that are anchored in concrete and localised values. Some scholars such as Cornell have advocated an interpretation 'that would ground the constitutional *grundnorm* of dignity, and not dignity that calls for the recognition of African humanist principles such as ubuntu'.[104] However, it is not necessary to strictly reconcile ubuntu with dignity. The viewpoint taken by Mokogoro and Woolman thus is compelling:[105]

> No one has suggested that we need to square ubuntu with equality or freedom, or reduce it entirely to community rights. We might do well to consider allowing these values to occupy their own separate spaces – closely aligned and overlapping, but with different roles to play when we apply our minds to constitutional conflicts … ubuntu and dignity do not map directly on to one another, but they do rhyme.

What follows is an application of ubuntu to article 6 of the Constitution.

3.3 Purposively interpreting article 6 through ubuntu to imply a right to water

In this part I will move to establish the normative basis for interpreting the right to life to imply a right to water using ubuntu – or, as some have characterised it, 'legal ubuntu'.[106] I earlier argued for a purposive interpretation method that is informed by value judgments. I have also advanced re-invigorative and transformative constitutionalism approaches. Therefore, I will consolidate these methods and apply them to interpret article 6 broadly, liberally, and purposively. In the process I prioritise ubuntu as a value of African extraction in the pursuit of socio-economic justice to advance normative justifications for asserting the existence of a right to water implied from the right to life.

In summary, when conceptualised as transformative, the Constitution enjoins an interpretation of its provisions in a manner that would be able to transform, among others, the gross socio-economic inequality prevailing in society. Drawing on Langa, transformative constitutionalism envisages the Constitution as a revolutionary instrument to address the prevailing chronic socio-economic deprivation. In asserting a normative basis for

104 D Cornell *Law and revolution in South Africa: ubuntu, dignity, and the struggle for constitutional transformation* (2014) 151.

105 Mokgoro & Woolman (n 7) 407.

106 Zitzke (n 69) 17.

this premise, I endeavour to invoke the value of ubuntu. As ubuntu is the antithesis of human suffering and deprivation, it can be deployed as a normative basis upon which the Constitution can 'create dependable [and durable] socio-economic transformation which safeguards human well-being'.[107] I argue that, taken collectively, ubuntu's principles of community, interdependence, solidarity and dignity affirm that all human beings have access to not only all the means necessary for their survival but also those goods necessary for a dignified existence. This would include their right to water.

In my view, ubuntu aids us in overcoming the three principal challenges facing the affirmative argument that water can be implied from the right to life. The first argument is that the right to life in article 6 should only be understood in the civil rights sense – the state is prohibited from taking a life through capital punishment, the unjustified use of force, or other extra-judicial means of killing. I will argue that ubuntu allows us to normatively justify a socio-economic dimension to article 6, in this case a right to water. Second, ubuntu in part allows us to justify the assertion of positive duties upon the primary duty bearer to realise a right to water under article 6. Third, ubuntu aids us in affirmatively identifying the state as the primary duty bearer for a right to water.

While I normatively ground these arguments in ubuntu, I will also rely on conceptions of rights that draw from the work of Shue and Fredman, as well as international human rights law that can aid us in making a right to water claim.

3.3.1 The socio-economic dimension of a right to water under article 6

Water is not explicitly mentioned in the Constitution's Bill of Rights provisions. A reading of article 6 of the Constitution may invite the suggestion that the provision was aimed at only including the civil rights dimensions at the exclusion of the socio-economic dimensions that would largely characterise a right such as water. This challenge is rooted in the familiar rights categorisation of a dichotomy between civil-political rights and socio-economic rights and even a trichotomy of solidarity/collective/peoples' rights. This is commonly expressed as first, second and third generation rights respectively. Accepting this, the categorisation leads to a dividing line of *judicially enforceable* first-generation civil-political rights as compared to *judicially unenforceable* second-generation socio-economic rights and even third-generation solidarity rights.

107 Makgato (n 94) 68.

In my view, ubuntu aids us to reject what Scott calls the 'legalistic "rigidification"'[108] of rights categories, or, more broadly, an interpretation that Mahomed AJA cautioned as being vulnerable to 'the austerity of tabulated legalism'.[109] This thereby embraces the co-permeation of rights categories. An ubuntu-inspired understanding of the right to life would imply that there is little or no distinction drawn between civil-political and socio-economic dimensions (although some ubuntu scholars do assert that the latter category should take prominence over the former).[110] Thus, the right to life expressed in article 6 can and should also accommodate a right to water claim that retains strong social and economic dimensions that are judicially enforceable.

I argue for an understanding of the right to life that is normatively grounded in the value of ubuntu. When grounded in ubuntu, without the necessaries to sustain human survival, life would be meaningless. Further, the right to life should not be understood as only the right of a person to exist in the purely biological sense of breathing etc. Rather, the right to life, when reflected upon with ubuntu, requires all the necessaries of life, which is understood through the prism of the dignity principle that compels that we value and respect the individual and their socio-economic status.[111] The nature of these 'necessaries of life' in the water context – whether an existential minimum core or more – is explored further in chapter 6. As such, principles of ubuntu, taken together, demand the recognition of the individual's worth qua a member of the community and that the right to life be constructed to require a material concern for the livelihood and socio-economic well-being of all members of society, which crucially includes their water needs.

Given that water provision in a water-poor context such as Namibia is predominantly procured through communal means, it is particularly apposite to embrace re-invigorative constitutionalism and apply the communitarian principles that inform ubuntu. As I have argued, this would be a moderate form of communitarianism, one that does not obscure the rights and interests of the individual to their personal water needs. This invites the recognition that the correlative duties attaching to a right to water are owed to both the community and to the individuals within them. This is also revealed in the solidarity principle accruing from ubuntu.

108 C Scott 'Reaching beyond (without abandoning) the category of "economic, social and cultural rights"' (1999) 21 *Human Rights Quarterly* 633 635.

109 *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) 71.

110 Oyowe (n 87) 333.

111 Himonga (n 5) 179.

This construction of ubuntu allows the individual-versus-community rights tensions that may arise to be carefully navigated by understanding that, while the individual is communal in nature, they simultaneously retain individual free will and the vision of life that they wish and choose to live. This construal would thus prioritise the recognition of the intrinsic value of every and all individuals that constitute the community.[112] In line with Metz's application of ubuntu to socio-economic aspects, the principle of respecting the communal nature of many African societies would require that we take heed of 'positive' human rights to socio-economic assistance.[113]

International law is also resourceful in overcoming the civil-political-versus-socio-economic rights divide that treats the right to life as falling squarely within the latter category. I will elaborately argue in chapter 4 that international law can be applied in Namibia directly and invoked in constitutional Bill of Rights interpretation. On this interpretative basis, ICCPR is instructive here as I have relied upon the UN HRC's General Comment 36 to advance a broad interpretation of 'life' in article 6 of ICCPR to include socio-economic dimensions.

The HRC's approach is reflected in the African regional jurisprudence, principally *SERAC*,[114] considered in chapter 4. International law thus offers us interpretative support for the construction of life in article 6 of the African Charter as inclusive of socio-economic entitlements such as water, in addition to its civil-political rights dimensions. The related arguments that advance the *transitivity principle* will receive closer treatment in the chapter 5 consideration of the justiciability objections arising out of the assertion of an implied right to water.

Therefore, a reading of article 6 of the Constitution through ubuntu, with the aid of international law sources cited, normatively justifies and grounds the right to water as an implied socio-economic dimension of the right to life.

Following the determination that a right to water can be implied from the right to life, attention should be given to the nature of the duties that arise from a right to water. I will argue that there are three correlative duties, duties that include both negative and positive dimensions and

112 D Bilchitz 'What is a just distribution of resources?' in D Bilchitz et al (eds) *Jurisprudence in an African context* (2017) 131 159.

113 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532 550.

114 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR).

attract duties to respect, protect and fulfil. The *respect* and *protect* duties, generally viewed as negative duties, can be asserted on the basis of the express wording of article 6: A right to water must be protected and respected. However, the *fulfil* duty, which requires positive action by the duty bearer, needs further elaboration in light of its textual omission from article 6 to which I turn next.

3.3.2 Article 6 and the textual absence of 'fulfil' positive duties

Chapter 2 demonstrated that the Namibian Supreme Court's interpretative approach is one that is grounded in purposive interpretation and thus rejects the strict, narrow, and precise construal of constitutional words and phrases; a generous, broad and purposive approach is to be preferred. Yet, I have asserted that the Supreme Court has not discounted the relevance of the language that is employed by the Constitution's text. Thus, an attentiveness to the precise constitutional language is necessary to ascertain the underlying scope of, in this case, article 6. This responds to the imperative to respect the language of the Constitution, even in circumstances where generous rights interpretations are adopted.[115]

In this light, one text-based argument that may be put forward to undermine an ubuntu-inspired interpretation of article 6 as implying a right to water that includes positive duties upon the duty bearer can be identified: Article 6 explicitly mentions the duties to *respect* and *protect* but omits the *fulfil* duty. Indeed, the respect and protect duties may gesture towards negative duties of restraint while the fulfil duty suggests positive duties of action on the part of the duty bearer. Be that as it may, the forthcoming analysis will demonstrate that these arguments do not hold water.

While the focus is on the text of article 6, the interpretative analysis must not lose sight of the relevance of other provisions in the Bill of Rights to holistically and harmoniously interpret the Constitution. I, therefore, advance the view that the state's positive duties can be drawn from a holistic reading of article 6 together with article 5. Article 5 generally manifests both the vertical and horizontal obligations that attach to the Bill of Rights in chapter 3, which includes the right to life. These are to be 'respected and upheld' by the three branches of the state and all organs of government.[116]

115 *S v Zuma* 1995 (2) SA 642 (CC) para 18: 'We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to "values", the result is not interpretation but divination.'

116 Taking into consideration the vertical and horizontal application of rights per art 5, Constitution. See *S v Myburgh* 2008 (2) NR 592 (SC) 618 (concerning the Court's duties

To meaningfully *uphold* a right to water, the correlative duties that accrue thereto ought to include the positive duty to *fulfil*, notwithstanding that *fulfil* is not explicitly mentioned. The Namibian Supreme Court is yet to fully engage with the nature of article 5 duties in a majority decision. However, the dissenting opinion of O'Linn AJA in *Mwilima*[117] offers support for the view that the state bears positive obligations to provide or fulfil in light of the general obligation contained in article 5, even though the specific provision being interpreted – the article 12 right to a fair trial in *Mwilima* and the article 6 implied right to water for purposes of my argument – may not include language that expressly identifies positive duties.

Further, in justifying the cogency of the normative approach that the *fulfil* dimension of a right to water is to be read into article 6,[118] I rely on Shue and Fredman's conception of specifically *positive* duties.[119] The article 6 right to life should be understood as invoking both positive and negative duties.[120] It is impossible to respect and protect the right to life without taking a wide range of positive actions that include the active provision of water to persons. As such, borrowing from Shue, every basic right including the right to life attracts three types of correlative duties: to *avoid* depriving (akin to respect); to *protect* from deprivation; and to *aid* the deprived (akin to fulfil).[121]

While the correlative duty to aid or fulfil in this typology is not explicated in article 6, I argue that it ought to be read into the provision on the basis of a broad, generous, and purposive interpretation. On the contrary, a narrow, mechanical and restrictive interpretation would assume that article 6-derived rights only retain the two correlative duties

to respect and uphold ch 3 through enforcement mechanisms); N Horn 'Human rights in the private sphere' (2014) 6 *Namibia Law Journal* 30 43-44. Comparatively, see also *Du Plessis & Others v De Klerk* 1996 (3) SA 850 (CC) para 45, where Kentridge AJ compares the construction of the South African 1993 Constitution equivalent to the Namibian Constitution's art 5 on the horizontal application of rights.

117 *Mwilima v Government of the Republic of Namibia* 2002 NR 253 (SC) 256 270 (O'Linn AJA dissenting).

118 To the extent that the original intention is relevant, there is no evidence in the Constituent Assembly Debates that the drafters had sought to exclude the state's positive duties under art 6. Namibia Constituent Assembly Debates 21 November 1989 – 21 January 1990 Volume 1 and 2 (Namibia National Archives 1990).

119 H Shue *Basic rights: Subsistence, affluence and US foreign policy* (1980) 51; Fredman (n 95) 69.

120 Per Shue, positive rights require that people act positively, that is, people are required to actively do something, while negative rights require that people refrain from acting in certain ways that would violate the right. Shue (n 119) 36.

121 Shue (n 119) 52–53.

that are constitutionally specified, a claim that Fredman and Shue have both thoroughly disproved as artificial.

As stated above, Shue's[122] seminal work has established the three correlative duties that every right attracts: respect, protect and fulfil. The cogency of this understanding of rights becomes apparent when we consider other more 'established' rights such as the right to a fair trial[123] and the right to vote.[124] While no *fulfil* dimension is referenced in the relevant constitutional provisions, it is accepted that the state has an obligation to take positive action such as establishing an effective criminal justice system with courts and providing the facilities for elections to be conducted.

The three correlative duties approach, by and large, is now well-entrenched in the contemporary understanding of human rights internationally. We have seen an embrace for the positive duties that accrue from article 6(1) of ICCPR, which duties enjoin the state to 'ensure' the right to life. This entails positive steps that are to be taken by the state as necessary for individuals to realise their rights. Further, the tripartite nature of duties has been endorsed in international soft law (a source assessed in chapter 4) such as the Maastricht Guidelines. Guideline 6 states that '[l]ike civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to *respect*, *protect* and *fulfil*. Failure to perform any one of these three obligations constitutes a violation of such rights.'[125]

In relation to this, the Maastricht Guidelines maintain that the obligation to *fulfil* requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the socio-economic dimensions of a right to water.[126]

122 Shue (n 119) 51; Fredman (n 95) 69.

123 The Constitution, art 12.

124 The Constitution, art 17(2).

125 My emphasis. 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997' which are reprinted in (1998) 20 *Human Rights Quarterly* 691. While the Maastricht Guidelines are not binding, they remain highly persuasive as the guidelines reflect an international consensus and have been 'widely accepted as an interpretive tool, utilised in discerning the duties incumbent upon states'. V Dankwa et al 'Commentary to the Maastricht Guidelines on violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 705 731.

126 Dankwa (n 125); Fredman (n 95) 6.

Concerning the positive duties accruing to the state, the *Mwilima*[127] majority also provides us with authoritative support. In this case the Supreme Court affirmed the positive duties arising out of the right to a fair trial to provide indigent accused with legal aid at the state's expense. The *Mwilima* majority, in relation to the positive and negative nature of duties arising from article 12, stated:[128]

> It seems to me that this argument is based on the wrong premise that the duty to uphold the rights and freedoms are all of a negative nature, i.e. that as long as those who must uphold the rights and freedoms refrain from doing anything, their obligation is fulfilled. *That may be so in regard to some of the rights and freedoms but there are also rights where positive action is required* such as [in article 16(2) requiring just compensation for expropriated property]. If this were not so it would mean that the right becomes illusory and affords no protection to the aggrieved person. In my opinion there is also a positive duty on [government] to ensure the right to a fair trial and where this means that an indigent accused must be provided with legal representation in order to achieve that object, that duty cannot be shirked by [government].

While the *Mwilima* majority's understanding of positive duties is commendable, it still falls short insofar as it takes the view that only some rights and freedoms require positive action on the part of the state. As I have argued above, all rights require positive action and thus establish all three correlative duties to fulfil, respect, and protect.

Building on this, Fredman observes that 'focusing on the different types of duties rather than the different types of rights gives one a more sophisticated tool for analysis and implementation' of a right.[129] Fredman adds that the value of the respect-protect-fulfil trichotomy lies in that it provides an opportunity to go beyond debates as to whether positive duties arise from a given right. Instead, we can begin to understand the *nature* of the positive duties that the right gives rise to.[130] This will indeed be the focus of chapter 6.[131]

127 *Mwilima* (n 117).

128 *Mwilima* (n 117) 256 (my emphasis).

129 Fredman (n 95) 69-70.

130 As above.

131 Worth noting is the quadripartite typology of duties that adds a fourth dimension, to recognise. This is prominently put forward by Normand as imposing obligations on states to not only ratify human rights treaties but also, for non-state actors, to accept human rights responsibilities. However, as Ssenyonjo argues, a duty to recognise is problematic as it undermines the fundamental principle that state consent to be bound by treaties through ratification is a purely voluntary measure to be decided through the exercise of the state's free will and sovereignty. M Ssenyonjo *Economic, social and*

It is worth noting that the argument has been made for a move away from a trilogy (or tetralogy) of duties in favour of the 'waves of duties' understanding of human rights obligations that Waldron propounded.[132] For Waldron, human rights duties should not be rigidly aligned with a Shueian trilogy of duties approach. They should rather take an enhanced understanding through presenting duties as *waves*. Waldron points out that '[e]ven a particular duty, thought of as associated with a right, itself generates waves of duties that back it up and root it firmly in the complex, messy reality of political life'.[133] Waldron asserts that the waves of duties means that these rights come with multiple successive duties that require commission, omission, and other forms of action.[134] Thus, the duties that a right to water, in the context of this book, would generate, the argument goes, cannot be neatly compartmentalised into separate and independent duties as the trilogy of duties may speciously imply. It is noted that Waldron's waves of duties approach is not intended to stultify the value in Shue's trilogy of duties approach but rather offers a critique that 'enhances' the duties understanding.

Koch has taken a firmer critique of the trilogy of duties approach and cites various disadvantages as the reason for her abstaining from employing it in favour of the waves of duties approach.[135] Koch's scholarship cannot, however, be approached with a broad-brush, universal lens as it is analytically constrained to the European Convention on Human Rights (ECHR) context and the corollary jurisprudence of the European Court of Human Rights (European Court), in addition to the HRC and ESCR Committee. Koch does not offer an assessment of other regional human rights systems such as Africa or Inter-America. Certainly, in the African system, there is a strong treaty basis for a trilogy of duties approach, and one which is countenanced in various African Commission on Human and Peoples' Rights (African Commission) decisions and instruments, as assessed particularly in chapter 4 of this book. I will thus follow a trilogy of duties approach in delineating a right to water obligations of the Namibian state in this book. However, mindful of the merits in Waldron and Koch's critique of the trilogy of duties approach, I will invoke the trilogy as an organising typology for the various duties that are generated by a right to

cultural rights in international law (2016) 36.

132 J Waldron 'Rights in conflict' (1989) 99 *Ethics* 503 509.

133 As above.

134 J Waldron 'Liberal rights: Two sides of the same coin' in J Waldron (ed) *Liberal rights: Collected papers 1981-1991* (1993) 1 25.

135 I Koch *Human rights as indivisible rights: The protection of socio-economic demands under the European Convention of Human Rights* (2009) 25; I Koch 'Dichotomies, trichotomies or waves of duties' (2005) 5 *Human Rights Law Review* 8.

water to offer conceptual clarity and ensure systematic organisation in my analysis of the various duties that water retains, to which I will turn in chapter 6.

3.3.3 Identifying the state as the primary duty bearer for a right to water

Affirming an ubuntu conception of the right to life that implies a right to water gives rise to the question of the identity of the primary duty bearer for the right's realisation. Indeed, a right to water would only be worth normative development and effective for the right holder if there is an identified duty bearer in the first place, who is obligated to, and capable of, shouldering the weight of duties.[136] As I have argued, the duties are threefold: to respect, to protect and to fulfil. Here, I focus on developing an argument for the state – acting through the executive and legislative branches principally – to be the *primary* duty bearer to realise a right to water.

I recognise that there may plausibly be other duty bearers beyond the state. This may include domestic or international non-state actors such as corporations,[137] international financial institutions,[138] and even third states owing to their extra-territorial international law obligations.[139] This is a reality that is of heightened importance in the age of globalisation and where non-state actors may retain *culpability* for human rights violations or *capability* in human rights realisation. However, my focus here remains exclusively upon the Namibian state as the *primary* duty bearer.

The community and interdependence principles of ubuntu aid us here as these require that individuals are not seen as isolated beings. Rather, there is a shared responsibility upon all members of society to ensure that individuals do not suffer deprivations of those socio-economic goods that

136 J Waldron 'Duty-bearers for positive rights' (2014) New York University Public Law and Legal Theory Working Papers Paper 497 1 2.

137 See J Hazenberg 'Transnational corporations and human rights duties: Perfect and imperfect' (2016) 17 *Human Rights Review* 479. For an argument on private mining companies' liability for right to water violations in South Africa, see O Fuo 'The right of access to sufficient water in South Africa: Comments on *Federation for Sustainable Environment & Others v Minister of Water Affairs* [2012] ZAG PPHC 128' (2013) 20 *Murdoch University Law Review* 21.

138 See M Salomon et al (eds) *Casting the net wider: Human rights, development and new duty bearers* (2007).

139 See T Bulto *The extraterritorial application of the human right to water in Africa* (2014); M Ssenyonjo 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15 *International Journal of Human Rights* 969 986-989.

are necessary to realise a dignified life. Water no doubt is among those indispensable socio-economic goods to which they must have access. Thus, ubuntu dignity requires a concern for the livelihood and socio-economic well-being of the individual, while ubuntu interdependence requires a recognition of the individual's status as equal in moral terms to that of the community, although communal interests and rights remain relevant in any distributive assessment.

I have earlier argued for Gyekye's version of ubuntu communitarianism of the moderate variety to be applied to the nation-state context. To realise every individual's ubuntu requires not only sympathy with those who suffer socio-economic deprivations but also active provision on the part of the state as the primary duty bearer of a right to water. Further, through ubuntu's principle of solidarity, as Metz advances, communal relationships would be honoured by requiring that the state must do what it can to improve the quality of life for individuals. Metz's philosophical interpretation of ubuntu thus constructs it as a moral theory that conceptualises human beings as retaining dignity owing to their capacity for community, which Metz understands to be a combination of identity with others and exhibiting solidarity with them, whereas human rights violations result in egregious degradations of their capacity for community.[140]

A more textual basis for this argument can also be advanced when we read a right to water together with article 5 of the Constitution, which is the general scope of application clause for Bill of Rights provisions in the Constitution. Article 5 positively identifies the primary duty bearer as the state (understood as the executive, legislature and judiciary) in relation to the obligations that are owed to the individual in the enjoyment of their fundamental rights contained in chapter 3. As I have argued earlier, this provides that the rights and freedoms must be respected and upheld, importing both negative and positive duties.

Materially, the article 6 right to life, in addition to being entrenched[141] as a fundamental right in chapter 3 of the Constitution, is listed as one of the non-derogable fundamental rights in those exceptional cases where derogation would be permissible in state of emergency circumstances.[142]

140 I engage Metz's theory advisedly while fully aware of Oyowe's meritorious critique of his ubuntu moral theory. O Oyowe 'Strange bedfellows: Rethinking ubuntu and human rights in South Africa' (2013) 13 *African Human Rights Law Journal* 103; Oyowe (n 87) 333.

141 The Constitution, art 131.

142 The Constitution, art 24(3).

There remain critical questions on article 22's justifiable limitations upon chapter 3 fundamental rights that arise.[143] These will receive attention in the chapter 6 discussion of the content of a right to water.

In this light, the normative basis for a right to water from the right to life in article 6 of the Constitution can be grounded in ubuntu. This does not conclude the analysis, however, as the substantive content of the state's obligations concerning water will be developed in chapter 6.

Having applied a purposive approach to article 6 to imply a right to water using the tools of transformative and re-invigorative constitutionalism, I now consider potential original intent objections.

3.3.4 Original intent concerns in implying a right to water from article 6

In this part I will argue that applying an original intent approach to article 6 paints an opaque picture as to the inclusion, or otherwise, of water within the scope of the right to life. I have argued in the preceding chapter that applying original intent as the *determinative* constitutional interpretative approach would be ill-advised. I will nevertheless argue that, even if an original intent approach is applied, as the Supreme Court has on various occasions, there is a dearth of evidence to support a claim that a right to water is excluded from article 6. I demonstrate below that there is no evidence that the Constitution's founders manifested an intention to have 'life' construed in the strictly negative sense, or that 'life' is confined to a civil right, or as prohibiting only the deprivation of life through capital punishment or other deprivations of life emanating from state conduct. I build this argument by considering historical sources that reflect the Constitution's drafting.

The original intention of the founders can be principally deduced from two sources: the drafting history of the Constitution and the minutes of the Constituent Assembly Debates.[144] UNSC Resolution 435[145] had initially outlined Namibia's independence and peace plan, thus paving the way for the Constitution's drafting and adoption. For a synthesis of political, military and geopolitical reasons that are outside the scope of this book, the implementation of Resolution 435 was delayed by over ten years. The first Namibian elections with universal and equal suffrage took place in

143 The Constitution, art 22.

144 The drafting history of the Constitution does not reveal a single founding figure such as George Washington for the US Constitution or BR Ambedkar for the Indian Constitution.

145 UNSC Resolution 435 (29 September 1978) UN Doc S/RES/435 (1978).

1989 under the control and supervision of the UN Transitional Assistance Group (UNTAG). These resulted in the election of the Constituent Assembly of which the primary mandate was to draft a constitution based on what came to be known as 'the 1982 Constitutional Principles'.

I will thus consider the 1982 Constitutional Principles as a key source to illuminate the drafting history and intention behind the provisions of the Constitution, specifically the article 6 right to life. Further, owing to the chapter 3 Bill of Rights provisions in the Constitution being fundamentally a progeny of the Universal Declaration, the Universal Declaration would be at the heart of any analysis of the 1982 Constitutional Principles and, therefore, by necessary implication, an understanding of the intention behind the Constitution's Bill of Rights provisions themselves.

3.3.5 The Universal Declaration and the 1982 Constitutional Principles as original intent sources

History records that in 1982 a letter was circulated to the erstwhile member states of the United Nations Security Council (UNSC) with an annexure that set out eight 'Principles for a Constituent Assembly for the Constitution of an Independent Namibia'.[146] The genesis of the 1982 Constitutional Principles is that these were drawn up pursuant to UNSC Resolution 435 and unanimously agreed upon by the Western Contact Group,[147] together with the 'parties concerned' – the frontline states,[148] the South West Africa People's Organisation (SWAPO), and various other Namibian political actors, as well as apartheid South Africa.[149] The 1982 Constitutional Principles enjoined the Constituent Assembly to formulate a constitution for an independent Namibia in accordance with the eight principles that were adumbrated therein.[150] These Principles are patently

146 UNSC Resolution 435 Annexure. Principles for a Constituent Assembly and for the Constitution of an independent Namibia; M Wiechers 'Namibia: The 1982 constitutional principles and their legal significance' (1989/1990) 5 *South African Yearbook of International Law* 1.

147 Britain, USA, Canada, West Germany and France.

148 Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe.

149 Wiechers (n 146) 2.

150 The eight principles may be adumbrated as follows: a unitary, sovereign and democratic state; constitutional supremacy; three government branches including an elected legislature, an executive, and an independent judiciary responsible for constitutional interpretation; a multi-party, proportional representation electoral system; a declaration of enforceable fundamental rights consistent with the UDHR; non-retrospectivity of criminal offences; a balanced public service, police service and defence services structure with equal access; and the establishment of elected councils for local and/or regional administration.

predisposed to liberal democratic values. For our purposes, the most material is Principle Five as reproduced here:[151]

> There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement, to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. *The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.*

The italicised text of Principle Five directs us to the Universal Declaration. As such, two provisions of the Universal Declaration are most relevant for our purposes. First, the Universal Declaration's right to life provision states that '[e]veryone has the right to life'.[152]

Second, the right to an adequate standard of living in article 25(1) of the Universal Declaration states that '[e]veryone has the right to a *standard of living adequate for the health and well-being of himself and of his family, including* food, clothing, housing and medical care and necessary social services'.[153] Adopting an original intent approach leads us to consider Principle Five of the 1982 Constitutional Principles and its requirement that the Bill of Rights in the Constitution to be consistent with the Universal Declaration. The Universal Declaration does not specify the scope of 'life' in article 2 and is silent on whether life is restricted to the civil sense or whether it can also accommodate socio-economic dimensions.

Article 25 of the Universal Declaration recognises the various socio-economic goods mentioned therein as 'rights'. These rights retain the ability to be vindicated in law as enforceable rights, a conclusion drawn from the final sentence of Principle Five that entitles aggrieved individuals 'to have the courts adjudicate and enforce these rights'. Those rights mentioned are tied to the right to an adequate standard of living as the level to which their realisation should aspire. Although not explicated, this would include water given the non-exhaustive listing of rights relevant to the right to an adequate standard of living. The cogency of

151 My emphasis.

152 Universal Declaration, art 3.

153 My emphasis.

this interpretation is developed further in the international law context considered in chapter 4.

Moreover, when considering article 25(1) of the Universal Declaration's inclusion of socio-economic rights on par with civil-political rights, a strong inference can be made that the Constitution's founders also intended to protect the status of human rights to these socio-economic entitlements. This inference is particularly attractive if one accepts that the founders were either (a) bound by the 1982 Constitutional Principles as a matter of international law; or (b) bound on the basis that the Constituent Assembly adopted the 1982 Constitutional Principles as the constitutional drafting framework. I will elaborate upon these arguments in the analysis of the legal status of the 1982 Constitutional Principles below. Therefore, the argument follows that while the Bill of Rights in the Constitution does not explicitly mention a right to water – or even the other socio-economic rights that are explicitly mentioned in the Universal Declaration such as food, clothing, housing, and medical care – these were not intended to be excluded from the corpus of human rights by the drafters.

I also draw attention to the reality that there is no direct record from the Constituent Assembly Debates to suggest any consideration of, or controversy around, the constitutional recognition of socio-economic entitlements such as water as enforceable human rights.[154] While the argument can be made that the founders of the Constitution's inclusion of constitutional Principles of State Policy (PSPs) that reference socio-economic entitlements related to an adequate standard of living as non-enforceable, I will more appropriately address this argument in the analysis of the potential textual justiciability objections that will arise from an implied right to water in chapter 5. At this stage, the conclusion is that the original intent approach has left the door open for the argument to be made that an enforceable right to water can be interpreted as a part of the Constitution's Bill of Rights, specifically the article 6 right to life.

3.3.6 Legal status of the 1982 Constitutional Principles

In light of my reliance upon the 1982 Constitutional Principles in evaluating the 'negative' argument that an original intent approach *does not* exclude an interpretation of enforceable socio-economic rights such as water from being interpreted as part of the right to life, I will consider the legal status of the 1982 Constitutional Principles and their continued legal effect in post-

154 This arguably is not surprising as the Constitution's drafting context (1989-1990) was such that there were limited comparative human rights precedents that constitutionalised socio-economic rights in the bills of rights of national constitutions.

Constituent Assembly Namibia. These issues have been raised in Namibian courts but remain without definitive judicial determination.[155] The issues have also been the subject of debate among Namibian constitutional scholars.[156] Even at the time of adopting the Constitution, divergent views were being expressed by Constituent Assembly members as to whether the Constituent Assembly was legally bound to follow the 1982 Constitutional Principles in their drafting of the Constitution.[157] However, this issue became moot when the Constituent Assembly unanimously resolved to adopt the 1982 Constitutional Principles as a framework to draw up the Constitution.[158] It is not insignificant that no detailed and robust process of legal certification to ensure the Constitution's compliance with the 1982 Constitutional Principles was adopted, such as the certification of the 1996 South African Constitution by the South African Constitutional Court.[159]

I first consider the views of Wiechers, who has asserted that the legal status of the 1982 Constitutional Principles is such that they were, and remain, binding upon Namibia. In Wiechers's view, the 1982 Constitutional Principles formed part of a binding UNSC resolution through their incorporation into Resolution 435's Peace Plan.[160] This Peace Plan (and thus the 1982 Constitutional Principles which the Peace Plan included) was approved in UNSC Resolution 632.[161] Resolution 632 expressly references and approves the UN Secretary-General's Report[162]

155 *S v Heita* 1992 NR 403 (HC) 406; *Kauesa v Minister of Home Affairs* 1994 NR 102 (HC) 137; *Chairperson of the Tender Board v Pamo Trading & Another* 2017 (1) NR 1 (SC) para 37. All these cases reference the 1982 Constitutional Principles but reach no determination as to their status and continued legal effect.

156 Wiechers (n 146); N Horn 'Forerunners of the Namibian Constitution' in A Bösl et al (eds) *Constitutional democracy in Namibia* (2010) 63.

157 Constituent Assembly Debates (n 118) 10-17.

158 'Mr T-B Gurirab: I want to make a formal proposal, indeed a formal motion, that the Constituent Assembly in this sitting adopt the 1982 constitutional principles as the framework for the constitution that we are going to draft. That is my formal motion.' Constituent Assembly Debates (n 118) 16.

159 *In re Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC).

160 Wiechers (n 146) 2.

161 UNSC Resolution 632 (1989) of 16 February 1989 UN Doc S/RES/632. The relevant provisions state: '*Having* considered the report of 23 January 1989 submitted by the Secretary-General and his explanatory statement of 9 February 1989 … *Approves* the report of the Secretary-General and his explanatory statement concerning the implementation of the United Nations plan for Namibia' (emphasis in original).

162 Further 'Report of the Secretary-General Concerning the Implementation of Security Council Resolutions 435 (1978) and 439 (1978) Concerning the Question of Namibia' (S/20412) 23 January 1989, http://undocs.org/S/20412 (accessed 14 July 2017) para 35 states: 'The United Nations plan for Namibia includes agreements and understandings reached by the parties since the adoption of Security Council Resolution 435 (1978) and

and the explanatory statement concerning the implementation of the UN Plan for Namibia.[163] Wiechers observes that the approval of the 1982 Constitutional Principles 'gives irrefutable support to the view that these Principles became part and parcel of the overall peace plan'.[164] This made the 1982 Constitutional Principles an 'internationally validated framework' for Namibian independence and the future Constitution.[165]

Wiechers thus accords the 1982 Constitutional Principles the status of a *binding* UNSC resolution. Their binding nature emanates from the premise that UNSC resolutions are binding upon all UN member states, including Namibia, by virtue of article 25 of the UN Charter under which UN members 'agree to accept and carry out the decisions of the Security Council'.

While I concur with Wiechers's view that the 1982 Constitutional Principles were *binding at the time of drafting* the Constitution, his view that they are of *continued legal force and effect* after the Constitution's adoption is difficult to accept. Two prominent views on the continued legal force of the 1982 Constitutional Principles have been expressed. On the one hand, Wiechers argues that the 1982 Constitutional Principles *remain* a binding international obligation on the Namibian government. Thus, should the Constitution be amended (or discarded) to abrogate or violate the 1982 Constitutional Principles, Wiechers argues, this would constitute a breach of both UNSC Resolution 632[166] and the obligations arising out of article 25 of the UN Charter.[167]

Horn, on the other hand, asserts that Wiechers's evaluation 'goes too far'. Horn argues that even though the 1982 Constitutional Principles became a binding UNSC Resolution, 'they were never intended to have a life of their own'.[168] Horn concludes that once the Constitution had

> confirmed as such to the Secretary-General. *These agreements and understandings remain binding on the parties*. In this connection, I wish to draw attention to the following ... (c) The text of the Principles concerning the Constituent Assembly and the Constitution of an independent Namibia, which was transmitted to the Secretary-General on 12 July 1982 (S/15287) …' (my emphasis)

163 UNSC 'Explanatory statement concerning his further report (S/20412) concerning the implementation of Security Council resolutions 435 (1978) and 439 (1978) concerning the question of Namibia / by the Secretary-General' http://undocs.org/S/20457 (accessed 14 July 2017).

164 Wiechers (n 146) 8.

165 As above.

166 UNSC Resolution 632 (n 161).

167 Wiechers (n 146) 19.

168 Horn (n 156) 66.

been drafted in compliance with the 1982 Constitutional Principles and accepted by the Constituent Assembly, the 1982 Constitutional Principles became obsolete.

In my view, both Wiechers and Horn err in their analysis. In particular, Wiechers's position that embraces the *de facto* primacy of international law, in the form of the UNSC resolutions, over the dictates of Namibia's sovereign Constitution is problematic. The answer to determining the continued binding legal effect of the 1982 Constitutional Principles can be revealed by scrutinising the actual text of the 1982 Constitutional Principles, an aspect that both Wiechers and Horn appear to have overlooked in their analyses. The 1982 Constitutional Principles provided that '[t]he Constituent Assembly will formulate the Constitution for an independent Namibia in accordance with the principles' as outlined. It follows that the 1982 Constitutional Principles were only legally binding upon the *Constituent Assembly* and insofar as it related to the Constitution's drafting. Self-evidently, the Constituent Assembly, being a functional institution, has ceased to exist with the completion of the Constitution's drafting. Indeed, the Namibian legislature is now constituted of the lower chamber National Assembly and the upper chamber National Council. These chambers have succeeded the Constituent Assembly and are thus vested with the constitutional power, together with the President, to amend the Constitution.[169]

Although I agree that the 1982 Constitutional Principles were not intended to have a life of their own, the Principles were not rendered obsolete when the Constitution was adopted, as Horn suggests.[170] My view is that they continue to serve as a significant interpretative source, analogous to *travaux préparatoires*. As such, the 1982 Constitutional Principles should carry attenuated weight and can be *considered* in determining the original intention of the drafters. However, the Principles cannot alone be binding so as to be conclusive in interpreting a given constitutional provision. Therefore, even if an original intent approach is applied through recourse to the Constituent Assembly Debates and the 1982 Constitutional Principles, the door remains open for the interpretative inclusion of an enforceable socio-economic right to water implied from article 6, as I have argued.

169 The Constitution, art 123.

170 Horn (n 156) 66.

At this juncture, it is appropriate to transition into considering comparative perspectives on a constitutional human right to water. I thus turn to examine the Indian and Motswana experiences.

3.4 Comparative perspectives on an implied right to water

The approach advanced of implying a right to water from life and the interpretation of the state's correlative obligations, including positive duties, finds support in comparative jurisprudence from both India and Botswana. In my comparative analysis, I deliberately avoid those jurisdictions with an express provision of an enforceable right to water in the Bill of Rights of their constitutions, such as Kenya, the Democratic Republic of the Congo (DRC), South Africa and Zimbabwe,[171] although tangential reference may be made to aspects of their jurisprudence where relevant and justified. It is through this critical approach to comparative material that I apply principled comparativism for deliberative purposes, as argued in chapter 1.

3.4.1 India

The Indian experience is apposite because of the textual similarities between the Indian and Namibian constitutional right to life provisions.[172] Further, the constitutional inclusion of PSP or DPSPs[173] in both. Nonetheless, it will be seen below that the Indian experience is limited by the scant articulation of a normative foundation in the Indian constitutional right to water jurisprudence.

While India's 1950 Constitution does not include an explicit right to water, the Indian Supreme Court and High Courts have read that right into the right to life. Article 21 of the Indian Constitution entrenches the right to life and does so in language similar to that seen in article 6 of the Namibian Constitution: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' Like article 6, this provision appears to assert the protection of life in the civil sense. Distinctively, however, India's article 21 is couched in *negative* language

171 For a breakdown of African constitutions with an express right to water, see F Higuet & E Secours 'The right to water and African constitutions', http://www.rampedre.net/implementation/territories/national/africa/constitutions (accessed 17 February 2019).

172 Cf the Irish experience where McIntyre discusses the (unenumerated) constitutional right to water under the Irish Constitution sourced from the right to bodily integrity. See O McIntyre 'The human right to water and reform of the Irish water sector' (2014) 5 *Journal for Human Rights and the Environment* 74 94.

173 An analysis of the principles of state policy is engaged in ch 5.

– 'no person shall be deprived' – compared to the *positive* language of Namibia's article 6 – 'shall be protected and respected'.

Notwithstanding what appears to be a civil right construction of life and the negative conception of the right as prohibiting deprivation, the Indian Supreme Court has interpreted article 21 expansively to include the right to water, among many other socio-economic rights such as education, housing and food. The fundamental right to water was pioneered in the 1991 decision of *Subhash Kumar v State of Bihar*,[174] where a writ petition was brought under India's PIL mechanism before the Indian Supreme Court. The writ was brought based on pollution caused by a private company through mining activities that discharged slurry from mining washeries into a river, causing the water to be unfit for drinking and irrigation purposes. The Supreme Court dismissed the writ after the petitioner had been found not to be acting in the public interest as required by law but in their personal interest. Nevertheless, the Court did assert that the '[r]ight to live is a fundamental right under Art 21 of the Constitution, and it includes the right of enjoyment of pollution free water and air for full enjoyment of life'.[175]

The article 21-derived right to water was again affirmed in the 2000 decision of the Indian Supreme Court in *Narmada Bachao Andolan v Union of India*.[176] The case concerned the Sardar Sarovar Dam Project that constructed dams for irrigation and electricity generation, and where the right to water came up against rights relating to the environment and those of displaced and indigenous peoples. The project resulted in the displacement of large communities because of the dam's surface area.[177]

Subhash Kumar was again endorsed by the Indian High Court decision of *Hamid Khan v State of MP*.[178] where the state was found to have failed in its duty to provide pure drinking water and for not taking the proper precautions to ensure proper drinking water to citizens.[179] Here, the state government was sued for failing to take appropriate precautions to ensure

174 *Subhash Kumar v State of Bihar* AIR 1991 SC 420 (Supreme Court of India). See also *Municipal Council, Ratlam v Vardichan & Others* 1980 SCC (4) 162 (Supreme Court of India), where the Court found statutory duties to provide water and sanitation to protect the right to sanitation and public health.

175 As above.

176 *Narmada Bachao Andolan v Union of India* AIR 2000 SC 3751 (Supreme Court of India).

177 See the critique by P Cullet 'Human rights and displacement: The Indian Supreme Court decision on Sardar Sarovar in international perspective' (2001) 50 *International and Comparative Law Quarterly* 973.

178 *Hamid Khan v State of MP* AIR 1997 MP 191 (Madhya Pradesh High Court, India).

179 *Hamid Khan* (n 178) para 6.

that the drinking water that it had supplied through hand pumps was free from excessive fluoride. The fluoride had adversely affected the health of those who consumed the water. As such, *Hamid Khan* can be said to assert a *duty to provide* or *fulfil* the right to water, one that implicitly requires the state to take positive steps in realising the right.

The decision of the courts in India are illuminating insofar as they justify the approach of reading a right to water into the right to life. However, the challenge with relying on this jurisprudence is that it scantily articulates the normative basis for reading in water. An attempt at normative developments is at best deduced from two decisions. The first decision is by the Indian Supreme Court in *Virender Gaur v Haryana* stating that the '[e]njoyment of life and its attainment including their right to life [*sic*] with human dignity encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed'.[180]

The second decision is the Indian High Court of Kerala in *Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala*. Here, there was a violation of the right to water for the people of West Kochi who had been without a supply of potable drinking water for more than three decades. The Court thus affirmed the right to water as:

> one of the primary needs of man, second only to air. Water is in fact the elixir of life. Any Government whether proletarian or bourgeois and certainly a Welfare State committed to the cause of the common man, is bound to provide drinking water to the public which should be the foremost duty of any Government.[181]

In so stating, the Court directed that within six months, the state of Kerala should take and complete all steps necessary for the supply of potable drinking water to the people of West Kochi in sufficient quantities through an efficient water supply system without fail.[182] Although the normative basis of water is scantily articulated, the broader article 21 jurisprudence of the Indian Supreme Court reveals a dignity imperative within the right to life which 'includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life'.[183]

180 *Virender Gaur v Haryana* (1995) 2 SCC 577 580 (Supreme Court of India).

181 *Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala* 2006 (1) KLT 919 (High Court of Kerala, India) para 3.

182 *Vishala* (n 181) para 4.

183 *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* 1981 (2) SCR 516 (Supreme Court of India); *Mohini Jain v State of Karnataka* AIR (1992) SC 1858

Notably, Indian jurisprudence has asserted that the right to water implies a state duty to 'provide' rather than simply to 'facilitate access' to water.[184] As such, Cullet argues in the context of an Indian constitutional right to water that '[t]he duty to provide also implies that water supply cannot be disconnected. Indeed, disconnections of water supply or withdrawal of access should be prohibited as a matter of principle under the right to water.'[185] This argument augments the earlier analysis that the Namibian Constitution's article 6, which is read as implying a right to water, also includes an obligation on the state to provide or to fulfil, notwithstanding the duty's textual absence from the article 6 provision.

While the basis for comparativism in Namibia has been asserted in chapter 1, merely adopting the Indian approach of constitutionally reading a right to water into the right to life without being sufficiently sensitive to the Constitution's text or disregarding the Namibian approach to constitutional interpretation would constitute a wanting recourse to comparativism. A cautious approach to the Indian jurisprudence would ensure that my argument is not left vulnerable to accusations of being unprincipled and outcome-oriented and, consequently, advancing an unjustifiable form of judicial activism with the purpose of rights creation and expansion.

Grounding the implied right to water in ubuntu thus allows us to avoid some of the challenges that India has seen in adjudicating right to water cases. Through ubuntu, we can develop the meaning and scope of a right to water and identify the appropriate correlative duties by applying a concrete value-premise. The principles of ubuntu discussed can thus be invoked in the enforcement of a right to water, thereby allowing interpreters, including judges, to normatively ground such right. This will be the focus of chapter 6 which develops the normative content of a right to water.

3.4.2 Botswana

Botswana is also a suitable comparator for Namibia. On a practical basis, they share geographic proximity and similar climatic environments that are largely desert and arid with water being a premium resource. On the legal front, the 1966 Botswana Constitution also does not include the full spectrum of socio-economic rights. Distinctively, however, unlike

(Supreme Court of India).

184 P Cullet 'Right to water in India: Plugging conceptual and practical gaps' (2013) 17 *International Journal of Human Rights* 56 67.

185 As above.

the Namibian Constitution, the Constitution of Botswana does not incorporate PSPs.[186] The right to life is protected under section 4 of the Botswana Constitution. The courts in Botswana, however, have upheld a right to water derived from the right not to be subjected to cruel, inhuman and degrading treatment in section 7 of Botswana's Constitution, as will be assessed below. Nevertheless, the analysis will reveal the limitations that are presented by a lack of a normative exposition upon which to ground the right to water: a wanting approach to the explication of both the positive and negative duties of the state to realise its right to water obligations.

In *Sesana*[187] the High Court of Botswana was faced with an application for an order declaring that the termination by the government of Botswana of the provision of certain basic and essential services to the Basarwa tribe of the San peoples in the Central Kalahari Game Reserve (CKGR) was unlawful and unconstitutional based on the legitimate expectation doctrine. The government of Botswana had relocated the community to new settlements and informed those who refused relocation that the provision of services would be terminated at the old settlements within six months. The basic and essential services that formed the crux of the request for the order were, for our purposes, the provision of drinking water on a daily basis and the maintenance of the supply borehole water.

Relying on the administrative law principles of legitimate expectation, Dibotelo J, writing for the majority, held that the termination of services by Botswana's government was neither unlawful nor unconstitutional and, thus, the government retained no obligation to restore the provision of the services.[188] Commenting on *Sesana*, Dinokopila critiques the decision as having 'missed an opportunity to establish a precedent regarding the judicial enforcement of socio-economic rights in Botswana' given the 'failure to adopt a purposive interpretation of the Constitution in the wake of globalisation and an era of human rights culture'.[189]

186 For a comprehensive analysis of socio-economic rights in Botswana, see B Dinokopila 'The justiciability of socio-economic rights in Botswana' (2013) 57 *Journal of African Law* 108.

187 *Sesana & Others v Attorney-General* 2006 (2) BLR 633 (HC) (Botswana High Court).

188 The dissenting opinion of Justice Dow is noteworthy. However, as it takes a rights-based approach (in contrast to the legitimate expectation analysis of the other two justices) to determine a violation of the constitutional right to life as a result of the withdrawal of essential services, including water, by the government. *Sesana* (n 187) 723.

189 Dinokopila (n 186) 118, adding: '*Sesana* also indicates the problems associated with the enforcement of socio-economic rights through the administrative law principles of legitimate expectation. Such problems include the undeniable fact that, even though the government might have consulted on the termination of essential services, this does

The issues in *Sesana* once again arose in *Mosetlhanyane*,[190] this time focusing specifically on the right to water before the Supreme Court of Botswana. The facts are similar to those of *Sesana* which presented, in the court's own words, a 'harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert where the appellants and their Basarwa community live'.[191] The Basarwa community was relocated to new settlements in line with the government's then new policy of wildlife conservation areas without human settlements. During the relocations, a pump engine and water tank that had been installed by the government for purposes of using a particular borehole were dismantled and removed. It was turned into 'a white elephant whilst the Basarwa communities in the area continue to suffer on a daily basis from lack of water'.[192] The appellants had thus sought a court order permitting them to use the existing borehole that the Botswana government had sealed or an alternative borehole within the CKGR, all at their own, not the government's, expense.[193] Applying a derivative right approach, the Court found that the Botswana government's actions violated the right of the appellants not to be subjected to cruel, inhuman, and degrading treatment under section 7 of the Botswana Constitution.[194]

Read in the context of limited socio-economic rights claims in Botswana, *Mosetlhanyane* is commendable in that the Court compelled the Botswana government to allow the appellants to have access to water as a right. The decision has been celebrated as a 'victory for the … judicial enforcement of socio-economic rights in Botswana within a legal framework that does not adequately provide for the protection of such rights'.[195] An analysis suggests that the appellants were cautious, and presumably

not remove the unjust nature of such an act. This would be particularly true in the case where it is eventually held, in the light of extensive consultations, that the government is under no obligation to restore such services.'

190 *Mosetlhanyane & Another v Attorney-General* 2011 (1) BLR 152 (CA) (Botswana Court of Appeal).

191 *Mosetlhanyane* (n 190) 154.

192 *Mosetlhanyane* 155. The borehole was previously sunk in 1986 by a private mining company. When the company no longer needed the borehole, it was agreed to be used to provide water for the residents of the CKGR, to which the Botswana government did not object. Between 1986 and 2002 the Ghanzi District Council maintained the engine of the borehole pump. It provided fuel for it and regularly took water from the borehole to the Basarwa communities in other parts of the CKGR.

193 *Mosetlhanyane* (n 190) 155-158.

194 *Mosetlhanyane* 159-160.

195 B Dinokopila 'The right to water in Botswana: A review of the *Matsipane Mosetlhanyane* case' (2011) 11 *African Human Rights Law Journal* 282.

strategic, in framing their claim as a negative right and obligation (that the government allow them to extract water from boreholes for domestic use) rather than as positive duties (that the government provide them with boreholes, which would include the care and maintenance thereof). This is the challenge with the judgment as the Court then determines the issue as a negative obligation upon the Botswana government not to interfere with the appellants' right to water, rather than the positive obligation to provide water and to protect citizens from inhuman conditions.

The plight of the communities living in the CKGR would be a classic case of peoples who cannot themselves provide for their essential services and needs, which places an arguably stronger set of positive obligations upon the government of Botswana to make water provision available. This avoids the problematic and counter-intuitive conclusion that a government would be prohibited from inflicting suffering through deprivations of self-financed access to water, yet it need not take the initiative to prevent suffering from a lack of water through positive action.[196]

What these two cases in Botswana add to the books' right to water analysis under the Namibian Constitution is that a robust theoretical foundation upon which to ground an *implied* right is imperative in order to determine not only the nature of a right to water, but also the various correlative obligations – negative and positive – that are imposed. Indeed, the interpretation that I have advanced achieves this through the purposive approach which is infused by the transformative constitutionalism underpinnings and ubuntu as an overarching value-premise. This would avoid the risk of manifestly absurd conclusions, such as the lack of a state duty to provide water at the state's expense for deprived communities such as those in *Mosetlhanyane*.

3.5 Conclusion

In applying a purposive approach to the interpretation of the right to life, this chapter has argued for an implied right to water. The normative foundation of the argument is rooted in the value of ubuntu, which is legally understood through its four interconnected principles of community, solidarity, interdependence and dignity. Ubuntu allows our interpretation of the right to life to be concordant with the re-invigorative and transformative aims of the Constitution, as I had argued in chapter 2.

There are positive duties upon the state that accrue from the right to life, notwithstanding the textual absence of the fulfil duty. Further, my

196 K Snell 'Can water be a human right?' (2014) 19 *Appeal* 131.

examination of the Constitution's drafting documents reveals that there is no support for the position that socio-economic entitlements were intended to be excluded from the Constitution as enforceable rights. The Universal Declaration supports this interpretative approach, which has assumed the utility of the original intent approach to Constitutional interpretation. I have also made reference to the Indian jurisprudence on a right to water derived from the right to life given the textual similarities between the Constitutions of Namibia and India. Nevertheless, while the comparative implied rights approach offers support for implying a right to water, the lack of a normative foundation in India's right to water jurisprudence has left it vulnerable to difficulties in balancing rights and resolving conflicts where they arise, such as those seen in *Narmada Bachao Andolan*. This approach of grounding water in ubuntu also potentially avoids some of the challenges seen in *Mosetlhanyane* in Botswana of, at best, asserting only *weak* positive duties upon the state. In the final analysis, the three correlative duties approach, infused with an ubuntu understanding, will equip us with the tools to develop the content of a justiciable right to water and more meaningfully chisel out the concrete obligations of the state in the forthcoming chapters. The next chapter will turn to a right to water drawn from the well of international law.

4 A RIGHT TO WATER UNDER INTERNATIONAL LAW

4.1 Introduction

As presented in chapter 3, this book thus far has invoked ubuntu to argue for a right to water that is anchored in the Constitution's Bill of Rights provisions, specifically the article 6 right to life. This chapter now turns to a right to water under international law. I will engage both binding international law and soft law sources to interpretatively invoke these in developing the normative and substantive content of a right to water in chapter 6. This chapter primarily examines the Constitution's international law provision – article 144. The chapter first assesses the application of international law in Namibia before considering a right to water under treaties that bind Namibia as well as customary international law (CIL) and general principles of law.

The chapter commences by analysing theoretical and practical concerns qua the domestic application of international law. While the inter-relationship between international law and municipal law has received some attention among international law scholars, and as it pertains to Namibia specifically, this chapter identifies material gaps in the existing jurisprudence and commentary on Namibia's international law – the municipal law 'model'.[1]

Through a Namibian jurisprudential and doctrinal analysis that draws on comparative perspectives and scholarship, I will argue for an understanding of international law that forms part of Namibian law as including both international agreements and general rules of public international law, with the latter being constituted of both customary international law and general principles of law. I will defend an understanding of international agreements as both retaining direct application in Namibian law and serving as an aid to interpret Bill of

1 I have undertaken a comprehensive analysis in N Ndeunyema 'The Namibian Constitution, international law and the courts: A critique' (2020) 9 *Global Journal of Comparative Law* 271.

Rights provisions in the Constitution. In so doing, the assessment will reveal the limited attention by domestic courts as to the application of international law municipally and, where it has been applied, the analysis in part is inadequate and at times inaccurate.

As to the interpretation of international agreements that bind Namibia, the analysis will assert that the appropriate interpretative methodologies are those reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[2] These provisions reflect customary international law. The chapter also examines the authoritative status of soft law sources such as the General Comments of various treaty bodies before Namibian courts.

The second part of the chapter turns to source a right to water from international law. An examination of various treaties binding Namibia is offered with an analytical distinction made between those treaties that assert either an *express* or an *implied* right to water. I will pay attention to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter), all of which I argue support an implied right to water. I will then critically engage with the international and regional jurisprudence developed thereunder as well as the soft law guidance offered by the respective treaty bodies. These sources will be relied upon in the argument in chapter 6 regarding a right to water's content and the state's correlative obligations flowing therefrom.

Finally, turning to customary international law and general principles of law, the chapter finds that these international law sources binding Namibia do not firmly lend themselves as the legal basis for a right to water domestically. Nevertheless, these are utile in developing the substantive content of a right to water that I have implied from article 6 of the Constitution.

4.2 The application of international law in Namibia[3]

4.2.1 Theorising the international law-municipal law relationship

At the heart of debates concerning the international law-municipal law relationship is the issue of supremacy and the independence or (extent of)

2 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol 1155.

3 For the principal literature on international law in Namibia, see G Erasmus 'The Namibian Constitution and the application of international law' (1989/1990)

separation between the two legal orders. The soundness of this analysis is germane because the question of the nature of the relationship arises in applying international law in a domestic context.[4] Four overarching theories have been developed to describe a given jurisdiction's municipal law-international law relationship.[5] These are the two prominent theories of monism and dualism, as well as inverse monism and harmonisation.[6] The historical analysis is stressed given the reality that these theories are impure, inadequate, and perhaps antiquated paradigms for understanding the municipal law-international law relationship, not least because of the globalised nature of the contemporary world legal order.

Monism captures unitary conceptions of law whereby international law and municipal law are viewed as a single and unified system.[7] A monist approach gives international law primacy over municipal law in both international and municipal decisions. International law has direct application and automatically forms part of the municipal legal order without the further need for incorporation or transformation within the state, for example, through domesticating legislation. Therefore, once a state has bound itself to an international agreement in line with its domestic provisions, or where a given rule is established as customary international law or as a general principle of law, then such international law would bind that state, including its courts. Domestic application would follow without the need for further legislative affirmation.

Under a dualist model, international law retains primacy over municipal law in international decisions, while municipal law has primacy over international law in municipal decisions. Sometimes referred to

15 *South African Yearbook of International Law* 84; T Maluwa 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: An explanatory survey' (1998) 23 *South African Yearbook of International Law* 45; O Tshosa 'The status of international law in Namibian national law' (2010) 2 *Namibia Law Journal* 5; Y Dausab 'International law vis-à-vis municipal law: An appraisal of article 144 of the Namibian Constitution from a human rights perspective' in A Bösl et al (eds) *Constitutional democracy in Namibia: A critical analysis after two decades* (2010) 261; D Zongwe *International law in Namibia* (2019).

4 D O'Connell 'The relationship between international law and municipal law' (1960) 48 *Georgetown Law Journal* 444.

5 D O'Connell *International law* (1970) 39; D Harris *Cases and materials on international law* (2010) 61. For a historical evolution of the theories, see T Finegan 'Holism and the relationship between municipal and international human rights law' (2011) 2 *Transnational Legal Theory* 480.

6 For an introduction to the historical debate on the theories, see J Nijman & A Nollkaemper 'Introduction' in J Nijman & A Nollkaemper (eds) *New perspectives on the divide between National and International Law* (2007).

7 O'Connell (n 5) 39; Finegan (n 5) 478.

as pluralism, dualism starts from the proposition that law is an act of sovereign will. Municipal law is distinguished from international law in that it is a manifestation of the will internally directed, as distinct from participation in a collective act of sovereigns.[8] Dualism holds that international law and municipal law are separate and dichotomous legal authorities with insignificant overlap, relationship and interplay between them.[9] A classic dualist assertion is that the two legal systems are to be differentiated based on the particular relations that they govern: Whereas a state's municipal law deals with social relations between individuals, international law regulates social relations between states, which alone are subject to it.[10] Dualism further asserts the precedence of the sovereign state and its municipal law. Thus, for international law to be applicable in municipal courts, the doctrines of transformation (or incorporation) and adoption must be given effect.[11]

At this stage it is important to heed Tshosa's three points of caution when considering these theories in the Namibian context. First, as a matter of practicality, the applicable theory is not to be purely determined theoretically and in the abstract.[12] Determining the domestic application of international law and treaties, in particular, would be conditioned by a rule of municipal law. A basic principle reflected in most legal systems with constitutions as the overarching normative framework is that constitutional law governs the internal application of treaties.[13] This principle applies to Namibia, as argued below. Second, Tshosa observes that the practical approach of national courts, including Namibia, reveal that even in monist states, courts frequently fail to effectuate binding treaties.[14] Third, Tshosa concludes that for Namibia, these theories 'are relevant only in the specific context of customary, but not conventional, international law'.[15] Tshosa observes that the real concern relates to 'how international law standards can be infused or, rather, incorporated' into municipal law to reinforce the effectiveness of the national legal system

8 O'Connell (n 5) 42; H Triepel *International law and state law* (1899).

9 Finegan (n 5) 478.

10 Tshosa (n 3) 5.

11 R O'Keefe 'The doctrine of incorporation revisited' (2009) 79 *British Yearbook of International Law* 8 10; Ndeunyema (n 1).

12 Tshosa (n 3) 6.

13 A Nollkaemper 'The effect of treaties in domestic law' in C Tams et al (eds) *Research handbook on the Law of Treaties* (2014) 123 130; Tshosa (n 3) 6.

14 Tshosa (n 3) 6; Dausab (n 3) 261.

15 Tshosa (n 3) 6.

given that national legal rules at times are not well-defined and inadequate to address practical legal questions.[16]

Nevertheless, Tshosa's points of caution do not make the theories of international law-municipal law redundant. Rather, they allow for the continued illumination of that relationship. Indeed, there is an observed 'symbiotic' relationship between international law and municipal law: Domestic law can be a material source of international law, while international law can simultaneously influence domestic law,[17] as I will argue with the consistent interpretation approach in this chapter. Therefore, in considering the relationship, one ought to closely consider the constitutional position. As such, the next part turns to examine the prescriptions of the Namibian Constitution.

4.2.2 International law prior to the Constitution

While the Constitution is ultimately dispositive of the application of international law in Namibia, it remains indispensable to foreground the analysis by revisiting the Namibian pre-independence position on international law's municipal application. What necessitates this is to not only properly contextualise the Constitution's 'newly'-established international law position but also, more pertinently, owing to the legal continuity as reflected in article 66(1) which recognises the continued force and validity of the common law as at independence, exception where it conflicts with the Constitution or legislation. It follows that the pre-constitutional common law position on international law's application would apply unless the contrary is gleaned from either the Constitution or legislation.

The legal system of South West Africa was effectively an extension of that of South Africa and applied a Westminster parliamentary sovereignty model that was imposed during British colonial rule.[18] The then unwritten and composite constitutions of South Africa contained no provisions on the application of international law. Concerning international agreements, the pre-Constitution position was that signature, ratification or accession to international agreements constituted an executive act. To form part of municipal law, domestic incorporation of international agreements by way

16 As above.

17 O Elias & C Lim 'General principles of law, "soft" law and the identification of international law' (1997) 28 *Netherlands Yearbook of International Law* 22.

18 Erasmus (n 3) 85. See also A Sanders 'The applicability of customary international law in South African law – the Appeal Court has spoken' (1978) 11 *Comparative and International Law Journal of Southern Africa* 198.

of a legislative act was required,[19] a position confirmed in *Binga*.[20] Strydom J – in distinguishing customary international law from international agreements in the form of United Nations General Assembly (UNGA) and United Nations Security Council (UNSC) resolutions revoking South Africa's League of Nations mandate over South West Africa – stated:[21]

> Obligations incurred by international treaty and resolutions by international organisations such as the United Nations stand on a different footing from international customary law and generally speaking a South African Court, and for that matter a Court of this territory, *will only give effect thereto if such treaty or resolution was incorporated by legislative act into the laws of the land.*

Binga thus confirms the domestic incorporation requirement for international agreements through legislation before their application. However, an unstated *caveat* to this position was that unincorporated treaties could be taken into account when interpreting ambiguous legislation.[22]

Concerning customary international law, common law principles and judicial decisions had determined its domestic application.[23] After a prolonged period of uncertainty and controversy, the *Nduli* decision by the South African Supreme Court of Appeal for the first time affirmed that customary international law did form part of South African law.[24] Owing to the vassal nature of the legal system before independence, *Nduli* was applied in South West Africa/Namibia.[25]

However, there were caveats to *Nduli* drawn from the English law at the time. First, customary international law would not apply where it was

19 Erasmus (n 3) 91, citing *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) 161.

20 *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA 949 (SWA) 968–969; *Pan American* (n 19).

21 *Binga* (n 20) 968 (my emphasis).

22 *Salomon v Commissioners of Customs and Excise* 1967 (2) QB 116.

23 RP Schaffer 'The inter-relationship between public international law and the law of South Africa: An overview' (1983) 32 *International and Comparative Law Quarterly* 283; J Dugard 'International human rights norms in domestic courts: Can South Africa learn from Britain and the United States?' in E Kahn (ed) *Essays in memory of Oliver Schreiner* (1980) 221 232.

24 *Nduli v Minister of Justice* 1978 (1) SA 893 (A) 906: 'According to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the assent of [South Africa]'. See Ndeunyema (n 1).

25 Erasmus (n 3) 87.

inconsistent with an Act of the South African Parliament, in line with the doctrine of legislative sovereignty.[26] Second, under the stare decisis doctrine, the courts would be bound to follow an established judicial precedent even though such precedent were discordant with a customary international law rule.[27] Third, the prerogative power of the executive through the act of state doctrine could override customary international law.[28] Pertinently, there appears to be pre-constitutional judicial paucity on the domestic application of general principles of law as a binding source of international law.

In summary, the general approach to international law in pre-Constitution Namibia was that a monist position applied to customary international law, thereby mandating its automatic application within the municipal order, whereas a dualist position applied for international agreements that required legislative incorporation into the municipal order.

4.2.3 International law under the Constitution

With the advent of independence, the Constitution jettisoned the previous international law-averse disposition by adopting legal features that can be described as 'international law-friendly'[29] or 'international law-positive'.[30] Although the Constitution's Bill of Rights framework has patently drawn from international human rights law, the minutes of the Constituent Assembly[31] that drafted the Constitution are silent on the precise motivations for this embrace of international law. However, a contemporaneous reading of the Constitution would suggest that it probably was in response to Namibia's history of colonialism and apartheid rule, which are systems that flagrantly disregarded and ubiquitously violated international law, including international humanitarian law norms

26 However, it was required that legislation 'should be interpreted to accord with international law wherever possible' per *Nduli* (n 24) 898, in light of the presumption that the legislature did not intend to derogate from CIL. Cf *Rev v Lionda* 1944 AD 348 352-355; *S v Penrose* 1966 (1) SA 5 (N) 11.

27 *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) QB 529 (CA); cf *S v Mushwena* 2004 NR 276 (SC) 369; Erasmus (n 3) 89; Sanders (n 18) 200.

28 Erasmus (n 3) 90; Sanders (n 18) 200. For a judicial critique of the act of state doctrine and its continued application in Namibia, see *Mushwena* (n 27).

29 Erasmus (n 3) 91; D Dermont 'The relationship between international law and municipal law in light of the interim South African Constitution 1993' (1995) 44 *International Law and Comparative Law Quarterly* 1.

30 Tshosa (n 3) 9.

31 Namibia Constituent Assembly Debates 21 November 1989-21 January 1990 Vol 1 and 2 (Namibia National Archives 1990).

that were ostensibly applicable during the armed conflict that preceded Namibia's independence. The claim is often made that 'Namibia is a child of international solidarity',[32] a legal and political truism that aptly reflects the United Nations (UN) and the international community's role on the 'Question of Namibia'.[33]

The Constitution's favourable predisposition to international law is evident in a plurality of provisions, including the Preamble and other explicit international law-related provisions.[34] Of these, the central provision is article 144: '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.'

Though laconic, article 144 invites the conclusion that it 'sought to give expression to the intention of the Constitution to make Namibia part of the international community'[35] and chimes well with principles of state sovereignty and state consent that are among the overarching premises of international law. To commence the article 144 analysis, the meaning of 'general rules of public international law' and of 'international agreements' is deconstructed.

Deconstructing 'general rules of public international law' and 'international agreements'

It is well accepted that article 144's reference to international agreements[36] is to be understood as a generic term that encapsulates all forms of written agreements that have been concluded between Namibia and other states (or international organisations) to demonstrate Namibia's consent to be bound by the content thereof. For an international agreement[37] to form part of Namibian law, the procedural requirements are derived from

32 See eg 'Statement by His Excellency Hage G Geingob, President of the Republic of Namibia at the General Debate of the UN General Assembly' 29 September 2015, https://gadebate.un.org/sites/default/files/gastatements/70/70_NA_en.pdf (accessed 17 September 2019).

33 UNGA 'Question of Namibia' 13 December 1985, A/RES/40/97.

34 See arts 1(4), 32(3(e), 95(d), 96(d), 99 and 140 of the Constitution, which are analysed in Tshosa (n 3) 9 and Erasmus (n 3) *93-94.*

35 *Government of the Republic of Namibia & Another v Cultura* 2000 1993 NR 328 (SC) 333.

36 'Commentary on Article 2(1)(a), Draft Articles on the Law of Treaties with commentaries' in *Yearbook of the International Law Commission* 1996.

37 The Namibian Constitution does not distinguish between the classes of international agreements such as political, technical, administrative or executive. Compare Constitution of the Republic of South Africa, 1996 sec 231(3).

various provisions of the Constitution. First, acting with the powers conferred by article 32(3)(e), the President (or delegate) would negotiate an international agreement and then sign it. These powers are exercised with the assistance of cabinet ministers under article 40(i). Second, upon presidential signature, the National Assembly is vested by article 63(2)(e) with the power and function 'to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e)'. Constitutionally, therefore, the President must act with the *approval* of the National Assembly.

The meaning and ambit of the phrase 'general rules of public international law' in article 144 are more controversial. Namibia-centric scholars, including Tshosa and Erasmus, take the restrictive approach that the phrase is synonymous with customary international law.[38] However, if the reality that the identification of the sources of international law remains one of the most vexing issues is anything to go by, this determination is not as straightforward. Further, a recourse to comparative constitutionalism reveals the reference to 'general rules of public international law' in constitutions such as that of Germany[39] and Kenya.[40] Other constitutions (those of Malawi[41] and South Africa[42]) specifically engage the term 'customary international law' to distinguish international law that is not sourced from international agreements.

In my view, taking a generous, broad, and purposive approach[43] to the interpretation of the Constitution, the reference to 'general rules of public international law' is to be correctly understood expansively as including

38 Erasmus (n 3) 98; Tshosa (n 3) 11. Tshosa takes an even more restrictive approach by asserting that '[the] term *general* in this context means rules widely supported and accepted by the representatively large number of states'. Tshosa (n 3) 11 (my emphasis).

39 Art 25 of 1949 German Constitution; H Rupp 'International law as part of the law of the land: Some aspects of the operation of article 25 of the Basic Law of the Federal Republic of Germany' (1976) 11 *Texas International Law Journal* 541; R Wolfrum et al 'The reception of international law in the German legal order: An introduction' in E de Wet et al (eds) *The implementation of international law in Germany and South Africa* (2015) 17.

40 *Kituo Cha Sheria & 8 Others v Attorney General* [2013] eKLR para 70. See also M Wabwile 'The emerging juridical status of international law in Kenya' (2013) 13 *Oxford University Commonwealth Law Journal* 167.

41 Cf Malawian Constitution sec 211.

42 Sec 322 South African Constitution: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. See *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); D Shelton 'Introduction' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011) 14.

43 *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) 69; *Cultura 2000* (n 35).

both customary international law *and* general principles of law.[44] This understanding is one that principally leans on the text of articles 38(1)(a) to (c) of the ICJ Statute which, in addition to international conventions, specifies 'international custom, as evidence of a general practice accepted as law', and 'the general principles of law of civilised nations'. Article 38(1) is widely accepted as reflecting customary international law on the formal sources of international law. Moreover, there is no *a priori* hierarchy in the three sources.[45] Some commentators, however, claim that general principles of law constitute a 'secondary' source with the central function of 'filling gaps'[46] in the absence of a treaty or customary norm.[47] Accordingly, it is submitted that both customary international law *and* general principles of law are part of binding Namibian law.[48]

Concerning customary international law, the textbook method for establishing it is described in article 38(1)(b) of the ICJ Statute as 'evidence of a general practice accepted as law'.[49] This traditionally consists of two elements. The first is the objective element of state practice (*constuendo*), which is a general practice that is sufficiently widespread and representative; the practice need not be uniform.[50] The second is *opinio juris*, the subjective element that requires the practice of states to arise from a belief that a legal obligation exists,[51] thereby distinguishing custom from mere usage or habit. The precise meaning and application of these elements in establishing custom remain uncertain. Some scholars have poured cold water on the claim that domestic courts systematically follow

44 While the specific reference to 'general rules of public international law' may be argued as excluding general *principles* of law, this is untenable as it would constitute a narrow interpretation of art 144.

45 J Crawford *Brownlie's principles of public international law* (2012) 35; S Yee 'Article 38 of the ICJ Statute and applicable law: Selected issues in recent cases' (2016) 7 *Journal of International Dispute Settlement* 472 488.

46 J Pauwelyn *Conflict of norms in public international law: How WTO law relates to other rules of international law* (2003) 127-129.

47 R Yotovana 'Challenges in the identification of "the general principles of law recognized by civilized nations": The approach of the international court' (2017) 3 *Canadian Journal of Comparative and Contemporary Law* 269 279.

48 *Mushwena* (n 27) 320.

49 See generally International Law Commission 'Identification of international customary law: Analytical guide to the work of the International Law Commission' (International Law Commission 2013), http://legal.un.org/ilc/guide/1_13.shtml (accessed 23 September 2019); M Wood *First report on the formation and evidence of customary international law* A/CN.4/663 (accessed 23 September 2019); M Wood *Second report on identification of customary international law* A/CN.4/672. (2013).

50 As above.

51 *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* 1969 ICJ Rep 3, 44; Crawford (n 45) 25-32.

this textbook method in their determination of custom.[52] Others maintain that, when determining rules of custom, the ICJ, in particular, has not used a single methodology but a mixture: induction, deduction and (the primary method) assertion.[53] Nevertheless, the central assumptions and many critiques of customary international law are outside the remit of the chapter. Rather, the chapter will align with the settled approach that the two elements remain established and are indispensable in determining the existence of a rule of customary international law.

While customary international law is settled as part of binding Namibian law, general principles of law are not as established. These have received scant attention or mention in Namibian courts, as will be observed in the case studies below. As it has now been resolved that article 144 incorporates the triad of international law sources of international agreements, customary international law, and general principles of law as part of binding Namibian law, the next part considers the scope of application of article 144.

Scope of article 144

Article 144 introduces the automatic and mandatory application of both general rules of public international law and international agreements duly agreed to under the Constitution as binding Namibian law. For good measure, this is evinced by the drafters of the Constitution's choice of peremptory language in article 144: '*shall* form part of the law of Namibia'. No (further) legislative action, such as incorporation or transformation, is required. This thus mandates the direct application of both general rules of public international law and international agreements by Namibian

52 C Ryngaert & D Siccama 'Ascertaining customary international law: An inquiry into the methods used by domestic courts' (2018) 65 *Netherlands International Law Review* 1. This study concludes that, from domestic court cases on matters of customary international law between 2000-2014, domestic courts (similar to the ICJ) do not normally identify norms of customary international law on the basis of the textbook method of ascertaining a general practice accepted as law. Instead, it finds that domestic courts tend to outsource the determination of custom to treaties, non-binding documents, doctrine or international judicial practice. Courts sometimes assert a customary international law norm without citing persuasive practice authority.

53 S Talmon 'Determining customary international law: The ICJ's methodology between induction, deduction and assertion' (2015) 26 *European Journal of International Law* 417. Concisely put, induction is a method of inferring the customary norm from an iterative process of state practice and *opinio juris*. Deduction infers a specific customary norm from a more general principle. Assertion means that the ICJ uses neither inductive nor deductive reasoning, but simply asserts CIL.

courts.[54] This manifests the so-called direct-effect doctrine.[55] In some instances, an international agreement would enjoin Namibia to undertake legislative and other measures to ensure the domestic effectiveness of international law.

From the language of article 144, however, there are two exceptions to the direct application of international law.[56] The first is the *constitutional supremacy exception*: International law will not apply where it is 'otherwise provided' for by the Constitution, that is, where it is incompatible with the Constitution itself. The exception aligns with the Constitutions' self-proclaimed supremacy in article 1(6). The test to determine the incompatibility of an international law position with the Constitution has not received significant judicial consideration. Only the High Court in *Kauesa* has arguably offered some guidance: 'The specific provisions of the Constitution of Namibia, where *specific and unequivocal*, override provisions of international agreements which have become part of Namibian law.'[57] Thus, to override international law,[58] a constitutional provision must *specifically* and *unequivocally* contradict international law.[59]

The second qualification is the *legislative exception*: International law will not apply where it conflicts with an Act of Parliament.[60] As the Supreme Court stated in *Thudinyane v Edward*,[61] in the context of the 'best interests of the child' doctrine of the Convention on the Rights of the Child (CRC): '[I]n Namibia, international agreements … *appear to have similar force of law as accorded to legislation*, in the absence of any constitutional provision or Act of Parliament contradicting the law or agreement in question.'[62]

54 Tshosa (n 3).

55 The doctrine of vertical or horizontal direct effect (to be distinguished from direct application) is subject to whether an international agreement, in particular, is self-executing or non-self-executing. See J Jackson 'Status of treaties in domestic legal systems: A policy analysis' (1992) 86 *American Journal of International Law* 310.

56 A third qualification (which both Erasmus and Tshosa appear to overlook) can also be added: Norms *jus cogens* bind Namibia, irrespective of whether they are (theoretically) in conformity with the Constitution or Acts of Parliament.

57 *Kauesa v Minister of Home Affairs* 1994 NR 102 (HC) 141 (my emphasis).

58 The test applies to international law, understood as also including general rules of public international law, not only international agreements as in *Kauesa*.

59 Cf *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 1 on the requirements for direct effect of European Union law that is unconditional, clear and precise; *Von Colson v Land Nordrhein-Westfalen* (C14/83) (1984) 1891 ECR on indirect effect of European Union law.

60 The Constitution art 63(2)(e).

61 *Thudinyane v Edward* (SA 17/2005) (2012) NASC 22 (unreported) para 18.

62 As above (my emphasis).

The Supreme Court's approach, albeit in the somewhat ambivalent language of 'appear to have', suggests that legislation and international agreements are on par. However, this would present practical interpretative difficulties where the provisions of legislation and international agreements are in direct conflict. The common law, which remains applicable in light of article 66(1) discussed earlier, offers a solution in the doctrine of consistent interpretation.[63] The doctrine requires legislation to be interpreted in harmony with international obligations wherever possible.[64] Article 144, it may be argued, thus obliges the Namibian courts to take judicial notice of international law and are enjoined to have recourse to it as a source of national law.[65]

An essential qualification to the common law's application is necessary: Customary law is placed on par with common law by article 66(1). I have argued in chapter 2 against the subservience of customary law in the Namibian legal milieu. Thus, what this would ordinarily necessitate is a determination of the position that customary law takes on the application of international law in Namibia, *in addition* to that of the common law. The common law is not to be regarded as the default or hegemonic regime. It remains an open question whether a single and coherent customary law principle on a given issue (such as resolving conflicts between treaties and the Constitution or legislation) can be extracted from Namibia's heterogeneity of communities with divergent customary laws.[66]

The determination is often made that Namibian law adopts a monist approach *vis-à-vis* the relationship between international law and Namibian municipal law.[67] However, in light of the preceding analysis in this chapter, the precise position would be that Namibia adopts a 'weak'[68] monism or 'qualified' monism approach, given that international law is subject to its consistency with the Constitution and Acts of Parliament.

63 *Nduli* (n 24) 898; see also Nollkaemper (n 13) 146. Cf sec 233 of the 1996 South African Constitution.

64 Dausab (n 3) 267.

65 Tshosa (n 3) 12. Tshosa does not cite authority for his contention that Namibian courts take judicial notice of binding international law, while Erasmus concludes that this 'flows logically from the content of Article 144' as this was the pre-constitution position under common law. Erasmus (n 3) 100.

66 R Anderson 'Redressing colonial genocide under international law: The Hereros' cause of action against Germany' (2005) 93 *California Law Review* 1155 1159.

67 Tshosa (n 3) 12.

68 M Killander 'The impact of transjudicialism on constitutional adjudication' in C Fombad (ed) *The effects of international law norms on constitutional adjudication in Africa* (2017) 216.

The next part moves away from theoretical constructs to examine the practical application of international law by Namibian courts.

Application of international law by Namibian courts

It is settled that international agreements, customary international law, and general principles of law binding upon Namibia would apply automatically unless they contradict the Constitution or legislation. Article 78 of the Constitution enjoins the judiciary to uphold the law,[69] an obligation that includes international law in light of article 144. Through the decisions of the Supreme Court principally, it will be demonstrated that courts have only – either at the invitation of the parties to a specific case or as a matter of judicial notice – superficially analysed the Constitution's international law clause. Further, courts have applied international agreements binding upon Namibia with limited reference to customary international law. Moreover, no substantive engagement with general principles of law is traceable in Namibian decisions.[70]

Consider first the courts' approach to international agreements. Namibian courts have favourably and directly relied upon international agreements in domestic decision making. In *Mushwena*[71] the Supreme Court considered the legality of the extradition of 13 accused respondents from Zambia after they had been apprehended and abducted by Namibian agents. The Court considered ICCPR and the UN Convention Relating to the Status of Refugees, which bound Namibia through accession. O'Linn AJA, commenting on the application of the ICCPR, states:[72]

> Not only has it *become part of Namibian domestic law by virtue of the Namibian Constitution*, but some of its basic principles have been incorporated into the Namibian, Botswana and Zambian laws relating to extradition, deportation and repatriation. The Convention is also part of international law and

69 See also arts 79(2) and 80(2) of the Constitution.

70 Cf R Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems of Africa' (2006) 30 *Fordham International Law Journal* 300-305.

71 *Mushwena* (n 27).

72 *Mushwena* (n 27) 320 (my emphasis). Similarly, the *Supreme Court in Shaanika & Others v The Windhoek City Police & Others* 2013 (4) NR 1106 (SC) considered art 14 of ICCPR on fair trial rights but does not consider the application of this international instrument in terms of art 144. In *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another* 1999 NR 271 (SC) 281 the Court interpreted torture, cruel, inhumane and degrading treatment in light of ICCPR and the Convention Against Torture but does not reference art 144. Cf *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC & Another* 2017 (1) NR 1 (SC) para 40.

> breaches of it are not only breaches of the domestic law of these countries, but breaches of international law.

Mushwena thus affirms the *direct and automatic application* of international agreements by Namibian courts. *Mushwena* is similar to the *Kauesa*[73] decision of the High Court to the extent that the latter case invokes and applies an international agreement.

Kauesa is to be distinguished, however, as it does not directly consider the application of an international agreement, but rather invokes it *in the interpretation* of the Constitution. In *Kauesa* the applicant challenged the Regulations to the Police Act that made it an offence for a member of the Namibian police force to publicly comment unfavourably upon the administration of the force or any other government department. In considering whether the provisions of the Regulations fell foul of the freedom of expression protected under article 21(1)(a) of the Constitution, the Court considered the provision of the African Charter on free speech and equality. The Court established that Namibia had acceded to the African Charter, thus making it part of binding Namibian law through articles 143 and 144 of the Constitution. The Court then clarified that:

> [t]he specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law. However, in all situations where such law is not in conflict with the provisions of the Namibian Constitution, such law will have to be given effect to in Namibia. In cases where the provisions of the Namibian Constitution are equivocal or uncertain as to the scope of their application, such provisions of the international agreements *must at least be given considerable weight in interpreting and defining the scope* of the provisions contained in the Namibian Constitution.[74]

Two central principles can be derived from *Kauesa*: First, the requirement that the Constitution's provisions can only override international agreements where the former is 'specific and unequivocal' is in line with the common law doctrine of consistent interpretation outlined earlier. Second, Kauesa also affirms the value of international law beyond its direct domestic application: in the interpretation and scoping of

73 *Kauesa v Minister of Home Affairs* 1994 NR 102 (HC). Although the High Court's Kausea decision was appealed to the Supreme Court, the latter considered neither the African Charter nor other rules of international law as a matter of direct application or interpretation, thus making the High Court's decision good authority. See *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC). Cf *S v Martinez* 1993 NR 1 (HC) on the perpetuation of existing international law under the Constitution.

74 *Kauesa* (n 140) (my emphasis).

Constitutional provisions. Notably, this embrace of international law as an interpretative resource is not textually asserted in the Constitution, as in other jurisdictions.[75]

However, there has been a lack of consistency in the direct application of international law by Namibian courts insofar as the Constitution and legislation are to take precedence. This is illustrated in *Mwilima*[76] where the Supreme Court had to consider a contradiction between an international agreement and domestic legislation. Article 14(3)(d) of ICCPR obligates the state to provide legal representation in criminal matters to indigent accused persons in the interest of justice. On the contrary, the Legal Aid Act had subjected the provision of legal aid in criminal matters to the availability of resources and funding from the state.[77] The majority refused to apply the Legal Aid Act as it took the view that it did not give full effect to the rights of an accused as provided for in article 14(3)(d) of ICCPR.[78] This rendered superior provisions of the international agreement over those of legislation, implying that the validity of the latter is to be tested against the former. Article 144 is unambiguous in that *both* the Constitution and legislation supersede international law including international agreements.[79] At the least, the *Mwilima* majority ought to have grappled with interpretatively reconciling the conflicting legislative and treaty provisions in accordance with the consistent interpretation principle under common law.

A further inconsistency in the (non-)application of international agreements is revealed in the Supreme Court's *Müller*[80] decision. There, the appellant, Mr Müller, relied on international agreements, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in claiming that he is permitted to adopt his wife's surname and to not be discriminated against on the basis of his sex. Sex is a protected category under articles 10 and 14 of the Constitution. The Supreme Court, after accepting that Namibia had acceded to and was bound by CEDAW, perplexingly stated: 'Such Conventions are of course subject to the Constitution and cannot change the situation'[81] before

75 Cf sec 39(1)(b) of the South African Constitution.

76 *Government of the Republic of Namibia v Mwilima* 2002 NR (SC) 235.

77 *Mwilima* (n 76) 260.

78 As above.

79 Cf *Thudinyane* (n 61).

80 *Müller v President of the Republic of Namibia & Another* 1999 NR 190 (SC) .

81 *Müller* (n 80) 205. Further Namibian decisions that consider international agreements include *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another* 1999 NR 271 (SC); *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991

summarily dismissing the reliance on CEDAW without any attempt at reconciling the Constitution with CEDAW provisions as required by article 144.[82]

Concerning the domestic application of customary international law, there is limited jurisprudence citing or relying on this as a source of law. Although reference is made to 'international law' by courts, rarely have courts positively identified a rule as one specifically of customary international law. Indicatively, in *S v Likanyi*[83] the Supreme Court was called upon to decide whether the arrest of the accused, Mr Likanyi, by Namibian agents – while Mr Likanyi was on Botswanan territory – violated the state's sovereign act of arrest.[84] The majority determined that there was a breach of 'international law' through the carrying out of the act of extra-territorial arrest by Namibian agents, whose action constituted a prohibited internationally wrongful act. The majority relied upon the Permanent Court of International Justice's decision in *SS Lotus*.[85] Although the majority considered and relied on 'international law' to the extent of determining that Namibia engaged in an internationally delinquent act, it did not substantively engage article 144 to positively identify whether the prohibition stems from international agreements or customary international law or, for that matter, general principles of law. Further, the majority erred in its failure to take note of another potential customary international law rule: State consent would preclude the wrongfulness of an internationally delinquent act.[86] This rule is reflected in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,[87] which are widely regarded as reflecting customary international law.[88] This reveals that Namibian courts

NR 178 (SC); see also Dausab (n 3) 261.

82 Similarly, *The Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC). See also N Horn 'International human rights norms and standards' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008) 144.

83 *S v Likanyi* 2017 (3) NR 771 (SC).

84 *Likanyi* (n 83) paras 68-69.

85 *SS Lotus* (*France v Turkey*) 1927 PCIJ (Ser A) No 10, 28 (7 September); *Likanyi* (n 83) para 110.

86 See N Ndeunyema 'Extra-territorial arrests by states: Did the Namibian Supreme Court get it wrong?' *OxHRH Blog* 31 August 2017, http://ohrh.law.ox.ac.uk/extra-territorial-arrests-by-states-did-the-namibian-supreme-court-get-it-wrong/ (accessed 18 July 2021).

87 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th session Supp 10, 43 (specifically arts 2-4).

88 S Talmon 'The responsibility of outside powers for the acts of secessionist entities' (2009) 58 *International and Comparative Law Quarterly* 495.

rarely explicitly identify and apply customary international law rules as part of Namibian law.[89]

These cases reveal the inconsistencies, inaccuracies and divergences in the application of international law domestically. This book will rely on the correct approach to international law in Namibia as advanced in this chapter in the assessment of a right to water.

4.2.4 Interpretative methodology and soft law resources

Given this chapter's determination that international agreements are directly binding on Namibian law subject to the stated exceptions, this necessitates an analysis of the appropriate methodology to be applied in the interpretation of international agreements within Namibia and particularly by Namibian courts.

From a practical perspective, the determination of a legally-coherent and legitimate interpretative methodology is critical. Not least because they are negotiated by a variety of states with divergent interests, treaty provisions are often framed generally, vaguely and inevitably attract ambiguity as to their meaning. From a doctrinal and normative perspective, determining an acceptable interpretative methodology avoids claims that norms such as human rights are premised upon questionable interpretative principles and as such are outcome-oriented. Norms such as a right to water that relies upon the implied rights doctrine, as argued for throughout this book, are acutely vulnerable to this critique. This heightens the necessity of articulating and relying upon irreproachable legal methods in interpreting international law.[90]

Moreover, in interpreting and applying a right to water that is asserted under international law within Namibia domestically, this chapter and chapter 6 will place particular reliance upon sources that are a step away from being legally binding law, that is, soft law sources. It thus is necessary to determine the authoritative status and relevance of soft law sources in claiming a right to water before Namibian courts.

89 In the early jurisprudence of *Corporal Punishment* (n 81) the Supreme Court could have expressed but did not express a position on whether the prohibition of corporal punishment had matured into CIL. As Tshosa holds, this failure by the Court was a missed opportunity to determine the domestic status of customary international law in early Namibian constitutional development. Tshosa (n 3). Cf *Cultura 2000* (n 35).

90 T Meron *Human rights and humanitarian norms as customary law* (1989) 81.

Interpreting international agreements in Namibian courts

In this part we turn to consider the *how* of interpreting the international agreements that are relied upon in this book. The issues are germane because, while international agreements may have direct application in Namibia, the meaning of international agreement provisions are often disputed. As I have argued earlier, *Kausea* affirms the parallel interpretative function of international agreements in relation to the Constitution.

In determining the appropriate method and techniques for interpreting international agreements by Namibian courts, two possibilities are offered: the rules of interpretation developed through judicial decisions for interpreting the Constitution and domestic legislation; alternatively, the rules of interpretation developed under international law to specifically interpret international agreements. The latter proposition will be defended. The customary international law rules that apply to the interpretation of international agreements – as reflected in articles 31 and 32 of VCLT – are applicable.

Whether a municipal court would be legally bound to apply the VCLT's interpretative rules is a matter determined by domestic law. On this premise, customary international law is part of binding Namibian law. There need not be two or more state parties to a dispute inviting the interpretation of an international agreement for the methodology of articles 31 and 32 of the VCLT to be applicable.

Namibia is not a contracting state party to the VCLT. [91] Nevertheless, articles 31 and 32 of the VCLT are a binding part of Namibian law by virtue of article 144 of the Constitution as there is little dispute that articles 31 and 32 of VCLT reflect norms of customary international law. This proposition finds abundant support, including the decision of the International Court of Justice (ICJ) in *Kasikili/Sedudu Island* concerning the Namibia/Botswana boundary where Namibia's agents asserted – and the ICJ accepted – that articles 31 and 32 of the VCLT form part of customary international law.[92]

91 In *Martinez* (n 73) the High Court, in determining the binding effect of the 1982 UN Convention on the Law of the Sea on Namibia, considered whether the UN Council for Namibia had signed the VCLT on Namibia's behalf, but was unable to establish the question conclusively.

92 *Kasikili/Sedudu Island* (*Botswana v Namibia*) Merits [1999] ICJ Reports 1045 para 18. See also *Memorial Submitted by the Namibian Government* para 46, http://www.icj-cij.org/files/case-related/98/8574.pdf (accessed 22 September 2019); *Oil Platforms (Islamic Republic of Iran v United States of America)* Preliminary Objections, Judgment (1996) ICJ Report (II) para 23; R Gardiner *Treaty interpretation* (2008) 12; M Villiger

Namibian courts are yet to expressly rely on the VCLT's interpretive framework as a matter of custom. Seldom have Namibian courts meaningfully considered, let alone referenced, the VCLT's interpretive rules in their interpretation of international agreements. Nonetheless, there exists a legal obligation, I argue, upon Namibian courts to apply articles 31 and 32 as a matter of binding customary international law.[93] To augment this argument, the Namibian Supreme Court has laudably affirmed a strict approach to respect for international law in the municipal setting through fidelity to the rule of law as a founding constitutional principle. Concurring in *Likanyi*, Shivute CJ has asserted:[94]

> The rule of law requires that even people accused of committing heinous crimes must be dealt with according to law. Where a person is brought before court in violation of international law, the rule of law – a foundational principle of the Constitution – requires that a court critically examine the conduct of the law enforcement agency in securing the presence of the accused within the territorial jurisdiction of the court.

While Shivute CJ's emphasis upon the centrality of international law to respect for the rule of law is in the context of substantive rules of international law, this also extends to quasi-procedural rules, such as the interpretative methodology in articles 31 and 32 of the VCLT interpreting international agreements.

Beyond legal justifications for applying articles 31 and 32 of the VCLT as custom, further normative and policy-based reasons exist on why municipal (Namibian) courts *ought to* apply the VCLT domestically. First is *harmonisation*, since divergent approaches remain between states and among international law judges and scholars as to the element(s) that ought to be relevant in treaty interpretation. Waibel captures this divergence in approaches.[95] Some emphasise the subjective intentions of the parties (including through liberal recourse to *travaux préparatoires*); others ascribe a significant premium to a treaty's object and purpose, while others stress the primacy of the text with limited scope for adducing extrinsic evidence about the intentions of the parties and a treaty's object and purpose.[96] The

Customary international law and treaties (1985) 484-506.

93 A Nollkaemper 'Grounds for the application of international rules of interpretation in national courts' in H Aust & G Nolte *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (2013) 37.

94 *Likanyi* (n 83) para 8.

95 M Waibel 'Principles of treaty interpretation: developed for and applied by national courts?' in Aust & Nolte (n 93) 10-11.

96 As above.

utility of articles 31 and 32 of the VCLT lies in that it offers a common approach – or in the least a common starting point – to interpreting international agreements. 'Common' in this context, however, is not to be understood as singular, as articles 31 and 32 of the VCLT indeed reflects an eclectic mix of interpretative approaches.[97]

Second is *legitimacy*. Particularly where the legitimacy of a municipal court to determine certain legal issues is tenuous, it may be tempting to turn to the VCLT's interpretative methodology. This allows municipal courts to avoid potential minefields and criticisms that their formulated interpretations may usurp the executive and legislative roles. For example, interpretative legitimacy concerns would be of potentially heightened relevance in the context of positive rights and duties of a socio-economic nature, such as a right to water in context of this book, because institutional justiciability objections as to the legitimacy of judges in adjudicating matters laden with policy, resource and budgetary considerations are likely to arise. Waibel moreover advances the use of the VCLT approach as particularly appealing to judges in countries in transition. Arguably, Namibia remains 'transitional' considering the sparse reliance upon international law in domestic decisions.[98]

The third is *practicality*. While articles 31 and 32 of the VCLT may be deemed as being primarily addressed to state parties in light of the language employed, it has also been claimed that the VCLT drafters had municipal courts in mind as addressees. Waibel cites the normative desirability of legal certainty and the need for convergence in treaty interpretation which were discussed by the International Law Commission and Vienna Conference that drafted the VCLT.[99] Waibel points out that national courts were implicitly a central audience for the VCLT's interpretive rules as the International Law Commission had discussed the issue based on reports that summarised interpretive practices that included many decisions of national courts.[100] Many early writings also examine treaty interpretation, as well as the law of treaties more broadly, from the perspective of national practice, including the practice of national courts. Moreover, even in the absence of explicit consideration of national courts as one important audience, the VCLT's drafters were seemingly aware that the audience was broad and that a diverse range of treaty interpreters would apply articles 31 and 32 of the VCLT.[101]

97 J Tobin *The right to health in international law* (2012) 79.

98 Waibel (n 95) 16.

99 Waibel 13.

100 As above.

101 As above; Nollkaemper (n 93) 37.

Status and application of soft law sources in domestic interpretation

In interpreting and applying binding law in Namibia – whether derived from the Constitution or legislation or international law – reference may be made to those interpretations within various sources that are a step away from being legally binding: soft law.[102] Soft law may take forms that include General Comments, general recommendations or resolutions, and are often issued by quasi-judicial or non-judicial bodies such as the ESCR Committee, the African Commission on Human and Peoples' Rights (African Commission), the HRC or the CEDAW Committee. Soft law sources are to be distinguished from comparative law sourced from foreign decisions (including foreign regional decisions such as the Inter-American and European systems) and which may hold persuasive authority within Namibian judicial reasoning.[103] These soft law sources are relied upon heavily in the substantive content of water analysis in chapter 6 of the book.

The significance of soft law lies in potentially aiding interpretation, particularly where legal provisions are vague, contestable, ambiguous or open-ended.[104] While it is settled that soft law sources are not legally binding of and by themselves, their persuasiveness and authoritative weight require attention. These concerns are not entirely new. The nature, drafting technique and legitimacy of soft law sources have been the subject of scholarly analysis, perhaps more prominently by Keller and Grover in the context of General Comments of the HRC. The issues Keller and Grover raise in their analysis mirror those arising from soft law issued by other bodies such as the ESCR Committee and African Commission that are at the disposal of domestic courts.

Reactions to General Comments lie at different levels of the authority spectrum. At the two opposite ends of this spectrum are those that concord their use as 'authoritative interpretations' of treaty norms, while others reject their use entirely as 'broad, unsystematic, statements which are not always well-founded, and are not deserving of being accorded any particular weight in legal settings'.[105] Some states have also been recorded in objecting to specific General Comments, asserting that their content

102 See A Boyle & C Chinkin *The making of international law* (2007) 211.

103 See ch 1.

104 P Alston 'The historical origins of the concept of "General Comments"' in L Boisson de Chazournes & V Gowland-Debbas (eds) *The international legal system in quest of equity and universality: Liber Amicorum Georges Abi-Saab* (2001) 763.

105 H Keller & L Grover 'General Comments of the Human Rights Committee and their legitimacy' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (2012) 118.

is an 'unacceptable attempt to attribute treaty provisions a meaning which they do not have'.[106] Similar criticism is exemplified by those who admonished the ESCR Committee's General Comment 15 which implied the right to water, which I will address in this chapter. Nevertheless, the normative legitimacy of General Comments ought to be assessed through their quality of reasoning, language and process for drafting General Comments, all of which would impact their interpretative and deliberative resourcefulness and persuasive authority.

Two principal theories can thus be advanced in justifying recourse to General Comments of treaties. The first is the *subsequent practice theory*. This theory views General Comments as constituting subsequent practice for purposes of article 31(3)(b) of the VCLT and can thus be taken into account in interpreting an international agreement (less so where a state has contested the General Comment's content). Relatedly, the acquiescence of state parties to General Comments may serve as a justification for treaty interpretation. The argument is that, per article 31(1) of the VCLT, a good faith interpretation of an instrument obliges state parties to duly consider the content of General Comments, as they are the product of a body established to interpret such an instrument, as well as to monitor and promote compliance with it. The proposition is thus for article 31(1)(c) of the VCLT to be interpreted more broadly to include the practice of treaty-monitoring bodies and not only states themselves as has been the tradition in interpreting international law.[107]

Second is the *authoritative interpretation theory*, where General Comments are asserted as 'authoritative' interpretations or statements of a treaty. Their authoritativeness refers to the fact that treaty body committee members are elected to perform duties specified and to do so implies that they need to adopt General Comments.[108] Authoritativeness may also derive from the expertise of committee members, drawn from the ESCR Committee's Concluding Observations of state parties over the years. The soft law character of General Comments does not mean they are devoid of any legal significance. They are particularly useful in both domestic and supra-national settings where there are attempts to resolve 'hard cases' by setting out important background principles against which a law may be analysed.[109] Indeed, what is unassailable from General

106 Keller & Grover (n 105) 119.

107 M Langford 'Ambition that overleaps itself: A response to Stephen Tully's critique of the General Comment on the right to water' (2006) 24 *Netherlands Quarterly of Human Rights* 433 435; Keller & Grover (n 105) 132.

108 Keller and Grover (n 105) 132.

109 Keller and Grover 129.

Comments is that they often reflect a robust legal analytical function that advances a common international understanding of treaties and serves to prevent state parties from claiming that a treaty obligation is limited to this or that area of its experience.[110]

Therefore, on the combined strength of the subsequent practice and authoritative interpretation theories, soft law sources such as General Comments can legitimately be relied upon in legal interpretation by Namibian courts. While aware of their legally non-binding nature, courts ought to consider soft law as resources that offer deliberative, interpretative and potentially persuasive value. This aligns with the international law-friendly disposition that pervades the Constitution.

In summary, it has thus far been argued that, subject to constitutional and legislative superiority, article 144 directly incorporates international agreements and general rules of public international law as part of binding Namibian law, the latter being constituted of both customary international law and general principles of law. Further, when interpreting international agreements, the rules of interpretation established under custom, as reflected in articles 31 and 32 of the VCLT, apply. These rules will be applied in interpreting a right to water-related international agreements in this chapter. Finally, as Namibian courts can also legitimately, yet judiciously, rely upon soft law sources in interpreting potentially persuasive authorities, the book will also critically rely on soft law sources throughout. In this light, the forthcoming parts of the chapter will consider the three sources of international law in the context of the legal basis of a right to water in Namibia.

4.3 A right to water under international agreements binding Namibia

In the following parts the chapter turns to analyse a right to water by interrogating international law sources that are found to be binding upon Namibia. The focus of this chapter thus is an analysis of the existence of a legally-binding right to water by drawing on the three principal sources of international law that are binding upon Namibia under article 144 of the Constitution: treaties to which Namibia is a contracting state party, customary international law and the general principles of law.

As a matter of human rights treaty law that binds Namibia, I argue that this question has largely been affirmatively answered with the adoption of

110 Keller and Grover 124.

the ESCR Committee in its 2002 General Comment 15.[111] The Committee interpretatively implied the right to water into the provisions of ICESCR, although with some scholarly demur as to its normative suitability. I will also consider other treaties that contain the express right to water provisions, although such treaties are of limited applicability *ratione personae* as they only extend to specially-protected categories of people.

Asserting a right to water as a norm of customary international law is an appealing approach as it would bind *all* states, including Namibia, even where no treaty law basis can be asserted. Elsewhere, I have extensively examined a right to water under treaty law, customary international law and general principles of law.[112]

4.3.1 An express right to water under treaty law

Various international and regional treaties that bind Namibia expressly recognise a right to water as part of a range of human rights guarantees. However, no independent, issue-specific treaty exists that proclaims a right to water from a strictly anthropocentric perspective, outlines a right's normative content and determines the obligations of state parties. However, international civil society and intergovernmental organisations have advocated a universal convention specifically dedicated to a right to clean water.[113] For our purposes, an *express* right to water is to be understood as one that is textually specified in a treaty instrument that binds Namibia. This is in contrast with an implied or derivative right to water under treaty law, which will be addressed in subsequent parts of this chapter.

A treaty-based right to water for children, persons with disabilities, women, and in armed conflicts

The international regional agreements that Namibia has ratified or acceded to that recognise the right to water expressly are the Convention on the

111 ESCR Committee 'General Comment 15: The Right to Water' (Articles 11 and 12 of the Covenant) (2002) UN Doc E/C 12/2002/11. See also HRC *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments* 16 August 2007 A/HRC/6/3; UN HRC *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque* 29 June 2010 A/HRC/15/31.

112 See N Ndeunyema 'Unmudding the waters: Evaluating the legal basis of the human right to water under treaty law, customary international law and the general principles of law' (2020) 41 *Michigan Journal of International Law* 455.

113 See UN Sustainable Development Platform *Statement by Green Cross International*, https://sustainabledevelopment.un.org/index.php?page=view&type=255&nr=2158&menu=35 (accessed 30 March 2019).

Rights of the Child (CRC);[114] the Convention on the Rights of Persons with Disabilities (CRPD);[115] CEDAW;[116] and the Geneva Conventions. Regional treaties include the African Charter on the Rights and Welfare of the Child[117] (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[118] It is argued that all these instruments are limited in scope as they apply only to specific categories of individuals or groups. Those who do not fall within one of the protected categories would not be able to claim rights guaranteed under the relevant treaty. These group-based treaties nevertheless are salient for, among others, developing the substantive content of a right to water and are thus examined here.

Beginning with CRC, article 24(1) enjoins state parties to recognise the child's right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health, requiring state parties to 'strive to ensure that no child is deprived of his or her right of access to such health care services'. Article 24(2) proceeds to list the appropriate measures that state parties 'shall pursue' for the full implementation of article 24(1). Among the measures listed under article 24(2) is '[t]o combat disease and malnutrition, including within the framework of primary health care through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and *clean drinking-water*'.[119] While article 24(2) explicitly refers to clean drinking water as among the appropriate measures that states are to take, this is only in relation to the child's right to the enjoyment

114 Convention on the Rights of a Child opened for signature 20 November 1989 1577 UNTS 3, entered into force 2 September 1990. Namibia acceded in 1990. See United Nations High Commissioner for Human Rights 'Status of Ratification', http://indicators.ohchr.org/ (accessed 25 May 2018).

115 Convention of the Rights of Persons with Disabilities (CRPD) opened for signature 13 December 2006, 2515 UNTS 3, entered into force 3 May 2008. Namibia ratified in 2007. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 2 August 2018).

116 Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), opened for signature 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981.

117 African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). Namibia ratified in 2004. See African Commission on Human and Peoples' Rights, Ratification Table: African Charter on the Rights and Welfare of the Child. See http://www.achpr.org/instruments/child/ratification/ (accessed 26 May 2018).

118 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted July 11, 2003. Namibia ratified in 2004. See http://www.achpr.org/instruments/women-protocol/ratification/ (accessed 2 August 2018).

119 My emphasis.

of health.[120] Given the scope of CRC, the right to water is only claimable to the extent that it relates to a child – a human being below the age of 18 years.[121]

While it is obvious that water is indispensable to the basic health of a child (or any person), water is also important for non-health-related reasons. Arguably, a right to water is only obligatory under CRC insofar as water is the nexus to realise the health of the child. This is a proposition that finds the interpretive support of the CRC Committee, which points to the essentiality to life and other human rights of water and the prevention of water-related diseases.[122] Those scholars who have analysed CRC's *travaux préparatoires* affirm this interpretation by pointing out that it was India that had proposed the introduction of the expression 'clean drinking water' during the revision of the draft of what later became article 24. This inclusion was to recognise the importance of providing clean drinking water to avoid the risk of serious disease and even the death of children.[123]

A similar approach to that adopted by CRC in recognising water as a derivative of health finds regional expression in article 14 (2)(c) of the African Children's Charter.[124] The Children's Charter adopts similar language and structure as CRC, although the African Children's Charter refers to *safe* drinking water as opposed to the CRC's *clean* drinking water. As a regional treaty binding Namibia, the African Children's Charter also applies to children under 18 years in Namibia.

120 CRC art 24(1). The child's right to water can also be implied for the child's right to an adequate standard of living in CRC art 27.

121 CRC art 1.

122 UN Committee on the Rights of the Child, General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24), 17 April 2013, CRC/C/GC/15 para 48: '*Safe and clean drinking water* and sanitation *are essential for the full enjoyment of life and all other human rights*. Government departments and local authorities responsible for water and sanitation should recognise their obligation to help realise children's right to health, and actively consider child indicators on malnutrition, diarrhoea and other water related diseases and household size when planning and carrying out infrastructure expansion and the maintenance of water services, and when making decisions on amounts for free minimum allocation and service disconnections. States are not exempted from their obligations, even when they have privatised water and sanitation' (my emphasis).

123 J Chávarro *The human right to water: A legal comparative perspective at the international, regional and domestic level* (2015) 59; S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1992) 353.

124 African Children's Charter art 14: '(1) Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. (2) States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures … (c) to ensure the provision of adequate nutrition and *safe drinking water* …' (my emphasis).

Treaties addressing women's rights also expressly affirm the existence of the right to water. CEDAW provides for a right to water in the specific circumstances of *rural* women's right to participate in and benefit from rural development.[125] Article 14(1) and (2) of CEDAW thus addresses the unique challenges that rural women – who represent a quarter of the world's population[126] – face in the context of the need for the economic survival of their families and the non-monetised work that they contribute. In responding to these challenges, CEDAW requires state parties to take appropriate measures that include ensuring the elimination of discrimination against rural women through rights that include enjoying 'adequate living conditions, particularly in relation to housing, sanitation, electricity and *water supply*, transport and communications'.[127] Article 14 of CEDAW thus 'engenders' the right to water as an intersectionality[128] concern by coupling gender with socio-economic class, given its specific application to women who are rurally located.[129]

Rural women are explicitly protected under article 14 since rural women fare worse than rural men, and urban women and men on every socio-economic indicator.[130] Article 14 thus seeks to ensure that rural women benefit directly from social security programmes and have adequate living conditions, including water supply.[131] This is a particularly pertinent concern in the sub-Saharan African context where 40 billion hours are spent collecting water every year, with women bearing two-thirds of this burden.[132] A 'holistic approach' to article 14 has also

125 CEDAW Committee 'General Recommendation 34 on rural women' (2016) CEDAW/C/GC/34 para 35.

126 CEDAW Committee (n 125) para 3.

127 CEDAW art 14(2)(h) (my emphasis).

128 On intersectionality, see K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 139; S Fredman 'Engendering socio-economic rights' in A Hellum & H Sinding Aasen (eds) *Women's human rights: CEDAW in international, regional and national law* (2013) 218.

129 For an intersectional perspective, anchored in Southern and Eastern African case studies, on a women's right to water discussion 'intersecting and overlapping marginalizations on the basis of gender, race, ethnicity, political exclusion, and social economic class', see A Hellum et al (eds) *Water is life: Women's human rights in national and local water government in Southern and Eastern Africa* (2015).

130 CEDAW Committee (n 125) para 5.

131 M Campbell *Women, poverty, equality: The role of CEDAW* (2017). CEDAW stated: 'Rural women's and girls' rights to water and sanitation are not only essential rights in themselves, but also are key to the realization of a wide range of other rights, including health, food, education and participation.' CEDAW Committee (n 125) para 81.

132 UNICEF *Water, sanitation and hygiene*, http://www.unicef.org/media/media_45481.html (accessed 19 July 2018). See also UN Economic and Social Council, Sub-

been advanced[133] and is reflected in the CEDAW Committee's General Recommendation 34 which asserts that '[r]ural women's and girls' rights to water and sanitation are not only essential rights in themselves, but also are key to the realization of a wide range of other rights, including health, food, education and participation'.[134]

Similarly, the African Women's Protocol recognises the rights of African women to food security, with the duty upon state parties to ensure that women have the right to nutritious and adequate food. Among the listed measures that the state is to take is providing women with access to clean drinking water per article 15(a). Like CEDAW, the African Women's Protocol's scope of application is limited to (African) women – which includes girls.[135]

CRPD expressly provides for the right to water. Through article 28(2) of CPRD, state parties recognise the rights of persons with disabilities to social protection. This has been interpreted as including their right to clean water services as affirmed by the UN Committee on the Rights of Persons with Disabilities (CRPD Committee).[136] The scope of application for CPRD is also limited to the protected group of persons with disabilities in Namibia.

A right to water under international humanitarian law, the body of international law that applies during international or non-international armed conflicts,[137] also merits some analysis. While a right to water can

Commission on the Promotion and Protection of Human Rights, *Final Report of the Special Rapporteur Mr El Hadji Guissi, Relationship between the Enjoyment of Economic, Social, and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation* paras 18–19 UN Doc.E/CN.4/Sub.2/2004/20 14 July 2004, https://www.cetim.ch/legacy/en/documents/rap-2004-20-ang.pdf (accessed 2 August 2018).

133 A Hellum 'Engendering the right to water' in M Langford & A Russell (eds) *The human right to water: Theory, practice and prospects* (2017) 316-317.

134 CEDAW Committee (n 125) para 18.

135 Art 1 African Women's Protocol.

136 UN Committee on the Rights of Persons with Disabilities 'Guidelines on treaty-specific document to be submitted by states parties under article 35 paragraph 1, of the Convention on the Rights of Persons with Disabilities', 18 November 2009, CRPD/C/2/3, 16. The Committee was established under art 34 of CPRD with the purpose of the monitoring the implementation of CPRD.

137 D Akande 'Classification of conflicts: Relevant legal concepts' in E Wilmshurst (ed) *International law and the classification of conflicts* (2012); D Fleck 'The law of non-international armed conflicts' in D Fleck (ed) *The handbook of international humanitarian law* (2013); C Byron 'Armed conflicts: International or non-international?' (2001) 6 *Journal of Conflict and Security Law* 63.

be impacted upon at the level of both *jus ad bellum* (water as a source of armed conflict and water-related conflict situations) and *jus in bello* (the law on the provision of water during armed conflicts), it is through the latter that international humanitarian law offers potential as a source of water-related rights and obligations upon states. As such, the Third[138] and Fourth[139] Geneva Conventions, which arguably also reflect customary humanitarian law by and large,[140] contain provisions that protect access to water in armed conflict-related situations. These protections extend to persons such as prisoners of war, internees and civilians, thereby creating water-related rights and obligations that bind parties participating in hostilities.[141] This has been considered by various scholars.[142]

138 Geneva Convention (No III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS.

139 Geneva Convention (No IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (entered into force 21 October 1950) 75 UNTS 287. See also the analysis in L Boisson de Chazournes *Fresh water in international law* (2013) 169-173.

140 International Committee of the Red Cross *Customary humanitarian law* https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm#a3 (accessed 19 September 2019).

141 Arts 20, 26, 29 and 46 of GC-III guarantees sufficient water for drinking purposes and other human needs; arts 85, 89 and 127 of GC-IV mentions water and protects civilian persons in times of war; art 54 of the First Additional Protocol of 1977 (Protocol [No I] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3) prohibits the attack on, destruction, removal or rendering useless of objects indispensable to the survival of the civilian population including drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party; cf arts 5 and 14 of the Protocol [No II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 609. Namibia has ratified or acceded to all of the above Geneva Conventions and Additional Protocols. See International Committee of the Red Cross *Treaties, States Parties and Commentaries – Namibia*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=NA (accessed 2 August 2018).

142 For scholarship on an international humanitarian law right to water, see I Winkler *The human right to water: Significance, legal status and implications for water allocation* (2012) 62-64; M Tigino *Water during and after armed conflicts* (2016); A Hardberger 'Whose job is it anyway? Governmental obligations created by the human right to water' (2006) 41 *Texas International Law Journal* 533 549-568. For a comprehensive analysis of four basic water prohibitions relating to international humanitarian law insofar as they relate to the use of poison as a means of warfare, the destruction of enemy property, attacks on objects indispensable to the survival of the civilian population, and attacks on installations containing dangerous forces, see Z Ameur 'The Protection of water in times of armed conflicts' (1995) 308 *International Review of the Red Cross* 550.

Analysing the express right to water under treaty law

The treaties assessed above that expressly provide for a right to water are of limited scope *ratione personae* as they only protect specific categories of groups or individuals in Namibia. These treaties thus do not offer an independent, general and free-standing right to water. Rather, we see that the right is often formulated as the derivative right of another 'principal' or 'core' right, be it the right to health (CRC) or the right to social protection (CRPD). This 'ill-defined status' of water, as Cahill frames it, has a pertinent drawback as it 'causes confusion as to the scope and core content of the right to water'.[143] This thus raises problems concerning water's justiciability and implementation given that questions as to the normative content present the challenge of establishing 'whether violations are of the right to water itself or, first and foremost, violations of other related rights'.[144] Cahill thus illuminates the challenge of cogently asserting that a right to water has, as a matter of law, been violated where we accept that water is not an independent right, but is derived from another related or dependent right.[145]

Concerning a right to water under international humanitarian law, Winkler has argued that if these water-related guarantees exist in the strenuous context of armed conflicts where significant derogations from various human rights protections are not prohibited, then they must be even more valid in times of peace as there would ordinarily be no military necessity justifications to restrict human rights. While Winkler's deductive reasoning may be attractive, given the *ratione materiae* (armed conflict) and *ratione personae* (prisoners of war, internees and civilians) limitations of the international humanitarian law sources that bind Namibia, international humanitarian law is of marginal relevance in the peacetime context that this book assumes. I thus refrain from further evaluating international humanitarian law sources.

All of the treaties that reference an express right to water assessed thus far are alone insufficient to establish a *human* right to water as well as to determine a right's content and the correlative duties upon states. A human right to water denotes a right that is of general application to *all human beings* by virtue of the biological status of their humanity alone. However, the assessed treaties require more than the basic biological

143 A Cahill "'The human right to water – a right of unique status": The legal status and normative content of the right to water' (2005) 9 *International Journal of Human Rights* 391 397.

144 As above.

145 As above.

status of a human being. They would apply only to rural women, children or persons with disabilities, as the case may be, although the application of water-related rights and obligations may sometimes also extend to the dependants and families of persons falling within those protected categories. While this 'vulnerability-based' approach to a right to water[146] is laudable, this chapter focuses on evaluating the existence of a *general* human right to water. Nevertheless, these treaties retain the potential to serve as evaluative and deliberative resources in determining the normative scope and substantive content of a right to water considered in chapter 6.

What follows, therefore, is a consideration of treaty law sources binding Namibia that may assert the existence of an implied right to water and one that is not limited through *ratione materiae* or *ratione personae* considerations.

4.3.2 An implied right to water under treaty law

Turning to the implied right to water, three treaties are offered to potentially support a right's legal basis: ICESCR,[147] ICCPR[148] and the African Charter.[149] I argue that these treaties[150] support an implied right to water that is of general application. I will also rely on judicial, quasi-judicial and soft law sources that are developed under these treaties as interpretative aids in this chapter and throughout this book.

146 Similarly, Target 6.2 UN SDG: 'By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations.'

147 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNTS 3, entered into force 3 January 1976. Namibia acceded 28 November 1994.

148 International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171, entered into force 23 March 1976. Namibia acceded in 1994.

149 African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217, entered into force 21 October 1986. Namibia in acceded 1994.

150 Cf art 10(2), Convention on the Law of the Non-Navigational Uses of International Watercourses UN Doc A/RES/51/229 (1997), which requires special regard to be given to 'the requirements of vital human needs' in the event of a conflict between users of an international watercourse. Namibia ratified the Watercourses Convention on 29 August 2001, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en (accessed 18 September 2019). See also the analysis of 'vital human needs' in S McCaffrey *The law of international watercourses* (2007) 369.

Implying water under ICESCR

Support for a right to water under ICESCR finds textual anchorage in two provisions: articles 11(1) and 12.[151] Article 11(1) of ICESCR reads:[152]

> The States Parties to the present Covenant recognize the *right of everyone to an adequate standard of living* for himself and his family, *including* adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

While article 11(1) does not explicitly refer to water, the provision has been interpreted as 'including' a right to water as part of a right to an adequate standard of living for the individual and their family.[153] The term 'including' is to be interpreted as implying that a rights therein are not an exhaustive *numerus clausus* and reflects the legal drafting tradition that is frequently adopted by domestic and international law-making organs. The interpretative inclusion of a right to water in article 11(1) is anchored in a teleological approach to interpretation as the primary rule of treaty interpretation under article 31(1) of the VCLT.[154] Further, the phrase 'adequate/acceptable standard of living' is a legal formulation seen in article 25(1) of the Universal Declaration of Human Rights (Universal Declaration)[155] and in the Namibian Constitution's article 95(j) Principle of State Policy.[156] Both the Constitution and the Universal Declaration omit an explicit reference to water.

151 Note also art 1(2) ICESCR providing that 'in no case may a people be deprived of its own means of subsistence'. Means of subsistence, it has been argued, must include water. See Cahill (n 143) 391.

152 My emphasis.

153 Although the right is gendered given the reference 'himself and his family', it applies to everyone and does not imply any limitation upon the applicability of this right to individuals or to femaleheaded households as stated in the ESCR Committee 'General Comment 12: The right to adequate food' (Article 11 of the Covenant) (1999) UN Doc E/C.12/1999/5 para 1.

154 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. See also T Bulto 'The emergence of the human right to water in international human rights law: Invention or discovery?' (2011) 12 *Melbourne Journal of International Law* 298.

155 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

156 The Constitution art 95(j).

The interpretation of article 11(1) to include a right to water was first – at least insofar as an 'authoritative' source is concerned – put forward by the ESCR Committee[157] in its 2002 General Comment 15.[158] General Comment 15 sets out the legal bases of a right to water, its normative content, the state's obligations[159] and corollary violations thereof,[160] a right's implementation at a national level[161] and the obligations of non-state actors.[162] The analysis here will be restricted to the legal bases of a right to water and I will return to the substantive aspects of General Comment 15 in chapter 6. Notably, the ESCR Committee's discussion of General Comment 15 extends only to water for personal and domestic use and thus excludes considerations borne out of commercialisation or transboundary concerns around water.[163]

Four principal justifications are relied upon by the ESCR Committee in asserting the legal bases of a right to water. The first is rooted in the *original intent* of the ICESCR drafters. The ESCR Committee states that the use of the word 'including' in article 11(1) of ICESCR indicated that the catalogue of rights mentioned – food, clothing and housing – was not intended to be understood as an exhaustive list but rather as exemplary.[164] The right to an adequate standard of living thus is the 'source right' for a right to water.[165] The ESCR Committee utilised article 11(1) to carve

157 The Committee is tasked with monitoring ICESCR's implementation by state parties as well as with developing general interpretations through General Comments. See Part IV, ICESCR; UN High Commissioner for Human Rights *The Committee on Economic, Social and Cultural Rights*, http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx (accessed 25 May 2018).

158 See GC15 (n 111) para 1. The ESCR Committee's GC4 also specifies a right to have sustainable access to safe drinking water for all beneficiaries of the right to adequate housing, but only mentions water without elaborating upon its legal source or normative content. GC15 was thus pioneering in offering a *full* exposition of the right to water under ICESCR. See ESCR Committee 'General Comment 4: The right to adequate housing' (Article 11 (1) of the Covenant), 13 December 1991, E/1992/23.

159 GC15 (n 111) paras 17-38.

160 GC15 paras 10-16.

161 GC15 paras 45-59.

162 GC15 para 60.

163 GC15 para 2. On the commercialisation and privatisation of water, see C de Albuquerque & I Winkler 'Neither friend nor foe – Why the commercialization of water and sanitation services is not the main issue for the realization of human rights' (2010) 17 *Brown Journal of World Affairs* 167; M Langford 'Privatisation and the right to water' in Langford & Russell (n 133) 463; A Lang 'Privatisation and regulatory autonomy: The right to water and international economic law' in Langford & Russell (n 133) 531.

164 GC15 (n 111) para 3.

165 P Thielbörger 'Re-conceptualizing the human right to water: A pledge for a hybrid approach' (2015) 15 *Human Rights Law Review* 225.

out a free-standing right to water given that water would be among the prerequisites for an adequate standard of living.[166] On this premise, a right to water was a *discovery of*, rather than an *invention by*, the ESCR Committee.[167]

The second justification is water as a *multiplier right*. Water is of overarching salience in the realisation of other rights as without water, other rights cannot be fulfilled. As the ESCR Committee frames it, water 'clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival'.[168] The ESCR Committee continues that water thus is necessary 'to realise many of the [ICESCR] rights' such as adequate food, ensuring environmental hygiene through a right to health,[169] securing livelihoods through the right to gain a living by work, and to enjoy certain cultural practices as part of the right to cultural life.[170]

The third justification relates to water as a *derivative right*,[171] derived from the rights to life, dignity and health.[172] The ESCR Committee points out that water 'should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost among

166 Bulto (n 154) 299.

167 Bulto 303.

168 GC15 (n 111) para 3. In a philosophical discussion of water as part of the right to an adequate standard of living, Copp, commenting on the phrase in the Universal Declaration, concludes: 'Any credible analysis of the concept of a basic need would imply … basic needs [such as] clean water'. D Copp 'The right to an adequate standard of living: Justice, autonomy, and the basic needs' (1992) 9 *Social Philosophy and Policy* 231 252. Winkler also highlights the challenge of determining what forms part of the right to an adequate standard of living in art 11(1) of ICESCR and advances Engbruch's assumption that an adequate standard of living is met 'when individuals live in an environment and under conditions that allow them to participate in social life while maintaining their dignity and to realise their rights by their own means'. Winkler (n 142) 62.

169 See also ESCR Committee General Comment 14 'The Right to the Highest Attainable Standard of Health (Art 12) Adopted at the 22nd session of the Committee on Economic, Social and Cultural Rights' on 11 August 2000 E/C.12/2000/4.

170 GC15 (n 111) para 6.

171 Interestingly, Cahill maintains that because water is a crucial element of art 11 of ICESCR rights (food, clothing, housing), it may be argued that 'the right to water still exists in international human rights law with a 'unique status' – somewhere between that of a derivative right and an independent right'; see Cahill (n 143) 391. Similarly, CEDAW has been interpreted by its treaty body, the CEDAW Committee, as recognising the right to water as a component of both the right to health and the right to housing.

172 See: Chávarro (n 123) 48; E Bluemel 'The implications of formulating a human right to water' (2004) 3 *Ecology Law Quarterly* 970.

them the right to life and human dignity'.[173] Water as a human right can thus be seen as being of intrinsic value, of which the worth derives from its 'inherent qualities, powers, and potentialities' and not through social conventions or subjective preferences.[174]

The fourth justification is rooted in the right to health in article 12 of ICESCR from which the ESCR Committee argued that the right to water can be derived.[175] This argument was elaborately advanced in the ESCR Committee's General Comment 14 which immediately preceded General Comment 15.[176] The ESCR Committee states that the article 12(1) right to health is 'an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water'.[177] The Committee also interpreted adequate supply of safe and potable water[178] as being covered by article 12(2)(b) of ICESCR, which outlined the steps to be taken by state parties to achieve the full realisation of the right to health.[179]

To recapitulate, the ESCR Committee has established the legal foundations of the right to water on the basis of various ICESCR articles relating to dignity, life, health and an adequate standard of living. In my view, these arguments are most appropriately considered as mutually reinforcing and inter-related rather than as separate and independent. For purposes of this book and as seen in chapter 6, I will, however, restrict the analysis to life, dignity and an adequate standard of living. This is in light of the unexplored status of the right to health as an enforceable right under the Namibian Constitution and under international law[180] that binds Namibia.

The ESCR Committee's justifications for the legal foundations of the right to water have not been without scholarly demur and criticism. The principal objector has been Tully who has taken issue with General

173 GC15 (n 111) para 3. The Committee does not cite the specific provisions, but these are presumably referring to the rights to life and dignity provisions in the Universal Declaration, ICESCR, ICCPR and the Optional Protocols.

174 M Penn & A Malik 'The protection and development of the human spirit: An expanded focus for human rights discourse' (2010) 32 *Human Rights Quarterly* 665 667.

175 On the distinction between an *implied* right and *derivative* right, see Thielbörger (n 165) 228.

176 The Committee also touches on the right to water from the perspective of the right to health in GC15 (n 111) paras 3, 8, 11–13, 44.

177 GC14 (n 169) para 11.

178 Potable water is water 'fit or suitable for drinking'; *Oxford English dictionary* (2017).

179 GC14 (n 169) para 15.

180 Tobin (n 97).

Comment 15 specifically.[181] While Tully objects to the legal basis of the right to water on numerous grounds, this chapter is restricted to legal and normative concerns[182] and refrains from engaging with his policy-based considerations.[183]

First, Tully disputes the expansive reading of the word 'including' in article 11(1) of ICESCR. Tully argues that the word is a 'self-evidently imprecise term' that leads one to 'speculate on the number and nature of other characteristics essential to an adequate standard of living but not explicitly guaranteed by the [ICESCR]'[184]. Effectively, Tully faults the ESCR Committee for engaging in a form of 'rights proliferation'.[185] For him, the word 'including' could also mean the interpretative inclusion of rights such as electricity, the internet or other essential civic services, something that would 'open up the floodgates of other less important rights'.[186] Tully criticises General Comment 15 as 'revisionist' and admonishes what he sees as the invention of a novel right to water.[187] Tully, nevertheless, does accept an implied right to access water but only insofar as it is necessary to grow food or satisfy housing needs.[188]

In responding to these critiques, it must first be observed that given that Tully's views were rendered in the early 2000s, much of the wind has been taken out of his ESCR Committee revisionist objections by the effluxion of time. The post-2002 developments, most notably the global consensus – or at least the absence of express objection – to the recognition of water as a human right is today epitomised in the 2010 UN General Assembly Resolution 64/292.[189] While UNGA resolutions, unlike UNSC

181 S Tully 'A human right to access water? A critique of General Comment No 15' (2005) 23 *Netherlands Quarterly of Human Rights* 45-48.

182 For a series of interesting debates between Tully and Langford on GC15, see Langford (n 107) 433; S Tully 'Flighty purposes and deeds: A rejoinder to Malcolm Langford' (2006) 24 *Netherlands Quarterly of Human Rights* 461; M Langford 'Expectation of plenty: Response to Stephen Tully' (2006) 24 *Netherlands Quarterly of Human Rights* 473.

183 Tully (n 181) 45-48.

184 Tully (n 181) 36-37; cf Langford (n 107) 435.

185 See P Alston 'Conjuring up new human rights: A proposal for quality control' (1984) *78 American Journal of International Law 607.*

186 Tully (n 181) 37; S Tully 'A human right to access the internet? Problems and prospects' (2014) 14 *Human Rights Law Review* 175.

187 Bulto (n 154) 292.

188 Tully (n 181) 36-37.

189 UNGA 'The human right to water and sanitation' Resolution adopted 3 August 2010, A/RES/64/292. No vote of Namibia is recorded as Namibia was presumably absent when the vote was taken. See also the Preamble to the UNGA Resolution 62/292 wherein the UNGA recalled its various previous resolutions on the right to

resolutions, do not attract the binding force of law, they may retain normative value in establishing the existence of a rule or the emergence of *opinio juris*.[190] The 2010 UNGA Resolution was promptly followed by a further UNGA resolution in 2013[191] and another in 2015,[192] both of which recalled and effectively reaffirmed the 2010 UNGA Resolution.[193] Further, the HRC adopted two resolutions in 2010[194] and 2011[195] which also reaffirmed UNGA Resolution 64/292.[196]

While Tully is not incorrect in observing that the meaning of the phrase 'adequate standard of living' in article 11(1) of ICESCR is imprecise, this is not surprising given the inherently vague nature of treaty texts. Nevertheless, one must accept that, at a minimum, 'adequate standard of living' requires an environment under conditions that allow individuals to participate in social life while maintaining their dignity.[197] Without access to water, realising this minimum condition would be impossible. As for Tully's floodgates of rights concern, this is more hypothetical than real. Granwall observes that the Committee's approach of water as a pre-requisite for other rights means that '[t]here will hardly be any flood of new rights only because of the special status of water is recognised'.[198]

development, the decade of water action, the habitat agenda, among others, that have affirmed a human right to water.

190 *Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (25 February 2019) (2019) ICJ Reports 155; *Legality of the Use or Threat of Nuclear Weapons* (Advisory Opinion) (8 July 1996) [1996] ICJ Report 226 70. For a comprehensive discussion of UNGA resolutions and their legal effects, see M Öberg 'The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' (2005) 16 *European Journal of International Law* 879-906; Ryngaert & Siccama (n 52) 10, who note that although the ICJ has the habit of regarding non-binding instruments such as UNGA resolutions as, under some circumstances, reflecting customary international law without much analysis of its own.

191 UNGA Res 68/157 'The Human Right to Water and Sanitation', 18 December 2013, A/RES/68/157 (adopted without a vote).

192 UNGA Res 70/169 'The Human Right to Water and Sanitation', 17 December 2015, A/RES/70/169 (adopted by consensus).

193 See analysis in P Thielbörger *The right(s) to water: The multi-level governance of a unique human right* (2014).

194 HRC Resolution 'The human right to safe drinking water and sanitation' Resolution A/HRC/RES/15/9 adopted 30 September 2010 para 3 (adopted without a vote).

195 HRC Resolution 'The human right to safe drinking water and sanitation' Resolution A/HRC/RES/16/2 adopted 24 March 2011 para 1 (adopted without a vote).

196 For a fuller analysis of the HRC's resolutions, see Ndeunyema (n 112); Thielbörger (n 165) 241.

197 Winkler (n 142) 43.

198 J Granwall 'Access to water: Rights, obligations and the Bangalore situation' unpublished PhD thesis, Linköping University, 2008 215.

Tully's second critique is one of over-inclusive interpretation. He argued that the ESCR Committee's inclusion of water in its interpretation of article 11 was outside its competence as an interpretative, non-legislative body. Tully points to the ICESCR's *travaux préparatoires* as revealing the deliberate omission of water by states at the drafting stage.[199] Tully suggests that the Committee's recognition of water as a human right, in effect, was an indefensible amendment of ICESCR. Since amending ICESCR to add new rights is only possible through the amendment procedure outlined in article 29,[200] Tully's argument implies that the Committee 'invented' rather than 'discovered' the right to water.[201]

The weight of Tully's second critique can be neutralised through an examination of the *travaux préparatoires* to ICESCR.[202] Thielbörger compellingly argues that ICESCR's textual silence on water ought not to be interpreted as a consensus that there is no such thing as a right to water. A plausible alternative interpretation is that the textual omission constitutes a 'negligent silence' as water was simply forgotten at the time of drafting ICESCR.[203] An examination of the ICESCR *travaux préparatoires* would thus reveal an ambivalence on this question at best, particularly having regard to the global food crisis that was contemporaneous to the ICESCR's drafting and when drinking water was considered a plentiful and renewable natural resource.[204] The absence of water from the list thus is neither an exclusionary or inclusionary absence, as Bulto argues, but results simply from a lack of 'cognition' or 'recognition'.[205]

Moreover, assuming that the *travaux préparatoires* did establish the exclusion of water as a human right, this would be of secondary significance in article 11(1) of ICESCR's interpretation in light of the supplementary nature of the *travaux préparatoires* as informed by article 32 of the VCLT. Nevertheless, it is evident that various comparative regional bodies have accepted General Comment 15's implying of the

199 Tully (n 181) 37.

200 As above.

201 Cf Bulto (n 154) 298, arguing that the water was more of a 'discovery' than an 'invention'.

202 Scholars, as secondary sources that have consulted the *travaux préparatoires* of ICESCR, are relied upon here. Recourse to the *travaux préparatoires* is secondary in light of art 32 of VCLT providing that interpretative recourse to the preparatory works would only follow where the primary methods in art 31 of VCLT are ambiguous, obscure, or lead to a result that is manifestly absurd or unreasonable.

203 Thielbörger (n 165) 227.

204 As above.

205 Bulto (n 154) 303 citing M Craven 'Some thoughts on the emergent right to water' in E Ridel & P Rothen (eds) *The human right to water* (2006) 37 38.

right to water. Prominently, the Inter-American Court of Human Rights relied on General Comment 15, among others. For example, in *Xákmok Kásek Indigenous Community v Paraguay*[206] it was held that the supply of 2,17 litres per person per day distributed by the government to the indigenous community of Xákmok Kásek was not a sufficient quantity and of adequate quality, and had exposed them to risks and disease.[207] The African human rights system's embrace of General Comment 15 will be assessed below.

Implying water under ICCPR

ICCPR also offers the potential to support a right to water through its article 6(1) guarantee of the right to life expressed thus: '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.' 'Life' in article 6(1) can arguably be understood in two senses. The first is in a strict and narrow sense that would impose exclusively negative obligations of restraint or non-interference upon the state, that is not to deprive a person of their life. The second is in a broad sense that would obligate the state to, in addition to negative obligations, also take positive steps to safeguard life.

Adherents of the narrow approach point to both the text and context of ICCPR. From the text of article 6 of ICCPR, Dinstein has argued that '[t]he human right to life per se is a civil right and does not guarantee any person against death from famine or cold or lack of medical attention'.[208] What is within the ambit of protection of article 6 of ICCPR, the argument goes, is confined to the deprivation of life through means of homicide, not the freedom to live as one wishes or to an appropriate standard of living.[209] This restrictive interpretation may further be buttressed when considering that the right to life is contained in ICCPR which enumerates civil-political rights and not ICESCR with its socio-economic rights focus.

206 *Xákmok Kásek Indigenous Community v Paraguay Inter-American Court of Human Rights* (Merits, Reparations, Costs) Judgment of 24 August 2010 Series C No 214 para 195. See also discussion in Chazournes (n 139) 158; J Chávarro 'The right to water in the case-law of the Inter-American Court of Human Rights' (2014) 7 *Annuario Colombiano De Derecho Internacional* 39-68.

207 Similarly, see also *Indigenous Community Yakye Axa v Paraguay Inter-American Court of Human Rights* (Merits, Reparations, Costs) (17 June 2005) Series C No 142; *Indigenous Community Sawhoyamaxa v Paraguay Inter-American Court of Human Rights* (Merits, Reparations, Costs) (29 March 2006) Series C No 146. For an analysis of these cases, see C Macchi 'Right to water and the threat of business: corporate accountability and the state's duty to protect' (2017) 35 *Nordic Journal of Human Rights* 186 199.

208 Y Dinstein 'The right to life, physical integrity and liberty' in L Henkin (ed) *The international bill of rights – the Covenant on Civil and Political Rights* (1981) 115.

209 Dinstein (n 208) 115.

It implies that article 6(1) of ICCPR is to be understood only in the civil rights sense and at the exclusion of its socio-economic connotations such as the right to water.[210]

A textual argument that narrowly constructs 'life' in article 6(1) as imposing only a negative duty of restraint on the state has been disputed. The year 1982 saw the HRC, the ICCPR's treaty body, adopt General Comment 6 on the Right to Life.[211] The HRC lamented the narrow and restrictive interpretation of article 6[212] to eschew a vacuous interpretation.[213] A 'modern and proper' construction of 'life' should not only protect against any arbitrary deprivation of life, but also place states under a duty to 'pursue policies which are designed to ensure access to the means of survival for all individuals and all peoples'.[214] While the HRC's General Comment 6 does not specify water, it states that the protection of the right 'requires that States adopt positive measures'.[215] The argument for water's inclusion is relatively elementary yet potent in its forcefulness: Water is a non-substitutable resource that is essential at the most basic level to ensure the survival and sustenance of human life.

More recently, in its 2018 General Comment 36 on the Right to Life, the HRC has also embraced a wider construction of life and expressly includes access to water.[216] General Comment 36 replaced General Comment 6.[217] I have also defended this approach in chapter 3 of the book. This construction avoids an interpretive peril that is aptly laid bare by the United Nations Development Programme (UNDP) in stating that a lack of access to water 'is a polite euphemism for a form of deprivation that threatens life, destroys opportunity and undermines human dignity'.[218] As

210 The *travaux préparatoires* to ICCPR reveal that the comments on right to life as it relates to state deprivation of an individual's life. See M Bossuyt *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (1987) 115.

211 HRC General Comment 6: Article 6 (Right to Life), 30 April 1982.

212 General Comment 6 (n 211) para 5.

213 Cahill (n 143) 397.

214 A Trindade *The parallel evolutions of international human rights protections and of environmental protection and the absence of restrictions on the exercise of recognized human rights* (1991) 35 51. Further, the HRC stated that ICCPR 'should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions'. *Judge v Canada Communication* 829/1988, HRC, UN Doc. CCPR/C/78/829/1998 (2003) para 10.3.

215 HRC General Comment 6 (n 211) para 5.

216 HRC 'General Comment 36 (2018) on article 6 of ICCPR, on the right to life' 30 October 2018 CCPR/C/GC/36 para 26.

217 HRC General Comment 36 (n 216) para 1.

218 UNDP *Human development report 2006: Beyond scarcity: power, poverty and the global water*

I have argued in chapter 3, the expansive understanding of the right to life should be informed by ubuntu to include a right to water.

Implying water under the African Charter

I argue that the African Charter supports an implied right to water. Unlike other regional instruments of the African Women's Protocol and the African Children's Charter discussed earlier, the African Charter, by virtue of article 2, applies to *all* individuals in Namibia without limitation *rationae personae*.[219] Pertinently, the African Charter has been widely celebrated as the pioneering international human rights law instrument to protect and render justiciable all three 'generations' of human rights – civil-political, socio-economic and group (solidarity or peoples') rights.[220]

Nevertheless, the African Charter does not explicitly mention a right to water. However, the right has been developed in the jurisprudence of the African Commission. The African Commission is a quasi-judicial body with a promotional mandate empowered to determine standards and formulate principles and rules aimed at solving legal problems relating to African Charter rights and freedoms.[221] As will be seen below, the African Commission's decisions evince an 'innovative'[222] purposive approach to the rights to life,[223] to health[224] and to a generally satisfactory environment[225] in the African Charter to accommodate water's interpretive inclusion as a right.

crisis (UNDP 2006) 5.

219 African Charter, art 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.'

220 See M Ssenyonjo (ed) *The African regional human rights system* (2012).

221 See generally R Murray *The African Commission on Human and Peoples' Rights and international law* (2000).

222 T Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 342.

223 African Charter, art 4: '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.'

224 African Charter art 16: '(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2.) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'

225 African Charter art 24: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

The African Commission's water jurisprudence covers both positive and negative duties.[226] In *Legal Assistance Group v Zaire*[227] it was held that the failure of the Zairean government to provide basic services, including safe drinking water, constituted a violation of the African Charter's article 16 right to the best attainable state of physical and mental health. The Commission interpreted the provision as requiring that state parties 'should take the necessary measures to protect the health of their people'.[228] The Commission thus found a violation based on Zaire's failure to comply with its positive duties to provide water. Similarly, in *Sudan Human Rights Organisation v Sudan*[229] the African Commission found the Sudanese government to be complicit in destroying wells and poisoning water sources in the Darfur region. Citing *Legal Assistance Group v Zaire*, the Commission in *Sudan Human Rights Organisation* also found a violation of article 16 of the African Charter through the poisoning of water sources that exposed the victims to serious health risks. It was considered a violation of the negative obligation to refrain from interfering with the right to water. [230]

Further, while the *SERAC*[231] decision does not establish a right to water, it merits analysis for its approach to implicit rights. Here, the African Commission considered a communication alleging that the military government of Nigeria's oil production activities with various multi-national corporations violated the Ogoni people's African Charter rights. The Commission established an implied right to food, which was violated through a breach of articles 4 (life), 16 (health) and 22 (development).[232] Although the complainant claimed a violation of the right to water through the contamination of water sources of the Ogoni population,[233] the African Commission did not pronounce on this claim.[234] Nevertheless, the African Commission's approach to the right to life here

226 See M Ssenyonjo 'The protection of economic, social and cultural rights under the African Charter' in D Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 91.

227 *Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995).

228 *Legal Assistance Group* (n 227) para 47.

229 *Sudan Legal Assistance Organisation v Sudan* (2000) AHRLR 297 (ACHPR 1999).

230 As above.

231 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

232 The Commission determined that the government's destruction of food sources, along with its failure to prevent oil companies from doing so, amounted to a breach of a right to food as it is 'inseparably linked to human dignity' and is implicit in the African Charter's rights to life, health, and economic, social and cultural development. *SERAC* (n 231) para 65.

233 *SERAC* (n 231) para 50.

234 See Bulto (n 222) 345-346.

was expansive as it did not only consider the deprivation of life in the civil right sense. Rather, it implicitly recognised the right to a certain *quality* of life in holding that 'the pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare'.[235] This rejection of the narrow interpretation of life is further seen in the African Commission's General Comment 3 that asserts the right to a dignified life which includes social and economic dimensions.[236] The Nairobi Principles embrace a similar approach.[237]

However, the African Commission has not been consistent in asserting the existence of a right to water. For example, the African Commission's General Comment 3 only mentions water insofar as it pertains to the state's article 4 positive obligations to persons held in custody. Likewise, in *Institute for Human Rights and Development in Africa v Angola*[238] before the African Commission, the complainants alleged, among other claims, the violation of detainee's rights to dignity under article 5 of the African Charter as a result of the failure to provide adequate water where 500 detainees had only two buckets of water for bathing between them. However, the Commission did not address the alleged violation of their right to water.[239] No reasoning for this silence is apparent in the decision.

235 *SERAC* (n 231) para 67.

236 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia, 2016 paras 6, 43.

237 'African Commission Principles and Guidelines on Social and Economic Rights in the African Charter on Human and Peoples' Rights' (Nairobi Principles), adopted at the 47th ordinary session, Banjul, The Gambia, 12 to 26 May 2010, formally launched at the Commission's 50th ordinary session in Banjul, The Gambia, from 24 October to 7 November 2011 para 87, https://www.achpr.org/legalinstruments/detail?id=30 (accessed 17 September 2019): 'While the African Charter does not directly protect the right to water and sanitation, it is implied in the protections of a number of rights, including but not, [*sic*] limited to the rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment.' For a drafting history of the Nairobi Principles, see International Justice Resource Centre 'Working Group on Economic, Social and Cultural Rights', http://www.ijrcenter.org/regional/african/working-group-on-economic-social-and-cultural-rights/ (accessed 19 September 2019); for a critique of the Nairobi Principles, see D Olowu 'A critique of the African Commission's draft principles and guidelines on economic, social and cultural rights in the African Charter' (2010) 11 *Economic and Social Rights Review* 7.

238 *Institute for Human Rights and Development in Africa v Angola* (AHRLR) 43 (ACHPR 2008).

239 Bulto (n 222) 346. For a comparative perspective from the European Court of Human Rights, where the failure to provide water was held to be a violation of ECHR art 3, prohibition of cruel, inhumane and degrading treatment, see *Riad and Idiab v Belgium ECHR* (24 January 2008) App 29787/03 (French Text) where asylum seekers were held to be detained without adequate water for consumption and hygiene; *Tadevosyan*

While a derivative approach is a plausible avenue for asserting a right to water, it also invites us to assess – or at the least be aware of – the limitations in a lack of an autonomous existence of a human right to water under the African Charter. Water rights cannot be claimed unless a 'parent right' is jeopardised due to a lack of an adequate quantity or quality of water. Water's subservience to other rights under the African Charter arguably has the consequence of being dependent on the 'main' right in the interest of which the right to water is protected.[240] Bulto laments that this lack of comprehensive legal protection of water in the African Charter, as the main regional[241] instrument, 'creates a hierarchy within a hierarchy, as it sits on the lowest rung of the already-marginalised socio-economic rights'.[242] It means that a right to water cannot be demanded *per se* and is thus susceptible to lying in the 'shadow' of other rights.[243]

In this context, what is unique about the African Charter and the African human rights system, more broadly, is that the system is not self-contained or insulated given the explicit permissibility of interpretive inspiration from external human rights systems.[244] The African Commission has thus had recourse to material from other sources such as the ESCR Committee's General Comments, including General Comment 15, as discussed earlier. While the Commission's jurisprudence has established a violation of predominately negative obligations and only a few positive obligations of state parties in relation to water rights as derived from various 'parent' rights, it has also failed to articulate the normative content of such water rights. However, other regional soft law sources can be relied upon for this purpose, principally the Nairobi Principles, which will be considered more critically in the chapter 6 discussion of the normative content of a right to water.

We have seen that the African Charter's article 4 right to life – as well as ICCPR's article 6(1) right to life elucidated earlier – has been interpreted expansively to accommodate not only the civil dimension of life but also

v Armenia ECHR 2 (2 December 2008) App 41698/04, where a detainee was not provided with adequate access to water and sanitation.

240 Bulto (n 222) 347.

241 The SADC Treaty, which Namibia ratified, can also be a potential source of law but it does not explicitly give a right to water and only references human rights as one of the principles of the member states (art 4(c)). It thus offers little that is worthy of further consideration in this book. See G Matchaya et al 'Justiciability of the right to water in the SADC Region: A critical appraisal' (2018) 7 *Laws* 18 25.

242 Bulto (n 222) 342.

243 Bulto 348.

244 Art 60 of the African Charter allows the Commission to draw inspiration from human rights sources beyond the African Charter.

social and economic dimensions. This understanding of the right to life is reconcilable with the interdependence of rights theory, as developed by Scott. Scott sees the concept as attempting to capture the idea that 'values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation'.[245] This promotes the notion that rights are 'developed not for the sake of rights but for the sake of persons'.[246] Scott describes interdependence in two senses: organic interdependence and related interdependence. Organic interdependence is where one right forms part of another right and may be incorporated into that latter right. Scott argues that these rights are inseparable or indissoluble in the sense that one right, termed the core right, justifies the other, termed the derivative right.[247] On the other hand, related interdependence treats rights as equally important and complementary, yet separate.[248]

The African Charter indeed embodies the interdependency of rights. At the time of the African Charter's drafting, socio-economic rights as enforceable rights were vigorously questioned internationally. The division was firmly between so-called 'first generation' rights that were civil-political and 'second generation' rights that were socio-economic.[249] However, the African Charter expressly rejects this strict dichotomy as demonstrated in the eighth indent of its Preamble: '[C]ivil and political rights *cannot be dissociated from* economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.'[250]

This text reflects the non-recognition by the founders of the African Charter of conflict between civil-political rights in the then 'Western' world, and economic, social and cultural rights in the then 'Communist' world – a dichotomy that has a strong genesis in Cold War rhetoric – resulting in the denigration of socio-economic rights as secondary and

245 C Scott 'Interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769 786.

246 As above.

247 Scott (n 245) 779-780.

248 Scott 783.

249 Ssenyonjo (n 220); C Odinkalu 'Analysis of paralysis or paralysis by analysis: Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 336; S Fredman *Human rights transformed* (2007) 66.

250 My emphasis. See further F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable, democracy in Africa* (2003) 57.

unenforceable.[251] Ouguergouz's study of the *travaux préparatoires* and context of the African Charter also reveals a deliberate intention on the part of the drafters to stress that it 'was not merely a carbon copy of existing international conventions but should be flexible and pragmatic and reflect Africa's peculiar economic problems, of which under-development was the most important'.[252] This was also intended to assert the ethos of African philosophy within the African Charter.[253]

In the same vein, Chenwi helpfully reminds us that while the African Charter presupposes a 'normative unity' of rights, it does not mean that one category of rights takes priority over another. Rather, these are to be read as implying that rights are mutually dependent.[254] This conceptualisation of the right to life in the African Charter thus allows for the interpretive inclusion of a right to water.

I conclude this part by emphasising the importance of regional systems, generally, and Africa's, specifically, as being particularly salient in reflecting local values that cannot effectively been reflected under the international system. Hansungule has argued that the 'preoccupation with universal values, though important, can lead to a de-emphasis of certain peculiarities that are nonetheless basic to some societies', allowing for the opportunity of recalling their values for inclusion in the system, in addition to what can be borrowed from other systems.[255] As Shelton states, regional systems 'have the necessary ability and flexibility to change as conditions around them change, yet are applied in response to regionally-specific problems; they achieve equilibrium between uniform enforcement of global norms and regional diversity'.[256]

251 Ouguergouz (n 250) 57.

252 Ouguergouz 31; cf M Mutua 'The African human rights system in a comparative perspective' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 5 11, expressing pessimism in the African Charter as a 'facade, a yoke African leaders have put around our necks'.

253 Ouguergouz (n 250) 31.

254 C Lilian 'Permeability of rights in the jurisprudence of the African Commission' (2014) 39 *Supplement South African Yearbook of International Law* 98.

255 M Hansungule 'Protection of human rights under the Inter-American system: An outsider's reflection' in A Gudmudur & J Möller (eds) *International human rights monitoring mechanisms essays in honour of Jakob Th Möller* (2001) 679 684.

256 D Shelton 'The promise of regional human rights systems' in B Weston & S Marks (eds) *The future of international human rights* (1999) 351.

Justifying implied rights

I have argued above that an implied right to water exists under treaty law that binds Namibia. The legal basis for a right to water varies. The ICCPR and African Charter provisions, I have posited, accommodate water through implied rights. Further, the right to health provisions in the African Charter and ICESCR are suitable textual sources for the right to water, although the limitation of asserting the right to water on this basis is that it would need to be violated in relation to the principal right – the right to health. I have comprehensively engaged with a right to water as being included among those rights that constitute an adequate standard of living in article 11(1) of ICESCR. I have also addressed the interpretative concerns attendant with deriving a human right to water from article 11(1) of ICESCR. Having relied on the implied rights doctrine to establish a human right to water, it is necessary to note that this approach is not without normative and doctrinal controversy. I will thus engage the main critiques here, also bearing in mind the rebuttal to Tully's objection above.

Implying rights has resulted in accusations of 'free-wheeling judicial review'[257] or 'promiscuous rights manufacture'[258] through the judicial broadening of rights. Nevertheless, implying rights where they are inexpress or un-enumerated is nothing new to either the interpretation of international human rights law as demonstrated above or within Namibian constitutional jurisprudence, including in *Mwilima* as discussed in chapter 5. In the same way that *Mwilima* implies the provision of free legal aid as an enforceable right from the article 12 right to a fair trial, I have advocated implying a right to water from various express rights under the international instruments considered here. Jurisprudence from the African Commission has also imported the implied rights doctrine, a jurisprudential development that has been described by Viljoen as among the Commission's 'boldest moves',[259] with Ssenyonjo asserting that the 'major consequence of … interpreting the African Charter is that most of the rights that are not expressly recognised by the Charter may be enforced'.[260]

257 R George 'The natural law due process philosophy' (2001) 69 *Fordham Law Review* 2312.

258 D Luban 'The Warren court and the concept of a right' (1999) 34 *Harvard Civil Rights-Civil Liberties Law Review* 14.

259 F Viljoen *International human rights law in Africa* (2012) 346. See also *SERAC* (n 231) para 60.

260 Ssenyonjo (n 226) 118.

Viljoen has traced the implied rights doctrine's origins to the US Supreme Court's *Griswold*[261] decision, which considered the un-enumerated right to privacy as being part of the 'penumbra' of the US Constitution's Fourteenth Amendment. Justice Douglas in *Griswold* reasoned that constitutionally guaranteed rights have 'penumbras, formed by emanations from those guarantees that help give them life and substance'.[262] Recognising the penumbra of rights thus allows the implying of inexpress rights. Notably, *Griswold* was decided in the context of the permissibility of contraception restrictions under the US Constitution, where there is no express mention of a right to privacy. It is the legal technique of implying rights that is what is proposed to be drawn upon in this book, not necessarily the divergent rights and values in given constitutions.

What the exact limits to implying rights are is informed by factors that include the structure and the nature of the right in question.[263] A central principle to bear in mind is fidelity to the interpretative rules for international treaties as seen in articles 31 and 32 of the VCLT, which I have earlier established as part of customary international law that is binding upon Namibia. The primary principle is that of good faith interpretation, according to the ordinary meaning of the text, and in light of the object and purpose of rights.[264] This allows us to avoid the risks of the illegitimate creation of a new right in opposition to the intention of state parties to a treaty.[265] If we are cavalier with our approach to implying rights, it opens up the concern of an unjustified 'conjuring up' of a right as Alston argued, thereby undermining the right's general acceptance as being authoritative and states' compliance, and undercutting the existing body of rights.[266] Consistent with the constitutional argument advanced in chapter 3, this book thus relies on the implied right to water as an approach that is endorsed by the HRC, the ESCR Committee and the African Commission.

4.4 A right to water under customary international law and general principles of law?

I have argued above that article 144 of the Constitution also renders customary international law and general principles of law, in addition to international agreements, part of binding Namibian law. Elsewhere, I have

261 *Griswold v Connecticut* 381 US 479 (1965).

262 *Griswold* (n 261) 484.

263 A Barak *Human dignity as a constitutional value* (2009) 78.

264 VCLT art 31(1).

265 Thielbörger (n 165) 231.

266 Alston (n 185) 620-621.

extensively assessed the issue of a right to water from an international law perspective[267] and concluded that no such right can be established under customary international law and general principles of law. Given that this book does not rely on a right to water sourced from customary international law or general principles of law, I only provide an analytical summation of the key arguments.

4.4.1 Customary international law

A treaty-based right to water, whether express or implied, presupposes that a state such as Namibia must be a party to a treaty (such as ICESCR) to be bound by it. There is value in seeking to assert a right to water as a matter of customary international law[268] given that customary international law is one of the three principal sources of law under article 38(1)(b) of the ICJ Statute: 'international custom, as evidence of a general practice accepted as law'.[269]

I have argued that establishing the crystallisation of a right to water as a customary international law norm remains challenging. This is even after UN bodies had 'recognised' the right to water, particularly through UNGA Resolution 64/292. Various commentators have looked into the existence of a customary international law right to water. What follows is an indicative summation of some of the most meritorious recent scholarly perspectives on the question.

Misiedjan argues that the right to water 'is still materialising in customary law as it currently has a weak status, which is mostly fuelled by state practice in combination with states' statements'.[270] Arden[271] only tangentially mentions the possibility of a customary international law

267 See Ndeunyema (n 112).

268 I will not consider water as an African *regional* customary international law human right. For an analysis of a regional customary international law right across five regional human rights systems, see Chávarro (n 123) 190-198, who does not make a definitive conclusion on whether or not such a right exists under customary international law in the African system.

269 Further, the ICJ in *Nicaragua* asserted the principle that even where a treaty norm and a customary international law norm have exactly the same content, neither the treaty or the customary international law norm can deprive the other of separate applicability. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits, Judgment (1986) ICJ Report 14 para 175.

270 D Misiedjan *Towards a sustainable human right to water: Supporting vulnerable people and protecting water resources* (2019) 73.

271 RH Justice Arden 'Water for all? Developing a human right to water in national and international law' (2016) 65 *International and Comparative Law Quarterly* 771 786.

right to water. McCaffrey[272] finds that despite the sufficiency of *opinio juris* in support, no right to water has emerged since the right has not been recognised 'by an authoritative and generally recognized source, such as the [ICJ], or by states generally', and given that 'some states that play important roles in the international system have yet to accept the existence of the right'.[273] Chávarro[274] finds sufficient evidence of state practice and *opinio juris* to conclude that the right to water amounts to an independent customary international law right. Bates[275] has argued that the 'right to water is a principle capable of being recognized as a principle of customary international law'. Larson,[276] after considering the evolution of state practice, national and international jurisprudence, and the activities of several international bodies, finds that 'it is possible to affirm that at least the core content of the human right to water … that is, the right of everyone to access to water necessary to respond to his/her basic needs … has achieved the status of a customary international norm'.[277] Finally, Thielbörger's study, which applies a reflective equilibrium approach to customary international law, has also found that the right to water has now achieved the status of a norm of custom.[278]

272 S McCaffrey 'The human right to water: A false promise?' (2016) 47 *University of the Pacific Law Review* 231-232.

273 McCaffrey's centralisation of 'some states' as more important in international law is problematic as it risks what Rajagopal terms the hegemonic nature of human rights discourse in international law; see B Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a third world strategy' (2006) 27 *Third World Quarterly* 767.

274 Chávarro (n 123) 115-124.

275 R Bates 'The road to the well: An evaluation of the customary right to water' (2015) 19 *Review of European, Comparative and International Environmental Law* 282.

276 RB Larson 'The new right in water' (2013) 70 *Washington and Lee Law Review* 2181 2208, citing SD Vido 'The right to water as an international custom: The implications in climate change adaptation measures' (2012) 6 *Carbon and Climate Law Review* 22 224-225.

277 The pre-2010 scholarship (preceding to UNGA Res 64/292) largely reflects the view that no customary international law right to water had yet evolved: A Hardberger 'Life, liberty, and the pursuit of water: Evaluating water as a human right and the duties and obligations it creates' (2005) 4 *Northwestern University Journal of International Human Rights* 331 340 345 finds: 'Although global recognition of this need is increasing, it has not reached the level of customary international law as a separate right.' M Williams 'Privatization and the human right to water: Challenges for the new century' (2007) 28 *Michigan Journal of International Law* 469 502. Williams cites D Bederman *International law frameworks* (2001), in which Bederman had argued that while there may be increasing state recognition of the right, one indication that the right to water is not yet customary international law is the very problem that makes the right so pressing: Many governments fail to ensure access to all citizens, and because generalised state practice is a necessary element of CIL, the failure of state practice impedes the development of CIL.

278 Thielbörger (n 165) 239.

I have found that, while there is strong evidence of *opinio juris*, state practice in support of a right to water is inadequate. I argued that the principal contention thus turned to the appropriate methodology in determining the constituent elements of a customary international law norm. Two customary international law methodological approaches were critiqued in the context of a right to water. The first is the 'sliding scale approach' which views the elements of customary international law as falling on a 'sliding scale' between state practice and *opinio juris*. Kirgis has argued that the two customary international law elements can be placed on a sliding scale whereby one element of custom can compensate for the other weaker element or, in the extreme case, an element can become entirely dispensable if the other element is of sufficient strength.[279]

The second is the 'reflective equilibrium approach' that allows the existence of strong *opinio juris* to compensate for inconclusive state practice. Thielbörger invokes the approach in his examination of a customary international law right to water, finding the state practice element wanting while *opinio juris* is sufficient. To overcome the insufficiency in state practice, Thielbörger has endeavoured to innovatively adopt a 'modern' approach in establishing customary international law. Thielbörger's approach draws on Roberts's original distinction between traditional and modern approaches to customary international law.[280]

In examining both the sliding scale and reflective equilibrium approaches, I have determined that asserting a customary international law right to water based on either of these theories is problematic for two principal reasons. First, this would propose a customary international law methodology that has the effect of fundamentally re-shaping the elements of customary international law in a manner that disregards its intrinsic limitations with the view to accommodate the desired policy outcome.[281]

The second is effectively a Third World Approaches to International Law (TWAIL) critique.[282] A major drawback in adopting an approach that is lopsided to *opinio juris* is that it opens up the normative challenge of

279 F Kirgis 'Custom on a sliding scale' (1987) 81 *American Journal of International Law* 146 149.

280 A Roberts 'Traditional and modern approaches to customary international law: A reconciliation' (2001) 95 *American Journal of International Law* 757.

281 B Simma & P Alston 'The sources of human rights law: Custom, *jus cogens* and general principles' (1988/1989) 12 *Australian Yearbook of International Law* 82 96.

282 JC Okubuiro 'Application of hegemony to customary international law: An African perspective' 2018 7 *Global Journal of Comparative Law* 232; BS Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 3.

allowing the practice of *some* states to determine what is or is not customary international law. Framed differently, the concern is a manifestation of hegemony and biases based on geographic, economic and political power. This would risk regressing to forms of international law making that were seen during the colonial period, during which the formation of customary international law rules was replete with recourse to the practices of only a handful of (Western) states.[283] The latent problems that would arise by reinforcing the role of *opinio juris* while downgrading the state practice are laid bare by Galindo and Yip:[284]

> Making customary international law exclusively an expression of a certain *opinio juris* is dangerous in many respects, especially because the practice of states can effectively play a role of protecting the interests of Third World states against the will of Great Powers. But the tendency of international courts to emphasize the role of *opinio juris* is even more dangerous when it represents the opinion of a single set of judges under the disguise of states' *opinio juris*.

In this light, my analysis has thus determined that there is no customary international law right to water.[285] It remains an idea of which the time has not (yet) come. At best, the rule can be regarded as *statu nascendi*, an emerging rule of custom that is yet to crystalise fully into a customary international law norm. [286]

Nevertheless, the overwhelming state consensus of a right to water as a matter of *opinio juris* is not insignificant. This can serve as a meaningful resource in interpreting and determining the normative content of a treaty-based right to water. I will thus invoke and rely upon various sources that may be regarded as *opinio juris* in the chapter 6 assessment of the content of a right to water in this book.

283 G Galindo & C Yip 'Customary international law and the Third World: Do not step on the grass' (2017) 16 *Chinese Journal of International Law* 251 254; Rajagopal (n 273) 767.

284 Galindo & Yip (n 283) 261.

285 I have also rejected the claim of a customary international law right to water based on the entire Universal Declaration as a reflection of customary international law norms. See Ndeunyema (n 112).

286 Winkler (n 142) 97. Another potential argument for establishing a right to water under customary international law is to establish the customary international law nature of the right to life from which a right to water can be derived. However, this argument is unlikely to hold as there is limited state practice or *opinio juris* to support the proposition of life as a CIL norm.

4.4.2 General principles of law

Turning to 'the general principles of law recognised by civilised nations'[287] as a source of binding law in Namibia, I have argued[288] that while general principles of law do not offer an independent legal basis for a right to water under international law, the significance – contrary to their relative neglect in the right to water literature – lies in their interpretative resourcefulness in legally constructing the substantive content and correlative obligations that accrue from a binding right to water that would retain its legal basis under treaty law, customary international law, or even domestic law.[289] This source arguably may be of relevance to water's status as a legally binding human right – in addition to treaty law and customary international law.[290]

General principles of law can function as a direct source of rights and obligations.[291] While general principles of law are listed third, there is no indication of any *a priori* hierarchy in the three formal sources in article 38(1) of the ICJ Statute.[292] Some commentators, however, claim that general principles of law constitute a 'secondary' source with the main function of 'filling gaps'[293] in the absence of a treaty or customary international law norm.[294]

Partly because of their unwritten character, the determination of general principles of law remains controversial under international

287 The phrase 'civilised nation' can today be argued to be obsolete, an argument that is concisely captured in *North Sea Continental Shelf* (n 51) (Separate Opinion of Judge Fouad Ammoun) thus: '[R]eferring to "the general principles of law recognized by civilized nations", is inapplicable in the form in which it is set down, since the term "civilized nations" is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law. The discrimination between civilized nations and uncivilized nations, which was unknown to the founding fathers of international law … is the legacy of the period, now passed away, of colonialism.'

288 Ndeunyema (n 112). See also Simma & Alston (n 281) 105, who advocate a firmer grounding of the legality of human rights norms in general principles of law as these would ensure a strong grounding in the consensualist conception of international law.

289 For a comprehensive assessment and characterisation of the key controversies around general principles of law as a source of international law, see M Vásquez-Bermúdez 'General principles of law' in *Report of the International Law Commission* (2017) 224.

290 F Ekardt & A Hyla 'Human rights, the right to food, legal philosophy, and general principles of international law' (2017) 103 *Archiv für Rechts- und Sozialphilosophie* 221 227.

291 Yee (n 45) 488.

292 Crawford (n 45) 35; Yee (n 45) 488.

293 Pauwelyn (n 46) 127-129.

294 See M Jackson 'State instigation in international law: A general principle transposed' (2019) 30 *European Journal of International Law* 391; Yotovana (n 47) 279.

law. Among the pertinent doctrinal issues is the contestation over their determinative methodology[295] and whether these are general principles of municipal law, of international law or of global legal systems.[296] As these issues are not the focus of this book, the position adopted here aligns with the widely-accepted view advanced by Redgwell that general principles in the article 38(1)(c) of the ICJ Statute sense may be derived and percolate from both municipal law and international law.[297]

I have argued that, while several states have constitutionalised a right to water in their national constitutions,[298] the number of states is not sufficiently widespread and recognised or common to the representative legal systems of the world[299] to constitute a general principle of law that affirms a right to water.[300]

Nevertheless, the absence of a general principle of law supporting a right to water does not necessarily mean that general principles are irrelevant to the debate, which brings us to the second possible role. General principles could be of potential relevance in defining the content and determining the obligations that attach to a right to water that is established as a matter of domestic law, treaty law, or – assuming such is meritoriously established – customary international law. A reliance upon their character as general principles may well be acknowledged and reflected in treaties such as ICESCR and ICCPR. However, in addition to being binding upon all states beyond only treaty state parties, their most complete legal forms arguably would be found outside these instruments,

295 C Redgwell 'General principles in international law' in S Weatherill & S Vogenauer (eds) *General principles in European and comparative law* (2017) 5 15.

296 Redgwell (n 295) 10.

297 As above. See also Pauwelyn (n 46) 125-126.

298 National constitutional provisions that have an explicit *enforceable* right to water – as opposed to water as an *unenforceable* principle of state policy – include sec 27(1)(b) 1996 South African Constitution; art 43(1)(d) 2010 Kenyan Constitution; sec 77(a) 2013 Zimbabwean Constitution; art 12 2008 Ecuador Constitution. In 2004 the Republic of Uruguay held a referendum that saw an approval of the constitutionalisation of access to potable water as a human right: see art 47 1966 Uruguayan Constitution, as amended in 2004. Most recently, Slovenia has taken the step of amending its Constitution to include a right to drinking water in art 70(a). See Constitutional Act Amending Chapter III, 2016 Slovenian Constitution. For a discussion of the European position on the right to water, see Thielbörger (n 193) 9.

299 Redgwell (n 295) 15.

300 Winkler (n 142) 93; K Bourquain *Freshwater access from a human rights perspective: A challenge to international water law and human rights law* (2008) 191; Thielbörger (n 193) 86-87.

thereby creating value in asserting and claiming them as general principles of law.[301]

This is particularly pertinent in light of the reality that it is a soft law instrument – General Comment 15 – that principally enunciates the substance of what a right to water would entail, including the normative content,[302] principles such as non-discrimination and equality,[303] and the correlative general and core obligations of state parties.[304]

The soft law nature of General Comment 15 may potentially receive limited acceptance when relied upon owing to its non-binding nature and questionable legitimacy. General principles of law thus may be utilised to offer universally-binding law that would define those minimum social standards, particularly in terms of the positive and negative obligations of states *qua* access and provision of water as a right. Moreover, the general principles of law found in international environmental law may be of potential application given that water access, provision and security would give rise to issues concerned with the environment. For instance, the precautionary principle, in the water context, would impose obligations of diligent prevention and control of foreseeable risks to the pollution of water sources.[305] Similarly, the polluter-pays principle would impose obligations on polluters, whether state or non-state actors.[306] I will thus return to rely on general principles of law in chapter 6.

4.5 Conclusion

International law can apply domestically in Namibia to ground a right to water's legal basis. The purpose of this book is to root a right to water in the Constitution's Bill of Rights provisions, which gives the right entrenchment beyond the limitations of international law. Nevertheless, this analysis concludes that a right to water under international law can be variously invoked to develop the content of a right to water. Most importantly, I will include resources from international law to interpretatively develop the normative and substantive content of a right to water implied from article

301 G McGraw 'Defining and defending the right to water and its minimum core: Legal construction and the role of national jurisprudence' (2011) 8 *Loyola University Chicago International Law Review* 127 150-152.

302 GC15 (n 111) paras 10-12.

303 GC15 paras 13-16.

304 GC15 paras 17-29.

305 P Birnie *International law and the environment* (2009) 153.

306 P Sands & J Peel *Principles of international environmental law* (2018) 240.

6 of the Constitution. These resources will include, in particular, General Comment 15 and the Nairobi Principles.

5 ADDRESSING THE JUSTICIABILITY CONCERNS

5.1 Introduction

Chapters 2, 3 and 4 of this book were collectively dedicated to constructing constitutional and doctrinal arguments for water as a human right of a justiciable character. In this chapter I seek to evaluate justiciability arguments in terms of normative and practical desirability. In essence, I enquire into how we defend the recognition of an implied constitutional right to water, a right that is concomitantly justiciable. This analysis will consider a variety of arguments advanced around socio-economic rights justiciability generally, a debate that has attracted both justiciability-*phobes* and justiciability-*philes*, and apply them in the context of a right to water in Namibia.

In proving that the various justiciability objections are answerable, the assessment will be principally typologised into three justiciability concerns: normative, institutional, and textual. The chapter commences by framing water issues in Namibia as not inevitably about water scarcity in the traditional, first-order sense of factual limitations in light of the Namibian arid climate, but of scarcity, as understood in the second-order sense of social resources advanced by Ohlsson. I will then address normative reasons why water, as a socio-economic right, ought to be regarded as justiciable. In so doing and in building upon the normative grounding of a right to water in ubuntu advanced in chapter 3, I will emphasise various normative imperatives for augmenting legal accountability and facilitating democratic inclusion. Two forms of institutional justiciability concerns are then examined: the legitimacy of courts to adjudicate water in light of the various policy, programmatic and resource issues that arise; and the capacity and competence of courts which are evaluated through the prism of polycentricity. In responding to institutional justiciability concerns, I will introduce and advance the model of bounded deliberative democracy, which model is applied elaborately in chapter 6. Finally, the chapter examines textual justiciability concerns that converge on the question of the court unenforceable Principles of State Policy (PSPs) in articles 95 and 101, with a critique of the Supreme Court's interpretation of PSPs in *Mwilima*.

All of the above related to *substantive* justiciability, which is distinguished from procedural justiciability. *Procedural* justiciability concerns, which would implicate doctrinal issues such as legal standing and court procedures for bringing rights claims, will only receive limited attention in this chapter when I endeavour to avoid the 'mirage' of a right to water's justiciability. While it is acknowledged that the boundaries between the typologies are not rigid, it is argued that these be kept separate for analytical clarity in this book.

5.2 Framing justiciability in a water-scarce context

I commence by framing water's justiciability. A potential concern can be factually grounded: In a context where many parts of Namibia on average receive low or no rainfall, the courts simply cannot 'let it rain' – *lex non cogit ad impossibilia*.[1] However, I argue that justiciability is not a question of courts adjudicating access to water as a factually absent resource. Rather, justiciability arguments ought to be appropriately understood through the theoretical framework of second-order scarcity that Ohlsson has advanced in the context of human geography.[2] Ohlsson distinguishes between the 'first-order' and 'second-order' scarcity of a resource – in our context, water.

First-order (or natural resource) scarcity arises where a resource such as water is of limited availability. Second-order (or social resource) scarcity refers to the adaptive capacity to manage first-order scarcity through the adoption of improved means, ways and methods.[3] As such, a social entity might not cope with the scarcity of water in the first-order, but this could be ascribed to the reality of second-order scarcity of social resources. Accordingly, Ohlsson observes that the adaptive capacity of a society facing scarcities of natural resources is contained in its ability to build institutions and facilitate institutional change as appropriate to the scarcity at hand.[4]

1 The law does not require the impossible.

2 L Ohlsson *Environment scarcity and conflict: A study of Malthusian concerns* (1999) 22-23. The Malthusian theory of population, within which Ohlsson's approach is rooted, is not necessarily endorsed herein.

3 Ohlsson (n 2) 147.

4 Ohlsson 158. See also Skogly's argument for an understanding of resources in the fulfilment of the state's socio-economic rights obligations as not only financial but also natural, human, regulatory and educational resources. S Skogly 'The requirement of using the "maximum of available resources" for human rights realisation: A question of quality as well as quantity?' (2012) 12 *Human Rights Law Review* 393.

Ohlsson's conception of second-order scarcity is largely directed at adaptation through capacity building and societal tools that mobilise an appropriate amount of social efforts to accomplish the often large structural change that is required for adapting to first-order scarcity.[5] The relevant social resources would include 'institutions' in a wide sense.[6] Consequently, it is apposite that the focus of this book is upon an institution in the narrow sense of courts, of which the adjudicative capacity allows them to hold other institutions to account for how they are managing second-order scarcity or, more accurately, second-order *difficulty*, where access to and distribution of water are impacted.[7] Indeed, this understanding of scarcity draws on the work of Sen's assertion in the famine context: 'Starvation is the characteristic of some people not *having* enough food to eat. It is not the characteristic of there *being* not enough food to eat. While the latter can be a cause of the former, it is but one of many possible causes.'[8] In the context of water, scarcity is the characteristic of some people not *having* enough water for their personal and domestic use. It is not the characteristic of there not being enough water for their personal and domestic use. While the latter can be a cause of the former, it is but one of many possible causes.

Second-order scarcity of water will thus be demonstrated in chapter 6 when elaborating upon the various state duties. Suffice to state here that examples may include the distribution of water in a discriminatory manner to benefit politically-favoured groups at the expense of others (duty to refrain from discrimination); the state's failure to prevent private entities such as corporations from interfering with existing water supplies (duty to protect); or the state's failure to provide, repair or otherwise maintain infrastructure that could optimise the availability of water that is scarce in the first-order sense (duty to respect).

The added value of asserting water's justiciability lies in the danger that water scarcity, of both the first and second order, risks the festering of conflict – whether within or between communities.[9] This is as a result of

5 Ohlsson (n 2) 165-167.

6 Ohlsson 161.

7 K Bakker 'The "commons" versus the "commodity": Alter-globalization, anti-privatization and the human right to water in the Global South' (2007) 39 *Antipode* 431 441-442, in which Bakker positively identifies socially-produced scarcity in the global context as from which 'the real "water crisis" arises … in which a short-term logic of economic growth, twinned with the rise of corporate power (and in particular water multi-nationals) has "converted abundance into scarcity"'.

8 A Sen *Poverty and famines: An essay on entitlement and deprivation* (1981) 1.

9 Ohlsson (n 2) 188.

contestations over water as a resource of limited availability.[10] The claim here certainly is not that the intervention of courts through adjudicating a right to water would nullify the risk of water-induced conflict. Rather, courts can, at least, play a critical role in attenuating the risk of conflict arising. Where disputes do arise, courts stand to significantly contribute to the sustainable resolution of disputes, in the process limiting the risk that such would morph into destabilising and violent acts.[11] As will be argued below, the court's role would not only be testing legislation or reviewing policies, in this case on water provision. Rather, courts would also evaluate the state's conduct in relation to its compliance with the relevant constitutional demands. I will return to calibrate the judicial role when advancing a bounded deliberation conception in this chapter and in chapter 6.

5.3 Normative justiciability concerns

This part turns to normative theory to argue for a justiciable right to water. Normativity is to 'prescribe, on the basis of values and principles, ideal or desirable states of affairs, or how things ought to be'.[12] Normativity proclaims 'what arrangements are attractive and, comparatively, better than others. It equips one with critical lenses from which to assess a concrete object or process.'[13] In the constitutional contexts of jurisdictions such as those of South Africa, Kenya and Ecuador, the normative justiciability question is settled or rendered redundant by the textual justiciability of a right to water in these constitutions. However, in Namibia, given the absence of a textually-explicit right to water, pertinent normative concerns remain to be overcome, in addition to establishing the legal basis of a right to water anchored in article 6 of the Constitution in the chapter 3 analysis.

The normative case *against* water's justiciability ought to be placed in its proper historical context. Until the early 1990s, the distinction between court-enforceable first generation civil-political rights and court-

10 Ohlsson offers various case studies in support of the hypothesis that water scarcity contributes to societal conflict. In the Rwandese genocide, it is claimed that owing to high population density, the country suffered from environmental scarcity of water and agricultural land. Further, Gaza's water scarcity was analysed as a factor that had worsened socio-economic conditions and heightened grievances within Gaza. Ohlsson (n 2) 41-42.

11 See *Shaanika & Others v The Windhoek City Police & Others* 2013 (4) NR 1106 (SC) para 50, where O'Regan J affirmed that the decision whether a home or dwelling should be demolished or removed 'not only raises a question of intense importance to the people whose home it is, but also may give rise to *divisive social conflict*' (my emphasis).

12 C Mendes *Constitutional courts and deliberative democracy* (2013) 5.

13 As above.

unenforceable second generation socio-economic rights was a popular dichotomy in human rights discourse.[14] As debate grew for enforceable socio-economic rights, arguments for and against took shape. The period during the Namibian Constitution's drafting also saw the dying days of the Cold War and the dissolution of the Soviet Union with 'new' Eastern European constitutions expressly including justiciable socio-economic rights with positive duties. These rights were viewed with scholarly disdain as 'a large mistake, possibly a disaster'.[15]

Reasons advanced against socio-economic rights included concerns that governments should not be compelled to interfere with free markets to avoid perverting ongoing attempts at creating market economies;[16] that courts lacked the institutional tools that were at the disposal of a bureaucracy in creating government programmes that were necessary to enforce and realise positive rights;[17] and the risk that positive rights would create a culture of dependency that could work against attempts at diminishing the sense of entitlement to state protection and to encourage individual initiative.[18] These affirmations are now ripe for challenge.

Socio-economic rights arguments from normatively moral, political and philosophical perspectives have received significant treatment in the literature and need not be rehashed here.[19] I have earlier constructed the normative case for a right to water under article 6 of the Constitution in chapter 3 of the book by primarily relying on the value of ubuntu. Here, I largely draw on the work of Fredman and King to identify key democratic values that represent rationales of importance to the justiciability debate: (a) moving beyond 'hydro-politics' through legal accountability; and (b) pursuing the deliberate inclusion of the excluded through participation, equality and representation.

5.3.1 Beyond 'hydro-politics': Achieving legal accountability

Political discourse on water access in the physical and economic sense, and at the basic level of personal, domestic and communal use is common

14 See E Riedel 'Core obligations in social rights and human dignity' in M Geis et al (eds) *Festschrift für Friedhelm Hufen* (2015) 79.

15 C Sunstein 'Against positive rights: Why social and economic rights don't belong in the new constitutions of post-communist Europe' (1993) 2 *East European Constitutional Review* 35-38.

16 Sunstein (n 15) 36.

17 Sunstein 37.

18 As above.

19 J King *Judging social rights* (2012); S Fredman *Human rights transformed* (2008).

place in Namibian society. However, I argue that the justiciability of a right to water would augment – rather than displace – the existing socio-political accountability that is exercised through electoral processes that allow people to directly hold their elected representatives to account.

Asserting legal accountability by accepting water's justiciability would serve to shift the debate on water-related issues away from being exclusively within the political realm. Problematically, water too often is politically framed as concerning the charity, benevolence or goodwill of political actors due to its apparent aspirational or 'manifesto' character.[20] As seen in the Nairobi Principles that are relied upon in chapter 6, the use of water as a political tool has been identified as particularly problematic by the African Commission on Human and Peoples' Rights (African Commission). Rather, the legal realm, where judicially claimable obligations for which the state as the duty bearer can be held to account using the strength of the rule of law, would find prominence in water-related discourse. This would thus allow the judiciary to serve as a forum of deliberative reason, rational argumentation, and neutrality.[21]

Further, legal accountability for the realisation of one's socio-economic right to water would not merely mean justiciability that is aimed at formally obtaining an explanation from the state as the duty bearer. On the contrary, it would require the state to account as to compliance with its duties – positive and negative – and within the respect-protect-fulfil framework. Where the state has not complied, it is required to justify why not.[22] I will elaborate on this in advancing deliberative democracy later in this chapter and in chapter 6.

Relatedly, the legal accountability that stands to be enhanced by asserting a right to water as justiciable resonates with the doctrine of 'public trust', with specific reference to water and natural resources generically. The public trust doctrine in Namibia holds that the state is the trustee of water resource titles – save where water is not lawfully owned

20 See Riedel (n 14) 79; King (n 19) 21, drawing on Kant's distinction between perfect and imperfect duties, the former attracting correlative rights while the latter are without.

21 The emphasis upon judicial legal accountability does not discount the relevance of other institutions created for checks and balances beyond the traditional tripartite branches, including hybrid institutions such as the Ombudsman, the Auditor-General and the Anti-Corruption Commission. These are outside the book's remit. See C Fombad 'The role of emerging hybrid institutions of accountability in the separation of powers scheme in Africa' in C Fombad (ed) *Separation of powers in African constitutionalism* (2016) 325.

22 Fredman (n 19) 103; King (n 19) 60-62.

as private property[23] – for the benefit of citizens. The corollary obligation is water management for the welfare of the general public. Although originally derived from common law,[24] the public trust doctrine has now found expression in article 100 of the Constitution[25] and in national legislation.[26] The public trust doctrine's significance lies in the fact that it could be invoked, as a matter of law, including constitutional law, to challenge government policies or action that do not facilitate the use of water resources vested in the state for public benefit. Nevertheless, this book does not consider the public trust doctrine further, given its extra-constitutional Bill of Rights roots.

It is worth emphasising the importance of water's justiciability as augmenting rather than displacing other socio-political and non-judicial accountability mechanisms that would be available to individuals and communities faced with challenges rooted in right to water deprivations. This is in light of the potential risks attendant to pursuing legal accountability for a right to water through the courts. Drawing on comparative cases, Clark[27] has articulated some of these risks using the Critical Legal Studies theory that caution against rights discourse in the pursuit of water justice by social justice movements globally.[28] The concern here is one

23 The Constitution art 16(1).

24 For the common law roots of the public trust doctrine in the water context, see L Feris 'The public trust doctrine and liability for historic water pollution in South Africa' (2012) 8 *Law, Environment and Development Journal* 1 11; RHLJ Arden 'Water for all? Developing a human right to water in national and international law' (2016) 65 *International and Comparative Law Quarterly* 771 776. The doctrine remains relevant in common law jurisdictions; eg, in *MC Mehta v Kamal Nath & Others* (1997) (1) SCC 388 the Indian Supreme Court affirmed that under the public trust doctrine '[t]he State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.'

25 The Constitution art 100: 'Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.'

26 Water Resources Management Act 11 of 2013 sec 4: 'The State, in its capacity as owner of the water resources of Namibia by virtue of Article 100 of the Namibian Constitution[,] has the responsibility to ensure that water resources are managed and used to the benefit of all people in furtherance of the objects of this Act.'

27 C Clark 'Of what use is a deradicalized human right to water?' (2017) 17 *Human Rights Law Review* 231.

28 Clark captures the potentially chilling effect of water rights litigation in two case studies: In the debates post-*Mazibuko* decision, which 'triggered both critique for its narrow interpretation of the right to water and calls for water justice activists to eschew rights-based litigation'; Clark (n 27) 233; *Mazibuko v City of Johannesburg* 2010 (4) SA 1

of 'deradicalisation' and 'institutional capture' whereby the invocation of the language of 'rights' risks placating the more radical demands of social justice movements and 'watering down' their claims to make them more palatable to courts.[29] Further, because litigation is fraught with the risk of a lack of success, the adjudication of socio-economic rights can potentially reduce community activism as courts would seemingly render final determination on the subject, resulting in the 'chilling effect' of shutting down future debate on water claims.[30]

In my view, the appropriate response to Clark's critique lies in recognising that courts at times are not the only or the most suitable forum in a specific context for pursuing socio-economic claims such as water. As such, activists in this area would need to strategically consider *whether*, *what*, and *how* to litigate, rather than entirely foreclosing the possibility of litigation through the blanket normative delegitimisation of water as a justiciable right. The effectiveness of justiciability would inevitably be influenced by various factors and is jurisdiction-specific. This approach acknowledges that courts need not be presumed as silver bullets (or fire blanks) in remedying all right to water concerns in Namibia. Thus, the cynical contentions that characterise courts as merely delivering 'hollow hope'[31] in bringing about social change are overreaching arguments at best.[32]

5.3.2 Beyond exclusion: Enhancing participation, equality and representation

Affirming a right to water as justiciable will enhance inclusivity by broadening participation within Namibia's democracy. Participation[33] is one of the key imperatives in the deliberative model examined in later sections of this chapter. Societal exclusion in participation is a challenge

(CC); in the *Lyda* decision in Detroit City, USA, where residents had challenged their water disconnections in Detroit bankruptcy proceedings, the Court stated that 'there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages'. *Lyda & Others v City of Detroit* (*In Re City of Detroit*) Bankr 13-53846 (Chapter 9) (ED Mich Sep 16, 2015).

29 Clark (n 27) 242.

30 Clark 254-255.

31 G Rosenberg *The hollow hope: Can courts bring about social change?* (2008). For a South African perspective on societal transformation, see A Kok 'Is law able to transform society?' (2010) 127 *South African Law Journal* 59; J Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 223.

32 See also ch 2.

33 For Waldron, participation is the 'the right of rights'. J Waldron *Law and disagreement* (1999) 233.

aptly summed up by Roy as follows: 'There's really no such thing as the "voiceless". There are only the deliberately silenced, or the preferably unheard.'[34] Therefore, facilitating inclusion in democratic participation requires what Said framed as a *contrapuntal* approach, one which goes against the grain and 'gives emphasis and voice to what is silent or marginally present'.[35]

Bringing socio-economic rights issues such as water within the judicial realm facilitates the move away from the interest-bargaining nature of politics and negotiations, a form of engagement that is largely individualised, bipolar and partisan. Rather, courts can be fora of wider public participation that serve as an alternative to transcend inequalities in bargaining power based on economic, social, political or collective considerations.[36] In an adjudicative context, the parties would be expected to engage with the advanced reasons, offering the potential for movement from their position and convincing the other party.

Courts, as independent and impartial institutions, have the potential to enhance democratic participation by moving away from partisan, power-prone interest bargaining to value-oriented deliberation, thereby augmenting deliberative democracy.[37] Judges would evaluate and deliberate upon arguments advanced. A further 'knock-on effect' is that decision makers would be more likely to reach their decisions in a deliberative, participative manner given the possibility of accountability through adjudication that considers both the reasons that informed the decision and the process adopted in decision making.[38]

A justiciable right to water also has the potential to narrow the existing chasm of inequalities in voice, power and influence within the (imperfect) Namibian democratic framework by embracing a *substantive* understanding of equality.[39] This argument is developed by Fredman[40] who critically applies Ely's[41] representation-reinforcing theory. The justiciability of

34 A Roy 'Peace and the new corporate liberation theology' (City of Sydney Peace Prize Lecture 2004), http://sydneypeacefoundation.org.au/wp-content/uploads/2012/02/2004-SPP_Arundhati-Roy.pdf (accessed 5 April 2019).

35 E Said *Culture and imperialism* (1994) 78-79.

36 Fredman (n 19) 105.

37 Fredman (n 19) 106.

38 R Larson 'The new right in water' (2013) 70 *Washington and Lee Law Review* 2181.

39 S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712; S Fredman *Discrimination law* (2011) 25.

40 Fredman (n 19) 109-113.

41 J Ely *Democracy and distrust: A theory of judicial review* (1980) 103.

positive duties through judicial review allows courts to be harnessed in buttressing democracy without overstepping their legitimacy bounds. The inequality concern in the context of access to water is revealed in the reality that predominantly commercial water claims have thus far been brought before Namibian courts,[42] although a lack of access to water has been and remains a chronic issue for the majority of Namibians who are already largely economically and politically marginalised. This manifests in interest bargaining that 'favours the powerful, with some groups being permanently excluded from the possibility of sharing power', thereby distorting the proper functioning of democracy.[43]

In this context, I concur with Fredman who critiques and rejects Ely's account of the function of judicial review as only legitimate where it is value-neutral or impartial and procedural, rather than requiring substantive engagement with the issues.[44] The centrality and role of values in adjudicating rights have received elaborate attention in chapters 2 and 3 of this book. Equality as a Namibian constitutional value, and one that Fredman invokes to critique Ely's approach to representative reinforcement as *only* procedural, is central to this analysis of water where inaccessibility is a major challenge. This approach thus offers justiciability as a mechanism to mitigate water poverty among – to borrow from Fanon – 'the wretched of the earth' in Namibia.[45]

One must concede that this model of participation is significantly predicated upon addressing unequal access to justice, the predominance of elite-dominated private interest rights litigation, financial barriers, the protracted nature of judicial processes, and the at times counter-productive adversarial set-up of the courts. Thus, water's justiciability risks aggravating rather than correcting societal inequality.[46] This peril may be characterised as a 'sharpest elbows problem' that may result in a right to water's justiciability being of disproportionate benefit to already privileged sections of society. The problem indeed is typified in right to health litigation in jurisdictions such as that of Brazil, where litigation has

42 Cf *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & Others* 2011 (2) NR 469 (SC); *Namibia Water Corporation Ltd v Aussenkehr Farms (Pty) Ltd* [2009] NAHC 1 (9 January 2009) (unreported); *Vilho Elifas Sheetheni Kamanja v Willem Andries Stephanus Smith* [2009] NAHC (26 November 2009) (unreported).

43 Fredman (n 19) 109.

44 Fredman 110.

45 F Fanon *The wretched of the earth (1961).*

46 Fredman (n 19) 107.

been found to disproportionately benefit individuals 'in the middle of the social spectrum'.[47]

The assumptions made in this model of participation no doubt present obstacles in ensuring that rights pervade to *all* intersections of a Namibian society which remains plagued by deep systemic and structural inequalities. However, they are not insurmountable. Innovative interventions that embrace transformative approaches to both the interpretation and application of procedural and substantive rules can precipitate legal reforms that stand to ameliorate the structural and institutional difficulties that the broader and less privileged majority would face in judicially vindicating their rights. While the *how* of instituting wider access to justice presents mammoth questions that are not within the primary remit of this book, some possible measures will be assessed in this chapter when I endeavour to avoid the mirage of a right to water's justiciability.

5.4 Institutional justiciability concerns

The second set of justiciability concerns relates to the role of courts as 'institutions'. Institutional justiciability evaluates 'the aptness of a question for judicial solution'.[48] In the words of the Israeli Supreme Court in *Targeted Killings*, these enquire into 'whether the law and the Court are the appropriate framework for deciding in the dispute'.[49] Two forms of institutional justiciability concerns are further distinguished: first, *institutional legitimacy*, followed by *institutional competence and capacity*. I address these in turn.

5.4.1 Institutional legitimacy objections

The legitimacy of courts to adjudicate upon matters that are (perceived to be) within the domain of the legislature and executive branches remain significant domestic contestations in the context of courts' powers of judicial review. Legitimacy concerns are of arguably greater relevance when considering positive rights and positive duties flowing from socio-economic rights given their inevitable implications upon policy determination, programme design, and resource allocation.

47 O Ferraz 'The right to health in the courts of Brazil: Worsening health inequities?' (2009) 11 *Health and Human Rights: An International Journal* 33.

48 King (n 19) 30, in which King coins the term 'prescriptive justiciability'.

49 *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel & Others* ILDC 597 (IL 2006) para 49 ('*Targeted Killings*').

As a comparator, it is of interest that Ireland – with significant constitutional similarities to Namibia as discussed in the PSPs analysis below – has largely adopted an approach of absolute deference to the legislature in policy determination. In *Sinnott v Minister of Education*, where the Irish Supreme Court considered the right to basic education of an autistic child, it was stated that '[if] judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role'.[50]

Where a constitution expressly provides for socio-economic rights such as water in its Bill of Rights, the forcefulness of the objection of courts as usurpative of executive or legislative functions and lacking legitimacy to adjudicate the issues arising out of this area of law would be less potent. It is only less potent because the legitimacy question would still arise when framing the extent to which the court can legitimately exercise its powers and prescribe action over the other organs of the state. This is vividly revealed in South Africa where there are express socio-economic rights provisions. Yet, when determining these questions, the courts are frequently taxed by the proper calibration of their adjudicative role. In *Minister of Health & Others v Treatment Action Campaign (No 2)* (*Treatment Action Campaign*)[51] the Constitutional Court of South Africa, in a case concerning the right to basic healthcare services that the state was constitutionally duty-bound to progressively realise through taking reasonable legislative and other measures within its available resources,[52] recognised the limits of the Court's legitimacy in adjudicating upon socio-economic issues. The Court affirmed:[53]

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In

50 *Sinnott v Minster of Education* (2001) IRSC 545 711 (*Sinnott*) (Hardiman J). *Sinnott* relies on an earlier precedent of *O'Reilly v Limerick Corporation* [1989] ILRM 18, stating that the distribution of the nation's wealth was a decision to be taken by the legislature and executive.

51 2002 (5) SA 721 (CC).

52 Constitution of South Africa, secs 27(1) and (2).

53 *Treatment Action Campaign* (n 51) para 38.

this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

At the heart of the legitimacy concern in *Treatment Action Campaign* (and *Mazibuko* analysed in chapter 6) is the separation of powers between the three organs – the executive, the legislature and the judiciary. The conceptual origins of the separation of powers doctrine are historically attributed to Montesquieu[54] and is enshrined as a foundational principle in the Constitution.[55] Courts, the argument goes, would intrude into the territory of the legislature and executive were they to adjudicate upon socio-economic matters such as water. Only the legislature and executive should retain a legitimate mandate to decide upon these matters, compared to judges who are unelected and thus unaccountable to the public.[56] The argument goes that judicial intervention in the social and economic space would give rise to what Bickel terms the 'counter-majoritarian difficulty'.[57]

The legitimacy concern, when framed in its 'pure' form, would support the absolute and strict separation between the judiciary and the other two organs at least.[58] This framing indeed is not alien to Namibian jurisprudence. The Namibian Supreme Court has at times expressed sympathy for a strict and absolute construal of the separation of powers doctrine. In *Mwilima* it was stated that '[a]ny attempt by a court of law to force the government to, for instance, increase the amount allocated for statutory legal aid, might be an intrusion into the exclusive domain of the government as to its expenditure and allocation of state funds, which …] was not permissible'.[59]

Interestingly, this strict construal of the separation of powers doctrine is relaxed in those contexts where the Supreme Court has been called to adjudicate the *negative* dimensions manifesting the restraint duties of

54 B de Montesquieu *The spirit of laws: Book XI* (2001); for a modern African analysis of the separation of powers doctrine, see C Fombad 'An overview of the separation of powers under modern African constitutions' in C Fombad (ed) *Separation of powers in African constitutionalism* (2016) 58.

55 The Constitution art 1(3): 'The main organs of the State shall be the Executive, the Legislature and the Judiciary', read with arts 27(2), 44 and 78.

56 S Yeshanew *The justiciability of economic, social and cultural rights in the African regional rights system* (2011) 77-79.

57 A Bickel *The least dangerous branch* (1962) 16.

58 For a case study of the application of the separation of powers doctrine particularly between the judiciary and executive, see N Horn 'An overview of the diverse approaches to judicial and executive relations: A Namibian study of four cases' in C Fombad (ed) *Separation of powers in African constitutionalism* (2016) 300.

59 *Mwilima v Government of the Republic of Namibia* 2002 NR 235 (SC) 251 (*Mwilima*).

fundamental rights with socio-economic implications. This is apparent in *Shaanika*[60] concerning the eviction of unlawful occupiers on municipal land. Here, the Supreme Court was less reticent in adjudicating and asserting the state's predominantly negative obligations flowing from the duty to refrain from housing deprivations through evictions. *Shaanika* held that a court order must be obtained prior to the state (acting through the municipality) demolishes structures or evicting occupiers, irrespective of the lawfulness of construction or occupation. This was part of the right to access courts that *Shaanika* implied from the article 12 right to a fair trial. I will return to negative duties when examining the duties of restraint that arise from a right to water in chapter 6.

5.4.2 Institutional incapacity and incompetence concerns

The second subset of concerns relate to the institutional incapacity or incompetence of courts to adjudicate socio-economic rights such as water. The argument is that concisely framed, judges are ill-suited to substantively determine the competing concerns and apply themselves to issues that require technical expertise in adjudicative circumstances such as water provision. Moreover, in adjudicating socio-economic rights, the courts would necessarily adjudicate upon positive duties – duties that are inherently characterised by their indeterminacy. This renders positive duties more suitable for political actors rather than the judicial process.

Institutional capacity and competence concerns arguably are best captured by the notion of 'polycentricity', which is the prism of evaluation here. In essence, the polycentric[61] – or many (poly) centred – nature of socio-economic matters such as a right to water results in the incompetence of Namibian courts as institutions to adjudicate this area of law. The most prominent polycentricism-phile arguably is Fuller. In a famous 1978 essay, 'The forms and limits of adjudication',[62] Fuller creatively invokes the image of a spider web to visualise the problem of adjudicating polycentric tasks:[63]

> A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all

60 *Shaanika* (n 11).

61 Polycentricity is not to be misunderstood as *policy*-centrism which would denote concerns of judicial policy making, an evaluation of which is best addressed as the institutional legitimacy concern.

62 L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 394. King (n 19) 189. Fuller attributes the term polycentricity to M Polanyi *The logic of liberty* (1951).

63 Fuller (n 62) 395.

> likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a 'polycentric' situation because it is 'many centered' – each crossing of strands is a distinct center for distributing tensions.

Indeed, Fuller argues for certain tasks to be left to either the legislature or 'the market' given that polycentric issues do not lend themselves well to adjudication for four principal reasons. Courts typically involve only two parties; the respective interests in the outcome of the case are diametrically opposed; courts can ultimately only satisfy one interest by ruling in favour of one or the other party; and while third parties would be affected by a ruling, they are incapable of influencing the outcome of a case.

Fuller proceeds to argue that these deficiencies lead to three principal undesirable consequences: Judges produce unintended results through their decisions; judges selectively involve parties who are not represented in the proceedings; and judges make assumptions as to the facts and attempt to recast the problem before them to better suit established patterns of judicial decision making.[64] Fuller thereby contrasts the 'bipolar' nature of adjudication with the 'multipolar' nature of polycentric issues.[65] Pertinently, Fuller observes the existence of 'polycentric elements in almost all problems submitted to adjudication', thereby rendering polycentricity as a challenge that 'is often a matter of degree'.[66]

When applied to the realm of socio-economic rights such as water, what renders these matters susceptible to arguments rooted in polycentricism is that they are heavily laden with polycentric questions that have strong implications for resource allocation, budgeting and policy making, issues that are best left in the domain of the executive and legislature. The essence of polycentricity as a concern is that the process of adjudication is innately bipolar, reactive and dispute-based, resulting in judges being unable to achieve the wide lens necessary to make polycentric decisions.[67] Fredman frames the polycentricity concern as arising because 'the number and complexity of competing principles is often greater in the context of positive duties'.[68] More than with duties of restraint, positive duties require action to be taken in a contexts where there are several available choices, whereby action in one direction would potentially foreclose

64 Fuller (n 62) 401; King (n 19) 191-192.

65 Fuller (n 62) 401.

66 Fuller 397.

67 Fredman (n 19) 96.

68 Fredman 103.

other policy choices.[69] Distributive decisions concerning resources may also be necessary. The futuristic nature of the action further requires decisions to be based on prognosis or the ability to judge the future, a reality that is particularly true with positive duties that require progressive programming.[70]

Applied to the specific context of water, the positive measures that a state must take to realise the right are undoubtedly multifarious. The implications range from tangible considerations such as infrastructure development and economic modelling to intangible interests, including health concerns and contextual, socio-cultural awareness and sensitivity. For example, the state must decide upon a variety of key issues that may include determining whether to source water through damming, subterranean reserves, desalination or piping from rivers; whether and where to construct a dam with land designated for flooding as a catchment area, with significant anthropocentric and ecological implications to be balanced;[71] the funding model for infrastructure development – whether through public-private partnerships or loans from domestic or international financial institutions, with potentially wider structural conditionalities; and the costing model for delivery and output to the consumer, be it full cost-recovery, subsidised provision, fixed charges, or volumetric charges based on usage.[72]

The essence of polycentricity as a concern is a well-known objection in judicial review generally, and one habitually raised in the context of resource allocation and policy-laden disputes involving the state.[73] Namibian courts have also cited polycentric arguments when asserting judicial deference in disputes involving the 'complex task of balancing competing interests'.[74] While Fuller does not originally address socio-economic rights or, indeed, a right to water, the concerns raised in

69 As above.

70 As above.

71 The flooding of OvaHimba ancestral lands has been cited for not pursuing the Epupa Falls Dam project, eg. BBC 'Angola and Namibia plan huge dam' 25 October 2007, http://news.bbc.co.uk/1/hi/world/africa/7062544.stm (accessed 9 April 2019).

72 See generally Bakker (n 7).

73 J King 'The pervasiveness of polycentricity' (2008) *Public Law* 101.

74 *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) 32-33 (Shivute CJ concurring), which approvingly cites the following passage by A Cockrell 'Can you paradigm? Another perspective on the public law/private law divide' (1993) *Acta Juridica* 227: 'a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues'. See also *Nakanyala v Inspector-General Namibia & Others* 2012 (1) NR 200 (HC) para 58.

his analysis are readily transferable to this setting. Indeed, Fuller's polycentricity concern has also been expressly invoked at the macro-level in making the case against constitutionalising justiciable socio-economic rights, for example, in the scholarly debates during the drafting of the 1993 South African Interim Constitution.[75]

Nevertheless, polycentricity as an objection to water's justiciability is surmountable. *First*, Fuller's deferential attitude to the legislature and 'the market' is problematic. I have already addressed the deficient assumptions that are made about the legislature in the earlier analysis engaging participation and interest bargaining. As for the market, the context of Fuller's postulations is significant. He originally writes from the perspective of the United States, a jurisdiction where the economic and social configuration is brute capitalism with a heavily market-dependent regime. This is in stark contrast with Namibia, where the market (domestically certainly) plays a lesser role. Beyond context, a reliance upon the market would serve to ignore the grave imbalances in bargaining power therein: At best, the market is indifferent to inequality, suffering and oppression. In the worst, the market is at the core of creating and maintaining this state of affairs.[76] The well-documented water privatisation controversies in developing country contexts such as Tanzania, Bolivia and Argentina, where the provision of water through commercial contracts located in international investment law provide vivid case studies of failures in realising the human right to water.[77] A market-centred approach stands in tension with the values of a transformative and re-invigorative constitution such as that of Namibia, as defended in chapter 2 of the book, one where the social and economic justice is a cardinal aspiration, and where the courts retain a legitimate role in addressing or ameliorating the prevailing socio-economic inequalities and deprivation. This is in addition to the reality that the market cannot resort to the claim that it is democratically accountable in the same way the state is. The forces that direct and restrain the market and the state are not equivalent.

75 D Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475 477-79; N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451; Cf M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882.

76 Fredman (n 19) 43.

77 Eg, T Meshel 'Human rights in investor-state arbitration: The human right to water and beyond' (2015) 6 *Journal of International Dispute Settlement* 277; E Truswell 'Thirst for profit: Water privatization, investment law and a human right to water' in C Brown & K Miles (eds) *Evolution in investment treaty law and arbitration* (2011) 570. See the analysis in ch 4.

Second, a series of compelling responses can be offered as to the diminished importance of polycentricity objections. King's work on the subject, written primarily from the perspective of English public law, generally,[78] and on the area of social rights, specifically,[79] is insightful. King evinces the pervasiveness of court adjudication of polycentric issues[80] and illuminates his book through the example of tax law. King argues for the refinement of polycentricity as a concept, given that 'we ought to regard polycentricity as a property of issues or problems and not "areas" of decision making such as resource allocation or planning'.[81] King claims that whether a legal issue is polycentric is an evaluation to be made only after the particular facts of a given case are measured against the legally-applicable framework.[82]

Therefore, as a result of the limited strength of the polycentricity objection, King advances two possible responses to polycentricity. The first is that the concept would fade into obsolescence as a justiciability concern in favour of more sophisticated analyses of judicial competence.[83] The second is for the refinement of the concept to render it more consistent with the role of courts in contemporary society.[84] Therefore, it is argued that while courts should *recognise* polycentricity concerns, these ought not to be fatal to the adjudication of socio-economic rights, generally, and water, specifically. In partially departing from King's proposition, it is advanced that, in giving due regard to the polycentricity concern, the appropriate response lies in devising the suitable legal tests to be applied in adjudicating positive duties such as a right to water, as advanced by various scholars.[85]

Before assessing models to address justiciability concerns, it is appropriate to preface this analysis with the so-called transitivity principle of rights that Shue has advanced: If everyone has a right to Y, and enjoyment of X is necessary for the enjoyment of Y, then everyone also has

78 King (n 73) 101.

79 As above.

80 King (n 19) 199.

81 King 193.

82 King 194. King's main thesis is that a legal issue is polycentric 'when the court is required to make, or should make, a legal binding as to the substantial and heterogeneous interests of a large number of non-represented persons'.

83 King (n 73) 104-105 112. King traces polycentricism's withering in the USA after *Broad v Board for Legal Education* 347 US 483 (1954).

84 King (n 73) *112.*

85 M Langford 'Justiciability of social rights: From practice to theory' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 37.

a right to X.[86] The transitivity principle, in the context of a right to water, can be formulated as follows: The characteristics identified in arguing against the justiciability of water as a socio-economic right – imprecision, programmatic and resource dependence, for example – are also shared by civil-political rights. This category of rights has justiciability features that are taken for granted. This exposes the logical fallacy in distinguishing socio-economic rights as non-justiciable compared to civil-political rights. While transitivity arguments are valuable, they stand to supplement arguments on a right to water's intrinsic justiciability. Deliberative democracy thus is advanced below to best underpin the normative assessment.

5.4.3 Responding through deliberative democracy

This analysis of institutional justiciability turns to offer a workable model that would inform the approach to adjudicating a right to water by Namibian courts. The question is how to fashion a role for justiciable human rights, which reinforces Namibia's democracy rather than detracts from it in light of the institutional justiciability concerns identified. The importance of a model or theory of justiciability aids us in resolving what Young has termed 'contestable rights-issues' where contestability may arise in situations where there is reasonable disagreement on a specific question about rights.[87]

This analysis invariably assumes that a right to water is established from the right to life in the Constitution's article 6, as I have argued in chapter 3 of the book. Relatedly, the analysis recognises the constitutional role of courts in adjudicating and enforcing fundamental rights and freedoms based on the combined reading of the Bill of Rights enforcement clauses, articles 5 and 25. The argument is that the model of bounded deliberative democracy should be adopted to best navigate around court's democratic legitimacy, institutional competence, and capacity concerns, and can best give meaning to the values identified for normative justiciability as advanced earlier. The analysis, however, will commence with an evaluation of the alternative dialogical model,[88] pointing out its

86 H Shue *Basic rights* (1980) 32.

87 A Young *Democratic dialogue and the constitution* (2017) 112; A Young 'In defence of due deference' (2009) 72 *Modern Law Review* 554.

88 A third approach of representation-reinforcing theories, which is not considered here, draws on the notion that adjudication reinforces representation of systematically silenced and under-represented groups in a representative democracy. See S Fredman *Comparative human rights* (2019) 87.

attractiveness but ultimately rejecting it as an inappropriate model in the constitutional context.

The dialogic model has been developed to principally respond to the problem of the democratic deficit to which judges are vulnerable when they exercise judicial review over legislation. As a model, it rejects the idea that either the judges or the legislators are infallible, which is a concern prompted by the reality that legislators may ignore fundamental long-term values or 'gang up' on the unpopular in the absence of independent courts having the ability to apply a Bill of Rights.[89]

The dialogical model is, in the adjudicative setting, perhaps best characterised by Hogg and Bushell[90] in their influential article that sought to describe the interpretation of the Canadian Charter of Fundamental Rights through 66 Canadian decisions wherein legislation was impugned. Their findings demonstrated that, in most cases, judges did not have the last word on rights issues but that the legislature generally was able to respond to judicial invalidation of legislation in ways that preserved the basic legislative objective.[91] Hogg and Bushell's analysis determined that a judicial decision that struck down a law on Canadian Charter grounds was followed by some action by the competent legislative body.[92] This thus exposed an inter-institutional 'dialogue' between the courts and the legislature, which revealed that unelected judges were not given a veto over the democratic will expressed through competent legislative bodies. Hogg and Bushell also observed that dialogue might continue outside the courts. A dialogue between courts and the legislature exists even when the courts hold that there is no Canadian Charter issue that is given rise to by impugned legislation.[93]

The potential suitability of a dialogical model to the adjudication of rights in Namibia would be anchored in the Constitution's article 25 enforcement of rights provision, which shares similarities with the

89 K Roach 'Dialogic judicial review and its critics' (2004) 23 *Supreme Court Law Review* 49.

90 P Hogg & A Bushell 'The charter dialogue between the courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Journal* 75.

91 Fredman *(n 88) 90.*

92 Hogg & Bushell (n 90) 82. See also R Dixon 'Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391, exploring the role of strong-form judicial review in the socio-economic rights experience of South Africa.

93 Hogg & Bushell (n 90) 105, citing *Thibaudeau v Canada* [1995] 2 SCR 627.

Canadian Charter's section 33.[94] Based on the text of article 25(1)(a) of the Namibian Constitution, it may be argued that the provision, like the Canadian Charter,[95] envisages inter-institutional dialogue among the courts, the legislature and the executive by granting courts the power and discretion to allow the legislature or the executive a specified period within which to correct any defect in an impugned law or action.[96] A similar approach is indeed embraced by section 33(1) of the Canadian Charter in allowing a Canadian legislature to declare the operation of a law for a period of up to five years notwithstanding that the possibility – or certainty – that the legislation might be understood by some, including the courts, as inconsistent with one of the Charter rights.[97]

However, various reasons render the dialogic model inapt for our purposes. First, Hogg and Bushell's article that originates and unpacks the model is *not* normative; it is a descriptive-cum-empirical[98] account that is drawn from observed patterns of decision making by Canadian courts applying the Canadian Charter.[99] This renders the model peculiar

94 This is in addition to the justification and equality clauses in secs 1 and 15 Canadian Charter, respectively.

95 The key distinction is that the locus of power under the Constitution's art 25 lies with the court, whereas in Canada the legislature is vested with declaratory power.

96 See the Constitution art 25(1)(a): 'Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that: (a) *a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority*, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid' (my emphasis).

97 Canadian Charter sec 33(1): Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in sec 2 or secs 7-15 of this Charter.

98 Fredman observes that the dialogic model also been used as the basis for normative arguments on the mutual accountability between the legislature and judiciary. In the decision of *Alberta Vriend v Alberta* [1998] 1 SCR 493 para 138, Iacobucci J, after citing Hogg and Bushell's article, stated: 'To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation … This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.'

99 Young (n 87) 6; Fredman (n 88) 90.

to the Canadian Charter experience, thereby limiting the propriety of transplantation into the Namibian milieu. The second drawback in applying the dialogical model is that, in its predominant form, it focuses upon the inter-institutional dialogue between the courts and the legislature, and consequently upon laws enacted and impugned. This neglects the centrality of the inter-institutional dialogue between courts and the executive, or even the trialogue that would exist between the courts, legislature and executive. The importance of the latter forms of inter-institutional engagement is worth stressing in light of the fact that, while socio-economic rights such as water may be grounded in legislation, a significant dispute as to the realisation of such rights may arise as a result of the action taken by the executive as a public organ. The third limitation is well captured by Fredman who points out that the dialogical model reveals 'a deep ambiguity as to the role of the judiciary', given that it is unclear whether a judge can ultimately make authoritative decisions on the meaning of human rights or whether they should defer authoritative decisions to the legislature.[100]

I argue that to overcome the institutional justiciability concerns raised above and to render effective the normative values that have been advanced to affirm justiciability, a deliberative democracy model should be adopted in the constitutional adjudication of positive duties arising out of socio-economic rights, specifically a right to water. The model retains a conceptual genesis in the deliberative democracy literature, particularly in the work of Habermas and Cohen[101] in the broader context of democracies and political decision making.[102]

While deliberative democracy has a panoply of potential applications in resolving social, political and cultural issues through democratic institutions such as legislatures, civil society organisations and political organisations, Fredman has sought to relate the model to human rights adjudication, that is, with courts as the forum for inter-institutional deliberation and particularly in the context of the challenge of positive duties that arise from socio-economic rights. Fredman puts forward not a pure form of deliberative democracy, but what she terms 'bounded

100 Fredman (n 88) 90.

101 J Habermas *Between facts and norms* (1997); J Cohen 'Deliberation and democratic legitimacy' in A Hamlin & P Pettit (eds) *The good polity* (1989); A Bächtiger et al (eds) *The Oxford handbook of deliberative democracy* (2017).

102 For a concise exposition of Habermas and Cohen's arguments, among others, see S Fredman 'Adjudication as accountability: A deliberative approach' in N Bamforth & P Leyland (eds) *Accountability in the contemporary constitution* (2013) 114-116.

deliberation'[103] with the constraint being human rights which arise as a product of prior deliberative consensus.

Given that the Constitution, particularly article 25 read with article 5, affirmatively pre-determines an express constitutional basis for the adjudication of fundamental rights disputes, the real challenge is how to formulate a democratically-justifiable role for the courts.[104] The overarching premise of a deliberative democracy model as to concerns related to the institutional legitimacy of courts is that, by augmenting the power of the electorate to hold the executive and legislature to account, judges can enhance rather than undermine democracy.[105]

Fredman's account of inter-institutional interactions focuses on the need for the court to scrutinise the reasons provided by the legislature for their policy choices, in the process ensuring that any restriction of a right is sufficiently justified. Fredman identifies the centrality of courts in adjudicating upon human rights as concerns that are not to be addressed based on interest bargaining. The undesirable consequence would be that interests of individuals and minorities may always be trumped by those with superior power, whether numerical, political or financial.[106] Deliberative democracy is value-oriented, thus moving away from a bargaining model of interest-governed action. It aids in disciplining political representatives by requiring that they 'justify decisions by reference to the public interest, not to preferences (whether their own or voters) which could be distorted or self-seeking'.[107]

In responding to the institutional legitimacy limitations of courts relative to the legislature, the fact that the judges are called to adjudicate rights within the confines of chapter 3 Bill of Rights would enhance judicial accountability given that judges would also have to justify their own decisions as against a background of values that have been reached by a prior process of consensus. In this way, the Bill of Rights also acts as a mechanism for accountability for both the legislature and the judiciary.[108]

103 Fredman (n 102) 106; S Fredman 'From dialogue to deliberation: Human rights adjudication and prisoners' rights to vote' (2013) *Public Law* 292; Fredman (n 19); Fredman (n 88) 90. See also Mendes (n 12).

104 Fredman (n 102) 106.

105 As above.

106 Fredman (n 102) 117.

107 Fredman (n 102) 115.

108 Fredman (n 102) 114.

In arguing for deliberativism, Fredman contrasts the model by directly drawing attention to the limitations inherent in a dialogical model.[109] First, a dialogic approach is concerned only with the court and the legislature, whereas the ideal process of human rights interpretation and application ought to be open to a much wider range of participants. Second, dialogicalism focuses only on the 'output' or the judicial decision itself, whereas the deliberative model, Fredman posits, 'looks behind the decision to the process of decision-making in the course of human rights litigation'.[110] The expectation under deliberativism is that judges do not simply articulate 'principles' that are identified abstractly. Instead, 'in recognition of the fact that the interpretation of a human right need not necessarily have a single right answer, the court itself should be required to justify itself in deliberative terms'.[111] Third, while the dialogic model assumes that courts are to render alternative solutions to human rights questions to that offered by the legislature, the deliberative model focuses instead on the *quality of deliberation*. Thus, the model places significant importance upon the process of deliberation before a court, not least because it regards the judicial output as itself part of a process of deliberation.[112]

In respecting the separation of powers doctrine, Fredman correctly asserts that the *primary* deliberative role lies with the legislature. Human rights decisions ought to be deliberative, not interest-based, thus rendering the legislature best placed for this purpose. The role performed by the courts is supervisory, to 'ensure that such decisions are indeed taken deliberatively within the constraints set by the human rights themselves'. They assume a supervisory role that should be directed at enhancing, rather than eroding, the deliberative dimension to modern democracy.[113] Decision makers must be in a position to persuade the court that they have fulfilled their human rights obligations while recognising that there is room for reasonable disagreement in the interpretation, delivery and acceptable limits of such rights.[114] Indeed, '[d]isagreement about rights is not unreasonable, and people can disagree about rights while still taking rights seriously'.[115]

109 Fredman (n 102) 106.

110 Fredman (n 102) 113.

111 As above.

112 As above.

113 Fredman (n 102) 118.

114 As above.

115 Fredman (n 102) 106.

Courts thus stand to ensure that 'the state explain and justify to the court, and therefore to the litigants and the public more generally, the grounds of its decisions and the reason for the selection of particular means'.[116] In other words, the provision of reasons is itself insufficient as the decision makers must account for the reasonableness of their decisions. This thereby rejuvenates the deliberative process while ensuring that the court does not overstep the grounds of legitimation by substituting for the democratic process.[117] Thus, Fredman notes, the deliberative approach is one that is 'bounded' given that it operates within the constraints of human rights.[118] Fredman describes the role of the court as 'not to exercise a conclusive veto or to prescribe an authoritative interpretation, but nor is justification measured against an open-ended standard of rationality or reasonableness, as in administrative law'. Rather, the expectation is that decision makers are to persuade the court that they have fulfilled their human rights obligations, with the courts taking into account both the pre-existing deliberative consensus as reflected in the Bill of Rights and of the fact that there is margin for reasonable disagreement.[119]

A prominent example of the deliberative model in action when courts adjudicate positive duties arising from socio-economic rights is offered in the *Treatment Action Campaign*[120] decision by the South African Constitutional Court. Here, a challenge was brought to compel the South African government to provide HIV/AIDS treatment on the basis of the right to access healthcare services under section 27(1)(a) of the South African Constitution, with a corresponding duty on the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.[121] The Court compelled the government to account for its decision to refuse to permit the use of the drug Nevirapine to reduce mother-to-child transmission of HIV/AIDS despite the drug's proven efficacy and the availability of resources for procurement. Commenting on the decision, Fredman notes that

> [b]y requiring the government to prove that its concerns over the safety of Nevirapine were based in evidence, the court introduced a strong requirement of accountability and transparency. *It was not enough simply to produce reasons; they were also required to be reasonable.* In this light, it was clear that the reasons put forward were lightweight relative to the enormous cost in human lives

116 Fredman (n 102) 118.

117 As above.

118 Fredman (n 102) 119.

119 Fredman (n 103) 298.

120 *Treatment Action Campaign* (n 51).

121 Constitution of South Africa sec 27(2).

> that the refusal entailed. But the judgment goes further than accountability, introducing a deliberative element into decision-making. This is because the government was required to explain its policies in a way which could convince others of their reasonableness, and on terms which were free of ideological or self-interested perspectives. Those who had previously had no voice in democratic decision-making were able to introduce their own perspectives, so that the court could create a synthesis of both.[122]

Indeed, the attractiveness of the deliberative democracy model is that it enhances key constitutional and democratic values, principles, and objectives that were advanced earlier in this chapter and chapter 2. In particular, it was argued that the Namibian Constitution represents a move from a 'culture of authority' to one where rights are exercised and protected within a 'culture of justification'. Such an obligation of justification requires that the organs of the state account for their actions, decisions and choices. Informed by a legal accountability approach, courts would require the government as the decision maker on socio-economic matters to offer a justificatory explanation of their decision. Fredman's[123] approach is helpful here in fashioning a model that affirms the value of accountability in adjudicating positive duties as 'although courts might regard such decisions as too polycentric for judges to handle, in fact, in the context of human rights, their very complexity might make it even more important to reinforce *the duty of explanation*'.[124] In these circumstances, the court's role is 'not to make the decision in the place of the decision maker, but to require the decision maker to give an open account of why a duty has not been fulfilled or has been fulfilled in one way rather than another'.[125]

The model thus stands to augment the court's deliberative role in rights adjudication. Outcomes, therefore, are not determined on the basis of factual power or authority but on the basis of reasons.[126] The values-oriented nature of the deliberative model also allows the overarching approach to the constitutional interpretation of purposivism infused with values drawn from transformative and re-invigorative constitutionalism imperatives – including equality and ubuntu – to be given expression.

As to the limits in the competence and expertise of courts in dealing with polycentric issues related to resource allocation, policy formulation

122 Fredman (n 102) 121-122 (my emphasis).

123 Fredman (n 19) 103.

124 As above (my emphasis).

125 As above.

126 Fredman (n 102) 114.

and planning, the deliberative model offers an excellent avenue to ensure that there exists accountability on the part of the state for its actions. As the court does not substitute its views with those of the decision maker, the risk of distorting the admittedly delicate balance of policy, fiscal and resources that the state is to strike is mitigated. Bounded deliberation thereby moves us away from a rudimentary understanding of the institutional functions and responsibilities of courts to a more nuanced transformative and re-invigorative paradigm.

5.4.4 Avoiding the mirage of water's justiciability

In advancing the argument for water as a justiciable human right to be appropriately adjudicated through a deliberative democracy model, I have pointed to various structural and procedural difficulties that would need be overcome so that a right to water is not merely 'theoretical or illusory but … practical and effective'.[127] The structural and procedural difficulties risk creating a *mirage* of a right to water, metaphorically drawing on the scientific optical illusion of water. Without a transformative approach to legal procedure, the claim to water's justiciability in Namibia would be stymied and stillborn.[128] Therefore, deliberate efforts ought to be made to ensure that the existing procedural hurdles and structural barriers that frustrate the ability of rights holders to claim their human right to water are overcome.[129] The challenges posed by effective justiciability are numerous and cross-cutting.

The intention here is not to exhaustively consider this but to offer a normative framework that can be employed by adjudicators when presented with rights claims. Indeed, as Damaseb DCJ captures in *Kashela*, '[i]t could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts; for where there is a right, there must be a remedy to be fashioned by the court seized with the matter'.[130] In taking the crux of *Kashela* further, where there is a right, there must exist procedural mechanisms that are adopted and adapted to feasibly facilitate the vindication of such right.

127 *Airey v Ireland* (1979) 2 EHRR 305 para 24.

128 On procedural justiciability, see L Sossin *Boundaries of judicial review: The law of justiciability in Canada* (2012).

129 Z Hinson & D Hubbard 'Access to justice in Namibia: Proposals for improving access to courts – *locus standi*: Standing to bring a legal action: Paper 2' (2012).

130 *Kashela v Katima Mulilo Town Council* 2018 (4) NR 1160 (SC) para 70. Here the Supreme Court appears to adopt an inductive method of inferring the intention of the founders without offering support for its proposition. This inductive approach to the founders' intention is frequent in the literature.

In so doing, I will briefly assess how transformative and re-invigorative constitutionalism imperatives can find meaning through the question of *locus standi*, the legal requirement that a person must meet in order to have the standing to bring a constitutional claim before the Namibian courts.[131] Succinctly, article 25 of the Constitution requires that a person be regarded as 'aggrieved' in order to vindicate their substantive or procedural rights. Who qualifies as 'aggrieved' is not constitutionally defined but has been understood by the Namibian courts as a person who retains a 'direct and substantial interest' in a given issue, in line with the common law approach to standing.[132] In recent decisions the Namibian courts, however, have shown a willingness to move away from the strict construal of aggrieved persons as advanced under the common law in favour of a more expansive understanding.[133]

To overcome a restrictive and narrow interpretation of standing as reflected in the contemporary common law rules, it is argued that a re-invigorative constitutionalism approach to the meaning of aggrieved person in article 25 ought to be embraced. As argued in chapter 3, the value of ubuntu is drawn from the constitutionally-ordained customary law. Ubuntu requires mutual concern, interdependence and solidarity. A restrictive construal of aggrieved persons to only individuals and those with a pecuniary interest in a matter, therefore, should be rejected in favour of an expansive understanding under which third parties can legitimately seek to affirm the rights of others as part of their communal duty, particularly those who are less privileged and relegated to socio-economic margins. Moreover, in light of the communitarian underpinnings of ubuntu, the collective vindication of rights, through class actions and public interest mechanisms, ought to be embraced to avoid a case of 'Hobson's choice' in rights vindication, as positively manifested in constitutional settings such as those of South African[134] and Kenya.[135]

As a comparative perspective, India offers a prime case study on how courts have developed the standing requirements in order to increase access to justice and ensure that rights, particularly those of a socio-

131 Namibia Law Reform and Development Commission '*Locus standi* discussion paper' (LRDC 27, March 2014).

132 *Kerry McNamara Architects Inc & Others v Minister of Works, Transpstuort and Communication & Others* 2000 NR 1 (HC).

133 *Lameck & Another v President of Republic of Namibia & Others* 2012 (1) NR 255 (HC) para 11; *Trustco Insurance t/a Legal Shield Namibia & Another v Deed Registries Regulation Board & Others* 2011 (2) NR 726 (SC) para 18.

134 Constitution of the Republic of South Africa, 1996 sec 38.

135 2010 Kenyan Constitution sec 22.

economic nature, are more easily accessible. In the 1980s India introduced institutional innovation of public interest litigation (PIL)[136] to overcome its then restrictive rules on standing so as to facilitate a voice for the poor and disadvantaged in society, thus rendering courts as vehicles for social conversation between co-equal citizens.[137] While PIL is not without practical limitations and challenges,[138] it offers Namibian courts a tested reference point on how to radically transform legal rules of procedure to realise substantive human rights such as a right to water. Although traditional concerns rooted in floodgates arguments against liberalised rules of standing are often raised, these have largely lost their currency. As the Namibian High Court in *Frans v Paschke* affirmed this through the apt water metaphor, '[f]loodgate-litigation arguments cannot cause an unconstitutional rule to survive. Sometimes … it is indeed necessary to open the floodgates to give constitutional water to the arid land of prejudice upon which the common-law rule has survived for so many years in practice.'[139]

While the transformation and re-invigoration of procedural law will require significant attention, the analysis in this part is but an introduction and will not be carried forward further in the book.

5.5 Textual justiciability concerns

In this part I turn to the Principles of State Policy (PSPs) as potentially manifesting textual justiciability concerns. In chapter 3 I made the argument for a constitutional right to water that is implied from the article 6 right to life that is interpreted through the prism of ubuntu. I now examine whether a justiciable right to water is compatible with the PSPs. The analysis draws on the Constitution's text, structure and history, which is enriched by domestic and foreign judicial perspectives.

136 A Bhuwania *Courting the people: Public interest litigation in post-emergency India* (2017).

137 Fredman (n 19) 125.

138 For a critique of PIL in India, see G Bhatia *The transformative constitution* (2019) 17. While not taking issue with PIL's original commitment of ensuring that those who were unable to approach the Court would not therefore lack a voice, Bhatia excoriates what he holds to be the substantive expansion of art 21 (right to life), and the removal of procedural constraints in order to enable 'justice', a practice that has seen the Court playing an active role in governance, and taking both quasi-legislative and executive actions. For a special issue critiquing PIL in South Africa, see J Klaaren et al 'Public interest litigation in South Africa: Special issue' (2011) 27 *South African Journal on Human Rights*.

139 *Frans v Paschke & Others* 2007 (2) NR 520 (HC) para 18.

Functionally, PSPs can generally be described as expressing constitutional directives that are primarily addressed to the state's political organs (the executive and the legislature) to programmatically secure specified goals of a certain social, political and economic nature, presenting duties of a 'transformative' character, duties that are not judicially enforceable.[140] The key PSP provisions for purposes of a right to water argument are articles 95(j) and 101. After article 95, entitled 'Promotion of the Welfare of the People', the chapeau states: 'The State *shall actively promote and maintain* the welfare of the people by adopting, inter alia,[141] policies aimed at'[142] 12 PSPs. These PSPs include women's equality; workers' and children's rights; trade unions; labour standards; access to public facilities and services; protections for senior citizens; social benefits; legal aid; living wages for workers; civic participation; and environmental protection. For our purposes, the most material PSP is contained in article 95(j), which requires 'consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health'. I have argued in earlier chapters (in the context of the right to an adequate standard of living in article 25 of the Universal Declaration and article 11(1) of ICESCR) that socio-economic matters can, and indeed should, be interpreted as including the provision of a right to water as a socio-economic dimension.

The PSPs in article 95, like all other provisions in chapter 11, are further qualified by the non-enforceability clause article 101. It provides that the PSPs in chapter 11 '*shall not of and by themselves be legally enforceable by any Court*, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.'[143]

The principal question is: Do the PSPs restrict the court enforceability of a right to water? My argument is the following: A right to water is derived from the article 6 right to life, which is a fundamental right provision contained in chapter 3 of the Constitution. Chapter 3 contains provisions that are explicitly judicially enforceable, with a significant – but not exclusive – focus on civil-political matters. It would constitute a

140 T Khaitan 'Directive principles and the expressive accommodation of ideological dissenters' (2018) 16 *International Journal of Constitutional Law* 389 391; L Weis 'Constitutional directive principles' (2017) 37 *Oxford Journal of Legal Studies* 4; BA Gebeye 'The potential role of directive principles of state policies for transformative constitutionalism in Africa' (2017) 1 *Africa Journal of Comparative Constitutional Law* 1.

141 This indicates that the list of PSPs is non-exhaustive.

142 My emphasis.

143 My emphasis.

constitutionally repugnant interpretation to invoke PSPs as *extra*-chapter 3 provisions to prohibit or limit the enforcement of a right to water implied from the right to life, which is a chapter 3 fundamental right.

In so doing, I also assess and reject the argument by some scholars that the Constitution's adoption of a PSPs framework that incorporates socio-economic matters reflects the drafters' intention to exclude such matters from court enforceability.[144] Nevertheless, I will argue that the PSPs are not rendered redundant or 'constitutional dead wood' through my argument. PSPs can be invoked in interpreting fundamental rights including a right to water.

In my view, the non-enforceability of socio-economic entitlements such as water addressed in the PSPs argument can be pursued through at least two senses: that water entitlements *cannot* (feasibly) be enforced by the courts or that they *should not* be. In this part of the chapter my assessment of the implications of PSPs centralises the *should not* argument and thus turns to interpret the relevant provisions of the Constitution. On the other hand, the *cannot* argument is one that invites normative and institutional questions relating to objections that include the inherent or practical non-justiciability of a right to water, which objections I have already addressed earlier in this chapter.

5.5.1 The constitutional PSPs and their history

In order to isolate the precise impact of PSPs upon a right to water, a historic and comparative appreciation of PSPs is apposite. The legal effect of article 101 – which invokes language that is similar to the 'contrajudicative'[145] clauses contained in comparative constitutions with PSPs or DPSPs – has been foremost considered by the Supreme Court in *Mwilima*.[146] *Mwilima* arguably also is the leading authority on the scant cases claiming the enforcement of socio-economic rights in the context of PSPs.[147]

144 For purposes of this part, I assume a material separation between certain civil-political and socio-economic rights.

145 Weis (n 140) 8, who employs the term 'contrajudicative' to aptly distinguish the concept from the overlapping and familiar concepts of 'non-justiciability' and 'unenforceability'.

146 *Mwilima* (n 59).

147 The Supreme Court also considered the PSPs in *Metropolitan Bank of Zimbabwe Ltd & World Eagle Properties Ltd v Bank of Namibia* 2018 (4) NR 1115 (SC) paras 32-33, determining that art 101 was not applicable as the banking legislation in question was not based on the PSPs in arts 95 and 98.

The dearth of socio-economic rights claims before Namibian courts can, at least in part, be attributed to the widely-held view that the Constitution's adoption of a PSP framework has the legal effect of prohibiting the judicial enforcement of socio-economic rights claims such as water, housing, health care and food. This is a view that can be traced to early commentary on PSPs. Carpenter, writing in 1990, took the view that '[t]he rights enumerated in the [Bill of Rights] are confined to the so-called first-generation or traditional human rights. The second and third generation rights do not feature in the Constitution, but only as principles of state policy (in chapter 11) and *not as judicially enforceable rights*.'[148]

Carpenter solely relies on the Constitution's PSPs to make the blanket claim that socio-economic rights, as second generation rights (in addition to third generation rights) are entirely outside the parameters of judicial enforcement. This 'perception'[149] of the unenforceability of socio-economic rights owing to PSPs is further perpetuated by Fourie: 'The authors of the Constitution chose to handle economic [and social] matters *outside the rights context* and specifically as policy goals.'[150]

This perception continues to attract support even in more recent PSPs scholarship.[151] I argue that these conclusions are predicated on a flawed interpretation of the PSPs concerning socio-economic entitlements and an erroneous understanding of the history of PSPs. Concerning the historical context, the Constituent Assembly Debates are silent on how the PSPs framework was imported into the Constitution and the precise rationale behind them.[152] In fact, no substantive commentary is recorded in the Constituent Assembly Debates when the PSPs were considered, except

148 G Carpenter 'The Namibian Constitution – *ex Africa aliquid novi after all*?' in DH van Wyk et al (eds) *Namibia: Constitutional and international law issues* (1991) 32 (my emphasis).

149 J Nakuta 'The justiciability of social, economic and cultural rights in Namibia and the role of non-governmental organisations' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008) 96, referring to the 'perception of ESC rights as unenforceable principles of state policy cannot be left unchallenged ... Such an attitude is defeatist and contrary to the principle that all human rights and fundamental freedoms are indivisible and interdependent.'

150 F Fourie 'The Namibian Constitution and economic rights' (1990) 6 *South African Journal on Human Rights* 363 365 (emphasis in original). See also G Naldi *Constitutional rights in Namibia* (1995) 96; J Cottrell 'Constitution of Namibia' (1991) 35 *Journal of African Law* 56 73.

151 J Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 2 *African Journal of Legal Studies* 1 8.

152 Namibia National Archives, Namibia Constituent Assembly Debates 21 November 1989 – 21 January 1990 Volume 1 and 2 (1990) 324.

that the Constituent Assembly members 'agreed to' them.[153] Further, there is no requirement for, or reference to, PSPs in the 1982 Principles, as critiqued in chapter 3 of the book.

A contemporaneous reading of the Constitution may nonetheless be helpful here. At the time of the Constitution's adoption, the use of PSPs as drafting techniques was not novel. PSPs had a long pedigree of inclusion within various earlier national constitutions. The 1937 Irish Constitution is said to be the archetype for DPSPs.[154] Ireland is claimed to have 'invented' DPSPs with the *raison d'être* of serving as an alternative to judicially-enforceable socio-economic rights.[155] Ireland was later followed by India in 1947.[156] Globally, approximately 30 national constitutions have since invoked this drafting formula, many of them in Africa.[157] The text of article 95 offers strong evidence that the drafters specifically consulted the language in the Indian and Irish DPSPs that was patently transplanted into Namibian PSPs.[158]

However, there are key distinctions between the underlying *raison d'être* behind DPSPs or PSPs in the Namibian and Indian constitutions at least. Some Indian Constitution commentators state that the reason for the dichotomy between unenforceable DPSPs and enforceable fundamental rights was a brainchild of BR Ambedkar, the Chairperson

153 Namibia National Archives (n 152) 322.

154 1937 Constitution of Ireland art 45.

155 For an analysis of the constitutional origins of DPSPs, see Gebeye (n 140) 5-8. Gebeye argues that a prominent reason for DPSPs in Ireland arose from the comparative concerns that were drawn from an era where the SCOTUS was aggressively striking down legislation aimed at social and economic protections for reasons based on laissez-faire, free market capitalism principles rooted in the freedom to contract. This is characterised as 'Lochner era constitutionalism', drawing on SCOTUS jurisprudence epitomised by *Lochner v New York* 198 US 45 (1905), where the US Supreme Court struck down a state law aimed at protecting the health and well-being of bakers in New York as the law was found to violate the 'liberty to contract' as part of the 14th Amendment. Gebeye finds that Ireland thus adopted social-oriented constitutional DPSPs that were unenforceable in courts as an alternative to the contra-Lochner era approach adopted by other European states that had explicitly constitutionalised social and economic rights.

156 1947 Constitution of India Part IV.

157 Gebeye (n 140) 8; Khaitan (n 140) 391; Weis (n 140) 8.

158 An example is PSP art 95(b) that obligates the state to 'enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength'. The spelling of 'vocations' in the Namibia Constitution as opposed to 'avocations' in the Indian and Irish constitution is the only (material) difference.

of the Indian Constitution's Drafting Committee.[159] Ambedkar took the view that 'the infant [Indian] State shall not be immediately called upon to account for not fulfilling the new obligations laid down upon it'.[160] Other reasons identified from the elaborate Indian Constituent Assembly debates included that DPSPs were to serve as temporary deference to India's status as a newly-independent state still suffering under the weight of colonialism;[161] served as a consensus-building rationale as a means to secure consent of ideological dissenters;[162] and were 'deferral' mechanisms to specified social values that the state is obligated to pursue but which were unrealistic ideals at the time of constitutional enactment and thus were ill-suited for immediate enforcement.[163]

As to the intention behind the PSPs in the Namibian Constitution, while I have noted the silence of both the 1982 Principles and Constituent Assembly debates, secondary sources offer some clues. Academic commentary by Fourie that was contemporaneous to the Constitution's adoption attributes the inclusion of PSPs and the neglect of social and economic matters *qua* fundamental rights in the Constitution to the political opinions and influences of the liberal Western democracies that were heavily involved in Namibia's independence and constitutional process; the perceived difficulty in giving legal effect to socio-economic rights; and the compromise and negotiated nature of the Constitution's drafting leading to the prioritisation of the 'all important' issue of political freedom.[164]

Assuming the accuracy of Fourie's rationale behind PSPs, the underlying 'political' motivations for Namibian PSPs can be clearly distinguished from Indian DPSPs. These distinctions in the underlying rationale are material as the analysis below will reveal. I will now turn to consider the PSPs in the context of *Mwilima*.

159 G Bhatia 'Directive principles of state policy' in S Choudhry et al (eds) *The Oxford handbook of the Indian Constitution* (2016) 648; Khaitan (n 140) 416.

160 P Jaswal *Human rights and the law* (1996) 115; G Bhatia 'Directive principles of state policy' in Choudhry et al (n 159) 648; W Osiatyński *Human rights and their limits* (2009) 135.

161 N Chandhoke 'The antecedents of social rights in India' in U Bhatia (ed) *The Indian Constituent Assembly: Deliberations on democracy (2016) 90.*

162 Khaitan (n 140) 392.

163 As above.

164 Fourie (n 150) 367-369.

5.5.2 Critiquing Mwilima's approach to PSPs

The factual background to *Mwilima* is set out here as the decision will be referred to throughout the analysis of the scope, application and effect of PSPs upon the assertion of a judicially enforceable right to water. *Mwilima* saw 128 respondents (applicants *a quo*) seek an order to compel the Legal Aid Directorate of the Ministry of Justice to provide them with legal representation at the state's expense. The facts arose out of criminal trials on charges including murder and high treason stemming from a thwarted armed attempt to secede from the then Caprivi region on 2 August 1999. The government sought to overturn the High Court decision declaring certain sections of the legislation on legal aid unconstitutional. The thrust of the government's argument was that those fair trial rights in article 12 must be interpreted in light of the PSPs, specifically article 95(h) of PSP to provide free legal aid, and article 101 on PSP court unenforceability, which was to be done with due regard to state resources.[165]

The government argued that it had neither the financial nor personnel resources to meet all the respondents' requests for legal aid under the relevant legal aid legislation, which the government claimed to have enacted in effectuating the article 95(h) while avoiding the problem of uncontrolled spending.[166] The respondents countered the government by arguing that if the circumstances were such that an accused person would not have a fair trial without legal representation and that an accused was not able to afford legal representation, then article 12 placed a duty on the government to provide assistance to such accused.[167]

The Supreme Court *en banc* decided the order with a majority of four to one, while the reasons were a majority of three to two. The (erstwhile) Chief Justice Strydom penned the majority opinion with Mtambanengwe AJA and Manyarara AJA concurring. O'Linn AJA dissented on the 'form of the order, the reasons and motivations for such an order', while Chomba AJA agreed with the majority's order but wrote separately as he differed with part of their reasoning.

Following the *stare decisis* principle, the majority decision by Strydom CJ is the binding authority. Nevertheless, given their deliberative value, the dissenting and separate opinions are also critically considered to illuminate salient positions concerning PSPs and their relationship with

165 *Mwilima* (n 59) 242.

166 *Mwilima* 241.

167 *Mwilima* 243.

fundamental rights in chapter 3. *Mwilima* makes various assertions on the nature and application of PSPs, which I critique next.

The obligatory character of PSPs

The first relates to the nature of the obligation(s) imposed by article 95 of the PSPs read with article 101. The majority in *Mwilima* held that article 101 was a 'disclaimer for legal liability' and took the view that the provision of free legal aid to indigents accused persons was the 'self-imposed duty' of the state which cannot by any means be held as limitless.[168]

This understanding is flawed. First, the *Mwilima* characterisation of article 101 as a 'disclaimer for legal liability' is untenable as it is inconsistent with the actual text: The PSPs in chapter 11 shall '*not of and by themselves* be legally enforceable by any Court',[169] subject to the qualification that courts are entitled to have regard to them in interpreting laws based on them. Article 101 thus envisages situations when the PSPs can be relevant to an interpretative enquiry. Therefore, article 101 is more accurately to be characterised as a *limitation* upon legal liability rather than as the more wide-reaching '*disclaimer* for legal liability'. While the PSPs alone cannot be invoked to compel the state to act, if it does act pursuant to the PSP obligations by enacting legislation, for example, such legislation is to be interpreted consistent with the PSPs.

Second, the *Mwilima* majority determines that the free legal aid PSP in article 95(h) is the 'self-imposed duty' of the state. However, interpreting article 95 of the PSPs as self-imposed would imply that the state can effectively opt in or opt out of those PSPs. As the majority acknowledged, free legal aid in the criminal context is part of the right to a fair trial in article 12, in addition to its stipulation as an article 95(h) PSP. The majority (erroneously in my view) distinguished between constitutional legal aid arising out of the former provision and statutory legal aid arising out of the latter.[170] The characterisation of free legal aid as self-imposed because it emanates from legislation that the government claimed to have enacted in pursuit of article 95(h) leaves room for a constitutional circumvention (inadvertent or otherwise) of the state's constitutional obligations arising out of the fundamental rights in chapter 3, in this case the right to a fair trial which warrants court vindication.

168 As above.

169 My emphasis.

170 In dissent, O'Linn AJA (correctly, in my view) rebuts the majority's distinction between statutory and constitutional legal aid is 'unnecessary and unhelpful, if not confusing'; *Mwilima* (n 59) 274.

Moreover, the majority implies that the legal aid duty does not arise because the article 95(h) PSP is *not* court-enforceable. The challenge with this claim is that the test to determine the existence of an obligation is not whether such an obligation is court-enforceable. Article 95 PSPs remain *constitutional* obligations.[171] The drafter's use of the modal verb 'shall' in establishing PSPs in both the chapeau to article 95 and in article 101 to emphasise the government's obligation notwithstanding their court non-enforceability – '*shall* nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles'[172] – clearly marks out their obligatory character.[173]

While PSPs are not obligations in the sense of *per se* providing the legal basis for direct enforcement in courts by dint of article 101, they also are *not* reducible to mere 'aspiration or symbolism'[174] or 'political exhortations' to the legislature and executive, with the only remedial relief being the ballot box.[175] Their constitutionally obligatory character means that the state must act in good faith to comply with PSPs. These obligatory PSPs can be 'enforced' through means other than the judiciary, such as the political and quasi-judicial state agencies.[176] Possibilities for accountability on PSPs included Parliament, the Ombudsman and other oversight bodies that may be established under law.

Further, PSPs are *programmatic*, as Khaitan accurately characterises, and thus require conduct on the part of the state to realise a specific goal, conduct that may include – but crucially is not limited to – legislation.[177] The necessity of conduct in pursuit of PSPs is discernable from the verbs in the chapeau of article 95: 'actively *promote* and *maintain*'[178] and the reference to 'planning' in article 95(j).

Accordingly, the obligations that arise out of PSPs cannot accurately be described as 'self-imposed', as the *Mwilima* majority found. Rather, the effect of article 101 is that PSPs are constitutional obligations that are binding upon the state but cannot be enforced through courts in isolation.

171 Bhatia (n 159) 648.

172 My emphasis.

173 Weis (n 157) 14-15; A Harel *Why law matters* (2014) 153.

174 Weis (n 157) 15.

175 Bhatia (n 159) 647.

176 Khaitan (n 157) 391.

177 Khaitan 397.

178 My emphasis.

Relationship between PSPs and chapter 3 fundamental rights

Another overarching concern that surfaces from *Mwilima* is the nature of the relationship between PSPs and fundamental rights in chapter 3. The *Mwilima* majority has established the principle that PSPs in article 95 cannot be interpreted to limit a chapter 3 right unless such an interpretation was 'clearly and unambiguously spelled out' in chapter 3 itself.[179] The *Mwilima* context concerned the provision of legal aid as arising from the fair trial guarantee in article 12, which the majority – under the banner of constitutional legal aid – found to stem from the obligations imposed by the combined effect of articles 5 and 25, provisions that empower courts to, among others, enforce the state's obligations such as those to provide legal aid.[180] I concur with this approach and will apply it below to a right to water.

PSPs in light of budgetary and resource intensity

A common argument against socio-economic rights as judicially enforceable is that they concern budgetary issues and are resource-intensive. This argument finds sympathy with the *Mwilima* majority, albeit in its analysis of statutory legal aid as opposed to constitutional legal aid. The *Mwilima* majority took the view that human and financial resource limitations made it impossible to provide free legal aid for all indigent and needy.[181] The majority found that for a court to attempt 'to force' government to, for instance, increase the amount allocated for statutory legal aid was impermissible as it would constitute an 'intrusion into the exclusive domain of the government as to its expenditure and allocation of state funds'.[182] The flawed premises of this line of reasoning have been considered in this chapter when addressing the institutional objections to the justiciability of a right to water.

Problematic PSP comparativism

In chapter 1 of the book I made a case for comparativism in constitutional interpretation, arguing for a methodologically cogent approach that is informed by the deliberative value of foreign jurisprudence. It is notable that the *Mwilima* majority relies heavily on comparative perspectives of Indian DPSPs. However, the majority's citation of comparativism reveals a flawed understanding and application of the Indian perspective.

179 *Mwilima* (n 59) 260.

180 *Mwilima* 259.

181 *Mwilima* 251.

182 As above.

The principal problem is that in drawing from Indian DPSPs, the *Mwilima* majority appears to pay less attention to the textual nuances of the DPSPs in the Indian Constitution or the abundance of jurisprudence on DPSPs that has been handed down in the Indian courts between 1949 and 2002, when *Mwilima* was decided. Rather, the majority quotes and relies upon a passage in a journal publication by De Villiers concerning 'Directive principles of state policy and fundamental rights [in] the Indian experience'.[183] De Villiers penned the article with the view to inform the DPSP debate that ensued in the run-up to the drafting of the South African Constitution.[184] Therein, De Villiers notes 'two important characteristics' of DPSPs. The first characteristic is that DPSPs 'are not enforceable in any court of law and, therefore, should they be ignored or infringed the aggrieved have no legal remedy to compel positive action'. The second characteristic is that DPSPs

> are fundamental to the governance of the country and oblige the legislature to act in accordance with them. They consequently fulfil an important role in the interpretation of statutes ... The unenforceability of the directive principles from a judicial perspective, has led Seervai to describe them as 'rhetorical language, hopes, ideals and goals rather than the actual reality of government'.[185]

The *Mwilima* majority explicitly endorsed De Villiers's characterisation of Indian DPSPs by labelling them as 'equally applicable'[186] to Namibian PSPs. In my view, the majority's endorsement and adoption of De Villiers's account of PSPs are wanting on several accounts. First, the historical genesis and rationale behind the respective PSPs or DPSPs diverge, as my assessment of the Namibian Constitution's historical intention above reveals. This historical context is pivotal to understanding the intended effect of PSPs and article 101.

Second, the majority's substantive reasoning fails to show sufficient sensitivity to the textual differences between the Namibian and Indian constitutions, in contrast to its purported awareness.[187] Illustratively, a key

183 B de Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 33-34. See also B de Villiers 'The socio-economic consequences of directive principles of state policy: Limitations on fundamental rights' (1992) 8 *South African Journal on Human Rights* 188.

184 Notably, the drafters of the 1996 South African Constitution are said to have rejected DPSPs as they were deemed inadequate for their transformative agenda. Khaitan (n 157) 390.

185 de Villiers (n 183 above).

186 *Mwilima* (n 59) 252.

187 *Mwilima* 257-58, where the majority asserts an awareness of the 'clear differences

distinction is textual-cum-structural: The Namibian equivalent of PSPs, the DPSPs in Part IV of the Indian Constitution, provide for a much more extensive list of socio-economic provisions as separate, independent, substantive articles, whereas the Namibian PSPs constitute only sub-provisions under article 95, most of which, in fact, are not socio-economic in character.

The Indian DPSP contrajudicative clause – article 37 – affirms that the DPSPs 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in governance of the country and shall be the duty of the state to apply these principles in making laws'. Distinctively, Namibia's article 101 provides that PSPs 'shall not of and by themselves be legally enforceable by any Court', but the Namibian Constitution permits their use as interpretative aids for laws based on them. Consequently, the interpretation of the limitation placed on PSPs enforcement under the Namibian Constitution is materially different from that operative in the Indian Constitution given these textual nuances. The *Mwilima* majority does not consider the text that entrenches the judicial enforcement of fundamental rights in the Indian Constitution's Bill of Rights.

Third, the majority decision fails to engage with the wealth of Indian domestic jurisprudence on DPSPs to gain potentially persuasive insights into how these have been interpreted. Reliance upon a single author's article alone for comparative insights is inadequate. Relatedly, and perhaps less a criticism than a temporal observation, the majority's primary authority in characterising DPSPs in De Villiers's contribution – a journal article published in 1992 and one that advances inaccurate and indeed sweeping generalisations on the operation of DPSPs – could have been improved. This is not least because of the vast and divergent academic DPSP scholarship that has been published between 1992 and 2002 when *Mwilima* was decided.

5.5.3 The impact of PSPs upon a right to water

I have now argued that PSPs are constitutional obligations which, alone, cannot be enforced through the courts. In line with my enhanced approach to the *Mwilima* principle, where a subject matter overlap exists between a PSP and a fundamental right, the fundamental right cannot be limited by PSPs. Rather, the fundamental right should take precedence over PSPs; PSPs may only be given limited weight, if at all.

among the various constitutional instruments'.

Applied to a right to water, I reiterate the argument advanced in chapter 3 of the book that the right to life should be interpreted as inclusive of an *implied* right to water as a socio-economic dimension and have relied on both the concept of ubuntu and international agreements. Like my argument for a right to water that is implied from the right to life, the right to legal aid in *Mwilima was implied* as part of the right to a fair trial. Both implied rights retain strong socio-economic dimensions that are programmatic and resource-intensive. It follows that because water as a socio-economic entitlement is the subject of both an enforceable fundamental right in chapter 3 and of unenforceable PSPs in article 95, water's nature as a fundamental right should triumph over its nature as a PSP. This thus precludes the unenforceable policy statements in article 95(h) from being invoked in a manner that curtails the enforcement of a fundamental right in chapter 3.[188]

Because a right to water is drawn from a constitutional fundamental right – life – in chapter 3, water as a right cannot be interpreted as being limited by an extra-chapter 3 provision, in this case the contrajudicative PSP in article 95(j) of maintaining an acceptable level of nutrition and standard of living and public health. It bears emphasis that chapter 3 retains its own *pro*-judicative clauses: Article 5 enshrines fundamental rights as enforceable in the courts while article 25(2) entitles aggrieved persons to enforce and protect constitutionally guaranteed fundamental rights through the courts. Articles 5 and 25 thus (ought to) take precedence over article 101. Chapter 3 rights cannot be diminished or detracted from, whether through legislative or executive action owing to the entrenchment of chapter 3 by article 131 of the Constitution.[189]

Further, interpretative imperatives support this argument. In line with the transformative nature of the Namibian Constitution, as has been argued in chapter 3 of the book, the interpretative approach that has been advanced ensures that PSPs are not invoked to frustrate the socio-economic transformative objectives of the Constitution.

5.4.4 PSPs as constitutional 'dead wood'

Another potential counterpoise to the principle that PSPs cannot limit fundamental rights in chapter 3 of the Constitution is reflected in the

188 *Mwilima* 259. The Indian Supreme Court – in the context of DPSP art 48 prohibiting cow slaughter and art 19(1)(g) right to practise and profess a trade – expressed this principle in the following terms: 'The directive principles of state policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights'; *Mohd. Hanif Quareshi v The State of Bihar* [1959] SCR 629.

189 The Constitution art 131.

'dead wood' problem. The concern is as follows: If PSPs are interpreted as having no bearing upon the fundamental rights in chapter 3, specifically the article 6-derived right to water in the context of the book (or the article 12-derived right to free legal aid in the context of *Mwilima*), such an interpretation would be in direct tension with the principle against applying an interpretation that would render PSPs redundant. Indeed, this constitutional 'dead wood' concern is explicitly raised in Chomba AJA's separate opinion in *Mwilima*.[190]

I argue that the 'dead wood' problem does not arise if an 'interpretation approach'[191] is adopted. This problem would be the antithesis of the doctrine of harmonious construction known in statutory and constitutional interpretation[192] as well as the principle of systemic integration that is codified in international treaty law.[193] To not render them entirely redundant, PSPs ought to retain some limited relevance and weight in the specific assessment of fundamental rights. The interpretation approach propounds that we can consider PSPs in defining the content of a right to water by looking at, for example, the 'due regard to the resources of the state' specification in various PSPs.

Potentially persuasive perspectives on the interpretation approach to DPSPs can be derived from India in *Re The Kerala Education Bill*, a decision that concerned the rights of Indian minorities to run educational institutions. Referring to the DPSP that had mandated the state to ensure the provision of effective and adequate education, the Indian Supreme Court stated:[194]

> The directive principles of State policy *have to conform to and run as subsidiary* to the Chapter on Fundamental Rights … nevertheless, in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body the court may not entirely ignore these directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and *should attempt to give effect to both* as much as possible.

190 *Mwilima* (n 59) 259 (Chomba AJA's separate opinion).

191 Bhatia (n 159) 657; Weis (n 157) 16.

192 As above.

193 Pursuant to VCLT art 31(3)(c). See A Rachovitsa 'The principle of systemic integration in human rights law' (2017) 66 *International and Comparative Law Quarterly* 557; C McLachlan 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279.

194 *Re The Kerala Education Bill* AIR 1958 SC 956 (my emphasis). I nevertheless recognise the 'mixed' Indian jurisprudence on harmonious construction. See Weis (n 157) 16; Bhatia (n 159) 645.

When applied to Namibia, by allowing PSPs to retain some scope of relevance – the exact degree of relevance of which would be determined on a case-by-case basis – in the interpretative enquiry of a fundamental right, this approach preserves the superiority of chapter 3 while maintaining an interpretation that does not render PSPs redundant in interpreting a right to water.

Thus, while PSPs cannot be invoked to limit constitutional fundamental rights, they nevertheless should be used as an interpretive aid in determining the nature and scope of a right to water implied from the right to life.

5.6 Conclusion

Having systematically assessed the various justiciability concerns, this chapter has advanced normative reasons as to why a right to water should be enforceable through the Namibian courts. A distinction between first and second-order scarcity is also advanced. Further, the institutional concerns are critiqued and countered through deliberativism. The Constitutional PSPs were equally identified as textual non-obstacles to water's justiciability as a fundamental right under article 6 of the Constitution. The next chapter now turns to develop a right to water's normative and substantive content, as well as the Namibian state's core and general obligations.

6 The content of a right to water and the Namibian state's obligations

6.1 Introduction

The preceding analysis of the book has ensconced the existence of a human right to water and addressed the various justiciability objections that arise. This chapter is dedicated to examining the concrete claims that would accrue from a right to water to the right holders, with the state as primary duty bearer.[1] The chapter endeavours to address the challenge of identifying the content of a right to water and the state obligations that flow from it, in terms of article 6 of the Constitution. These issues are critical in ensuring that the right holder can substantively exercise it, through a claim against the state as the primary duty bearer. Defining water's substantive content also undermines any scepticism as to the right's indeterminacy, a charge frequently levelled against social and economic rights more broadly.

This chapter attempts to give content to a right to water and identifies various obligations that are placed upon the Namibian state. The legal basis of a right to water I advance is one that is implied from the Constitution. Details of its substantive content and the state's obligations would thus need to be developed by courts with recourse to values and extraneous legal resources. The chapter thus once again invokes the re-invigorative constitutionalism paradigm by deploying ubuntu as the anchoring principle in developing a right to water's content and correlative obligations. Further, international law sources are particularly helpful resources here. As discussed in chapter 4, international agreements are not only directly binding in Namibian law but, where appropriate, can also be invoked in the interpretation of Bill of Rights provisions. Additionally, reliance is placed upon comparative perspectives.

In the context of the challenge posed by determining the state's obligations, the chapter addresses two of the most demanding issues. The first is temporality, which considers the immediacy or otherwise

1 The terms 'obligation' and 'duty' are employed interchangeably.

of realising the state's obligations. The second is resource constraints. I will argue for a two-tiered approach to the state's obligations, namely, the non-negatable essential content obligations and the general non-core obligations. I will propose that the bounded deliberativism model should be invoked in adjudicating water's essential content and the general obligations. In addition, the progressive realisation model is advanced specifically as regards the general obligations of a right to water. Attention is drawn to the second-order difficulty of water scarcity – that of social resources – which is more nuanced than conceptions of resource scarcity in the financial or material sense.

6.2 Justifying the normative and substantive sources relied upon

In developing a right to water's content and the state's obligations, ubuntu will once again be applied as the guiding principle in this chapter. Moreover, soft law sources will be critically invoked in light of the interpretative resourcefulness of international law in Namibia, thereby functioning as 'normative gap fillers'. Most prominent is General Comment 15,[2] which is the pioneering international instrument to have asserted the right to water's normative content. General Comment 15 is of heightened persuasiveness as it is developed by subject-matter experts on the Committee on Economic, Social and Cultural Rights (ESCR Committee). Similarly, a right to water is also implied from the provisions of the African Charter on Human and Peoples' Rights (African Charter),[3] with water's substantive content being articulated principally by the Nairobi Principles of the African Commission on Human and Peoples' Rights (African Commission).[4] The Nairobi Principles draw generously

2 General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant) ESCR Committee (20 January 2003) UN Doc E/C 12/2002/11 (2002). See also Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments HRC (16 August 2007) UN Doc A/HRC/6/3 (2007); Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque HRC (29 June 2010) UN Doc A/HRC/15/31 (2010).

3 See ch 4.

4 African Commission Principles and Guidelines on Social and Economic Rights in the African Charter on Human and Peoples' Rights (Nairobi Principles) (adopted at the 47th ordinary session held in Banjul, The Gambia from 12 to 26 May 2010 and formally launched at the Commission's 50th ordinary session held in Banjul, The Gambia from 24 October to 7 November 2011) para 87, https://www.achpr.org/legalinstruments/detail?id=30 (accessed 17 September 2019). See also African Commission Guidelines on the Right to Water in Africa (adopted during the 26th extraordinary Session of the African Commission on Human and Peoples' Rights held from 16 to 30 July 2019, in Banjul, The Gambia).

upon General Comment 15, albeit with nuanced differences that respond to the African context.[5]

The normative position expressed in General Comment 15 will be assessed with the aid of the publication of the World Health Organisation (WHO) on *Guidelines for Drinking-Water Quality* (Drinking-Water Quality Guidelines), the latest edition being published in 2017.[6] It will be noted that while General Comment 15 and the Drinking-Water Quality Guidelines do not completely overlap, both align with similar principles on water's content and they refer to one another. While the Drinking-Water Quality Guidelines would constitute non-binding soft law, they represent the 'normative standards that are underpinned by science, ethics and human rights'.[7] The Drinking-Water Quality Guidelines explicitly affirm that they do not promote the adoption of an international standard, but instead advocate the use of a risk-benefit approach that draws from qualitative and quantitative considerations in the establishment of national standards and regulations.[8] The Drinking-Water Quality Guidelines thus serve as a resource that facilitates adopting guideline values to locally relevant standards,[9] an approach that takes into account national and regional variances that would render a single universal approach impossible.[10] Namibian courts would thus be able to assert context-specific approaches to the content of a right to water using the Drinking-Water Quality Guidelines.

Given that these soft law instruments are non-binding, at best offering only normative guidance, there is heightened importance in engaging with the substantive reasoning behind their various approaches and in determining their applicability in the specific context of Namibia. Crucially, the intention is not to engage in a broad analysis of a right to water's content and the state's obligations; an abundant body of scholarly

5 M Ssenyonjo 'The protection of economic, social and cultural rights under the African Charter' in D Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 91 98.

6 WHO *Guidelines for Drinking-Water Quality* (2017), https://apps.who.int/iris/bitstream/handle/10665/254637/9789241549950-eng.pdf;jsessionid=A4304278A81F4F257664C287DCAA423F?sequence=1 (accessed 10 July 2019). The WHO previously published four editions of the Guidelines for Drinking-Water Quality (in 1983-1984, 1993-1997, 2004, 2011) as successors to the previous international standards for drinking-water in 1958, 1963, 1971.

7 L Gostin et al 'The normative authority of the World Health Organization' (2015) 129 *Public Health* 2.

8 Drinking-Water Quality Guidelines (n 6) 2.

9 Drinking-Water Quality Guidelines (n 6) 31.

10 Drinking-Water Quality Guidelines (n 6) 2.

literature to that effect already exists.[11] The aim is to offer a focused examination that deliberately avoids an acontextual and uncritical regurgitation of General Comment 15 and like sources. In this light, the chapter will be deliberate in pursuing this aim with an emphasis upon transformative and re-invigorative constitutionalism ideals.

I will thus invoke the values and legal resources developed in this chapter to scope out the content and obligations of a right to water. It is important to emphasise that the General Comment 15 analysis leans towards the abstract – it does not endeavour to address a pre-determined right to water challenge or claim. Therefore, to focus and contextualise the analysis, the chapter will consider the water challenges identified in the Namibian milieu through the report published in 2012 after a country visit to Namibia in 2011[12] by Catarina de Albuquerque, the former Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation.[13] The chapter will also rely on comparative perspectives from jurisdictions that have adjudicated right to water claims domestically.

With respect to the Special Rapporteur's report, there remains a paucity of scholarly, non-journalistic literature on the Namibian water situation, literature that does not (directly) originate from governmental sources. Although now slightly dated, the Special Rapporteur's report remains relevant and offers an arguably more reliable, objective, legally analytical yet practically informed assessment of the water situation. This may be contrasted with access to water self-assessments of the 2016 ESCR Committee's Periodic Report[14] by the Namibian government and the attendant Concluding Observations by the Committee,[15] both of which only tersely address the water situation in Namibia with scant legal analysis.

The Special Rapporteur's report is reliable as it is offered by an independent expert body. Although not a judicial body, the Rapporteur

11 See the critical analysis of GC15 in I Winkler *The human right to water: Significance, legal status and implications for water allocation* (2012).

12 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Addendum: Mission to Namibia, HRC (28 June 2012) UN Doc A/HRC/21/42/Add.3 (Special Rapporteur's Report).

13 Special Rapporteur.

14 Consideration of reports submitted by States Parties under arts 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Initial Reports of States Parties Due in 1997 – Namibia, CESCR (13 February 2015) UN Doc E/C.12/NAM/1.

15 Concluding Observations on the Initial Periodic Report of Namibia, CESCR (23 March 2016) UN Doc E/C.12/NAM/CO/1.

engages a compelling methodology that incorporates site visits and interviews with Namibian governmental and non-governmental organisations including ministries, legislators, the Ombudsman, civil society, international organisations represented in Namibia, local authorities, as well as private actors including private investors and rural, urban, and peri-urban communities.[16] Further, the Special Rapporteur invaluably evaluates the water situation in Namibia from a human rights perspective, with significant reliance upon the normative standards contained in General Comment 15.

6.3 Developing the *AQuA* content

I argue for ubuntu to be invoked in developing a right to water's normative and substantive content. In chapter 3 it was advanced that ubuntu communicates that all persons are entitled to have access to an amount of water that ensures a dignified life. This translates to adequate water that is more than just the bare minimum required for life. It follows that, when faced with a right to water claim, courts would be required to develop what the right would entail, including its content and correlative obligations.

I will have recourse to General Comment 15, the Nairobi Principles, and the Drinking-Water Quality Guidelines as the key normative frameworks in evaluating a right to water through ubuntu as a re-invigorative constitutional value. These thus aid us in avoiding reinventing the wheel in determining water's content and the corollary obligations of the state. General Comment 15 has advanced the standard of a right to water that is *adequate* for purposes of human dignity, life and health. I will, however, principally focus on water for purposes of 'life' as protected in article 6 of the Constitution, 'life' that is understood and interpreted through the value of ubuntu, while accepting that dignity and health are nevertheless intrinsic to the expansive conception of 'life' I advance.

Under General Comment 15 the right to water entails both *freedoms* and *entitlements* for the right holder.[17] On the one hand, General Comment 15 demarcates freedoms as including the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or the contamination of water supplies.[18] On the other hand, entitlements include the right to a system of water supply and management that

16 Special Rapporteur's Report (n 12) para 2.

17 GC15 (n 2) para 10.

18 As above.

provides equality of opportunity for people to enjoy the right to water.[19] This dichotomy between freedoms and entitlements is one that mirrors the distinction between positive and negative duties of rights that manifests throughout this book.

General Comment 15 states that water 'should be treated as a social and cultural good, and not primarily as an economic good', to be used sustainably for present and future generations.[20] General Comment 15 sets out the elements of what constitutes adequate water, for which it cautions 'should not be interpreted narrowly, by mere reference to volumetric quantities and technologies'.[21]

It is emphasised that General Comment 15 extends only to water that is adequate for two types of uses: personal and domestic use.[22] These uses would ordinarily include drinking to prevent death from dehydration; sanitation; washing of clothes; food preparation; and personal and household hygiene.[23] This prioritisation does not preclude the possibility of claiming water that is needed for other purposes, particularly in the context of realising other rights to health, food and cultural life.[24] These rights dimensions, however, are not pursued in the book.

Most pertinently, the ESCR Committee identifies three substantive dimensions that apply in all circumstances where adequate water is required: ***A****vailability* – water that is available in sufficient quantity; ***Q****uality* – water that is safe and acceptable; and ***A****ccessibility* – water that can be feasibly accessed. For convenience, I collectively term these '*AQuA*'. To focus the analysis, the application of the *AQuA* elements to a right to water, as a component of the right to life in the Constitution, is examined by drawing on the Special Rapporteur's report rooted in the Namibian context.

19 As above.

20 GC15 (n 2) para 11.

21 As above.

22 GC15 (n 2) para 6. A similar approach of prioritising water for personal and domestic uses is reflected in art 10(2) of the UN Watercourses Convention 1997 (GA Res 51/229, annex (May 21, 1997), 36 ILM 700 (1997)), which binds Namibia, in stating that '[i]n the event of conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 to 7, with special regard being given to the requirements of *vital human needs*' (my emphasis). The phrase 'vital human needs' is said to have been designed to protect and prioritise the water needed for sustaining human life, including both drinking water and water required for food to prevent starvation. See T Bulto *The extraterritorial application of the human right to water in Africa* (2014) 61-62.

23 GC15 (n 2) para 2.

24 Bulto (n 22) 60.

6.3.1 Availability

The first substantive requirement of a right to water, per General Comment 15, is that water should be available in sufficient quantity. Concerning the normative standard for water's availability, General Comment 15 determines that water supply for each person must be sufficient and continuous for personal and domestic uses. While the ESCR Committee has pegged the quantity of water per capita to the Drinking-Water Quality Guidelines, it has recognised that some individuals and groups may also require additional water depending on health, climate and work conditions.[25] Indeed, the Drinking-Water Quality Guidelines express the availability of water in relation to quantity or service level primarily from the perspective of health. Beyond the basic human physiological need for water to maintain adequate hydration and an additional requirement for food preparation, the Drinking-Water Quality Guidelines observe that there is a basic requirement for water for health. The assumption is that the daily per capita consumption of drinking water is approximately two litres for adults, although actual consumption varies according to climate, activity level and diet.[26]

The Drinking-Water Quality Guidelines further assert that, from the available data, a minimum volume of seven-and-a-half litres per capita per day is required to provide sufficient water for hydration and incorporation into food for most people under most conditions.[27] Additionally, the Drinking-Water Quality Guidelines state that adequate domestic water is needed for food preparation, laundry and personal and domestic hygiene, which are also important for health, as well as water for income generation and amenity uses.[28]

The Drinking-Water Quality Guidelines hold that the quantities of water collected and used by households are primarily a function of the distance to the water supply source or total collection time required.[29] This broadly equates to the level of service received, with four levels of service outlined in the WHO table given below.

25 GC15 (n 2) para 12.

26 Drinking-Water Quality Guidelines (n 6) 83.

27 As above.

28 As above.

29 As above.

Table 1: WHO table on the service level and quantity of water collected[30]

Service level	Distance/time	Likely volumes of water collected	Public health risk from poor hygiene	Intervention priority and actions
No access	More than 1 km/more than 30 min round-trip	Very low: 5 litres per capita per day	Very high: Hygiene practice compromised. Basic consumption may be compromised	Very high: Provision of basic level of service Hygiene education Household water treatment and safe storage as interim measure
Basic access	Within 1 km / within 30 min round-trip	Approximately 20 litres per capita per day on average	High: Hygiene may be compromised Laundry may occur off-plot	High: Provision of improved level of service. Hygiene education Household water treatment and safe storage as interim measure
Inter-mediate access	Water provided on-plot through at least one tap (yard level)	Approximately 50 litres per capita per day on average	Low: Hygiene should not be compromised Laundry likely to occur on-plot	Low: Hygiene promotion still yields health gains Encourage optimal access
Optimal access	Supply of water through multiple taps within the house	100–200 litres per capita per day on average	Very low: Hygiene should not be compromised Laundry will occur on-plot	Very low: Hygiene promotion still yields health gains

30 See also Drinking-Water Quality Guidelines (n 6); G Howard & J Bartram *Domestic water quantity, service level and health* (2003), https://apps.who.int/iris/handle/10665/67884 (accessed 21 August 2019).

Table 1 reveals that the Drinking-Water Quality Guidelines consider service level as a useful and easily measured indicator that provides a valid substitute for the quantity of water collected by households, serving as the preferred indicator for oversight.

The Drinking-Water Quality Guidelines state that the available evidence indicates that health gains accrue from improving service level in two key stages: the delivery of water within 1 kilometre or 30 minutes of total collection time; and when supplied to a yard or household level of service.[31] Further, health gains are likely to occur once water is supplied through multiple taps as this will increase water availability for diverse hygiene practices. The volume of water collected may also depend on the reliability and cost of water,[32] to which I will return to when assessing affordability. The Drinking-Water Quality Guidelines, therefore, stress the importance of data collection on various indicators.[33]

Another important dimension of water's adequacy is the issue of continuity. While General Comment 15 only mentions continuity in terms of water supply that must be 'sufficient and *continuous* for personal and domestic uses'[34] for each person, the WHO's Guidelines elaborate upon the substance of this dimension. This is in the context of interruptions to drinking water supply that are a result of either intermittent sources or engineering inefficiencies.[35]

While some of these requirements are met in parts of Namibia, the Special Rapporteur's report reveals that there are clear shortfalls. Thus, as of 2011, 97 per cent of the population in urban areas had access to improved water sources in Namibia, while in rural areas the figure stood at 80 per cent.[36] This rural-urban gap reflects the socio-economic divide that generally prevails in Namibia and manifests in a form of second-order scarcity. In terms of the water supply systems in Namibia, the Special Rapporteur describes it as follows:[37]

> There are three main water supply systems in Namibia: (i) distribution by local authorities, although they reportedly face resource constraints; (ii)

31 Drinking-Water Quality Guidelines (n 6) 84.

32 As above.

33 As above.

34 GC15 (n 2) para 12 (my emphasis).

35 Drinking-Water Quality Guidelines (n 6) 86.

36 Special Rapporteur's Report (n 12) para 16. See also a wider analysis of water availability in Winkler (n 11) 17-20.

37 Special Rapporteur's Report (n 12) para 16.

> Namibia Water Corporation (NAMWater), a publicly held company, which delivers bulk water; and (iii) the Directorate of Water Supply and Sanitation within the Ministry of Agriculture, Water and Forestry which develops water infrastructure, including pipelines and boreholes, in rural areas as well as delivers water to public buildings. Water supply in Namibia is highly decentralized and founded on the principle of community-based management. With respect to boreholes, which are mostly located in rural areas, mechanisms such as water associations and water point committees aim to ensure community-involvement of both women and men in these decision-making bodies. Members of the committees are trained to make minor repairs, while the Directorate of Water Supply and Sanitation is responsible for handling major breakdowns.

The Special Rapporteur also takes special note of the adverse health impact of lack of access to water on children who suffer from diarrhoea and malnutrition as well as persons living with HIV.[38] Access to water complications such as those caused by natural disasters, especially floods, were also recognised.[39]

The availability of water is additionally impacted directly by the distances that are travelled to water points. In rural areas, the distances travelled by rural dwellers to access water points received significant attention. The report emphasises the higher incidences of poverty in rural areas as opposed to urban areas.[40] The Special Rapporteur highlights the considerable time spent collecting water by some Namibians, specifically in rural areas, where

> more than seven per cent of the population travel more than one kilometre to get water, and this percentage can reach as high as 15.4 per cent in the dry season. In some regions, there are considerably higher numbers of people travelling such distances: in Kavango, for instance, more than 18 per cent of the population must travel more than one kilometre to get water in the rainy and in the dry season. More than 15 per cent of the population in Kunene, Ohangwena, Omusati, and Oshikoto travel over a kilometre to collect water in the dry season. Poor households suffer disproportionately from these distances and face greater challenges transporting water back to their households because they are less likely to have access to a means of

38 Special Rapporteur's Report (n 12) paras 19-20.

39 Special Rapporteur's Report (n 12) para 23. Access to water complications would indeed include drought-induced challenges, as has plagued Namibia between 2014 and 2019, although the Special Rapporteur omits mention of drought probably because Namibia experienced flooding at the time of the Report's compilation.

40 Special Rapporteur's Report (n 12) paras 45-46.

transport besides walking. In this context, poor households are likely to turn to unsafe water sources which are closer to their homes.[41]

The Special Rapporteur finds that the situation was markedly worse for remote communities such as ovaHimba people who reported walking two hours to reach a water point; alternatively, ovaHimba relied on closer but dirty water sources that are also used by animals.[42] The Special Rapporteur notes that while rural communities were tasked with making small repairs to their water sources, the availability of spare parts was cited as a major challenge. The installation of water infrastructure without ensuring that spare parts are available to the community to make repairs potentially leads to the use of the facilities being discontinued.[43]

6.3.2 Quality

The second substantive dimension is that the water required for personal or domestic use must reach the quality standard of being *safe*. Safe water entails being free from micro-organisms, chemical substances and radiological hazards that, for example, threaten health. Furthermore, water should be of an acceptable colour or appearance, odour, taste and flavour[44] for personal or domestic use.[45] Safe water requires the absence of qualities objectionable to the majority of consumers, including highly-turbid or highly-coloured water.[46] Again, recourse is to be had to the Drinking-Water Quality Guidelines in determining quality.

The 2012 Special Rapporteur's report highlights the inadequacy and weaknesses in the existing regulatory framework in Namibia to ensure water quality and prevent water pollution. It specifically laments the lack of periodic testing of boreholes.[47]

Concerning the mining sector, the Special Rapporteur notes that a significant part of the Namibian economy relies on mining activities but found that there was no proper oversight. Particularly concerning

41 As above.

42 Special Rapporteur's Report (n 12) para 48.

43 Special Rapporteur's Report (n 12) para 49.

44 While the taste or flavour requirement may not necessarily undermine the safety of water from a health perspective, it is arguable that this preserves the dignity of the individual consuming it. See A Kok & M Langford 'The right to water' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 191 199.

45 GC15 (n 2) para 12.

46 Drinking-Water Quality Guidelines (n 6) 7-8 219.

47 Special Rapporteur's Report (n 12) paras 23-60.

was the potential over-extraction of groundwater as well as potential water pollution as a result of mining activities.[48] The Special Rapporteur expresses concern about the lack of necessary regulations to ensure that mining does not endanger the availability and quality of water for personal and domestic use as well as the risk of irreparable harm to the environment.[49]

6.3.3 Accessibility

The third substantive requirement for a right to water is accessibility. Accessibility requires water as well as water facilities and services to be accessible to everyone without discrimination in Namibia. Here, the ESCR Committee asserts four often overlapping dimensions: physical, economic, non-discrimination, and information accessibility. They are examined here in turn.

Physical accessibility requires that water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity of, each household, educational institution and workplace. Thus, a strong overlap exists between water's physical accessibility and availability as analysed above. In addition, all water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements.

The ESCR Committee states that physical security should not be threatened when accessing water facilities and services. This is a concern that is particularly relevant in the Namibian context where deprived rural, urban and peri-urban communities often encounter human hazards such as the risk of sexual violence against women and children,[50] and natural hazards such as the risk of encountering wild creatures such as river crocodiles[51] while accessing water sources.

Economic accessibility requires that water, and water facilities and services, must be affordable for all. The ESCR Committee observes that

48 Special Rapporteur's Report (n 12) para 57.

49 Special Rapporteur's Report (n 12) para 59.

50 J Graham et al 'An analysis of water collection labour among women and children in 24 sub-Saharan African countries' (PLoS One 2016), https://doi.org/10.1371/journal.pone.0155981 (accessed 10 July 2019).

51 'Woman saves hubby from jaws of crocodile' *New Era* 26 February 2016, https://neweralive.na/2016/02/29/woman-saves-hubby-jaws-crocodile/ (accessed 10 July 2019); 'Crocodile kills mother and child' *New Era* 27 March 2018, https://neweralive.na/posts/crocodile-kills-mother-and-child (accessed 10 July 2019).

the direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realisation of other International Covenant on Economic, Social and Cultural Rights (ICESCR) rights.[52] The Special Rapporteur states that the ICESCR's prohibition against retrogressive measures includes raising the price of services disproportionately so that poor people can no longer afford water and allowing the deterioration of infrastructure owing to a lack of investment in operation and maintenance.[53] De Albuquerque cautions that 'retrogressive measures are more common and their impacts often exacerbated by austerity measures'.[54]

The Special Rapporteur observes that Namibia followed a cost-recovery model that seeks to recover only those costs related to supply, operation and maintenance for water provision. While she agreed with the cost recovery approach for the sustainability of safe and regular water provisions, the Special Rapporteur expresses concern that households with poor and unemployed members could not afford water,[55] with in-kind contributions (such as crop produce or livestock) for water provision in rural areas being identified as a possibility for the impecunious.[56]

The Special Rapporteur also finds that NAMWater, the state-owned bulk water supplier to municipalities, had engaged in the practice of disconnecting water supply to municipalities 'so as to prevent those in charge from abusing power and keeping the water tariff revenues for themselves rather than paying the municipality's water bills'.[57] The Special Rapporteur further reported complaints – especially in urban areas – about the cost of water and the lack of a subsidy scheme to assist people who could not afford to pay for water.[58] The Special Rapporteur further notes that in the capital city, Windhoek, the water tariff structure was such that the lifeline supply was calculated at 33 litres per person per day. This, De Albuquerque notes, was short of the WHO's estimate that 'to live a life in dignity, people require more than the lifeline supply, for instance, at least 50 litres per day, for consumption and hygiene needs'.[59] Alarmingly, the Special Rapporteur notes the struggles with water affordability for

52 GC15 (n 2) para 12.

53 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Addendum, HRC (11 July 2013) UN Doc A/HRC/24/44 paras 13-14.

54 Special Rapporteur's Report (n 53) paras 13-14.

55 Special Rapporteur's Report (n 12) para 42.

56 Special Rapporteur's Report (n 12) para 38.

57 Special Rapporteur's Report (n 12) para 39.

58 Special Rapporteur's Report (n 12) para 40.

59 Special Rapporteur's Report (n 12) para 41.

many Windhoek households, pointing out that she was informed that 'in Windhoek, water supply is disconnected from as many as 280 households per day'.[60]

Concerning *non-discrimination*, this seeks to achieve *formal* and *substantive* equality in accessing water. To ensure non-discrimination, it is required that water and water facilities and services must be accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds in ICESCR.[61] Given the Namibian context of this analysis, the prohibited grounds would include those enumerated in the Constitution, including sex, race, colour, ethnic origin, religion, creed or social or economic status.[62]

The significance of the non-discrimination dimension of water lies in the fact that the state's correlative duties are not subject to concerns such as the availability of resources to realise a right to water. The obligation of non-discrimination is therefore immediate. Nevertheless, in contexts such as Namibia's where discriminatory practices have been historically pervasive in society, it is to be recognised that redressing inequalities brought about by colonial and apartheid discrimination will require time to eradicate and dedicated resources to eliminate underlying structural barriers.[63] Even in this context, the existence of historically-rooted and *de facto* discrimination from accessing water due to temporal and resource limitations is not a justification in itself. The structures of discrimination must be eliminated as promptly as possible through *positive* state action. This would require a focus upon the disadvantaged as a category of people who are under greater constraints in their ability to enjoy access to water relative to others. This thereby embraces substantive equality that may include directing resources to the disadvantaged.[64] The Special Rapporteur

60 Special Rapporteur's Report (n 12) para 42. For a comparative assessment towards quantifying affordable water based on expenditure percentage of disposable income in a household, see H Smets 'Quantifying the affordability standard: A comparative approach' in M Langford & A Russell (eds) *The human right to water theory: Practice and prospects* (2017) 276.

61 GC15 (n 2) para 12.

62 The Constitution art 10(2).

63 Cf *City Council of Pretoria v Walker* 1999 (2) SA 363 (CC), where the South African Constitutional Court suggested that cross-subsidisation per se among consumers and differentiation in tariffs for services are not unconstitutional. The Court found that a policy of charging flat rates in a predominantly black community and consumption-based rates in a neighbouring community was necessary in order to ensure that disadvantaged communities enjoy access to basic services.

64 S Fredman *Human rights transformed* (2008) 77.

found that, in Namibia, the principal responsibility for collecting water was performed mostly by women and girls. Water collection chores also had adverse effects on children's ability to attend school, the risk of carrying heavy water containers to health, and adults' ability to engage in other productive activities for the household.[65]

The ESCR Committee cautions that inappropriate resource allocation can lead to discrimination that may not be overt and cites the example of investments that disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.[66]

The ESCR Committee further asserts that where payment for water services is to be made, this is to be based on the principle of equity to ensure that these services, whether privately or publicly provided, are affordable for all, including socially-disadvantaged groups. The Committee stresses that equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.[67] This is reflected in the cost recovery model of water supply to reduce financial exclusion in water access.

The ESCR Committee emphasises the state's 'special obligation to prevent any discrimination on internationally prohibited grounds in the provision of water and water services'[68] as well as discrimination that 'has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water'.[69] The Nairobi Principles further oblige states to proscribe discrimination of vulnerable and disadvantaged groups, including those with precarious land and property rights, informal settlers, rural and peri-urban areas, indigenous communities, and the imprisoned or detained.[70]

Finally, *information accessibility* includes the right to seek, receive and impart information concerning water issues. Individuals should thus have access to information that will enable them to participate in decision making that involves access to drinking water.[71] It is notable that the

65 Special Rapporteur's Report (n 12) para 47.

66 GC15 (n 2) para 14; Nairobi Principles (n 4) paras 31-38.

67 GC15 (n 2) para 27.

68 GC15 para 15.

69 GC15 para 13.

70 Nairobi Principles (n 4) paras 92(p)-(v).

71 J Chávarro *The human right to water: A legal comparative perspective at the international,*

dimension of information accessibility gives rise to procedural obligations such as the obligations to ensure access to information concerning safe drinking water issues, and participation in decision-making processes related to safe drinking water.[72]

Having identified key aspects of the normative content of a right to water under the Constitution, we turn to define the various correlative obligations that bind the state. I will advocate a dual thresholds approach to the state's water obligations: essential content/minimum core obligations, and general obligations that are progressively realisable.

6.4 Developing the state's trilogy of obligations

I advance an understanding of the Namibian state's correlative obligations flowing from the *AQuA* elements of a right to water that is informed by the trilogy of duties approach: respect, protect and fulfil. This framework has been argued under article 6, specifically, and the Bill of Rights provisions, generally, in chapter 3 of the book. Indeed, the trilogy of duties approach is extensively endorsed by the ESCR Committee and the African Commission.[73] This part argues that a right to water's correlative obligations includes non-negatable essential content obligations and general non-core obligations.

While the analysis in chapter 3 made the case for the *nature* of duties that bind the state, this part builds upon that to analyse the *content* of those duties. It is stressed here that negative or restraint duties are often contrasted directly with positive duties such that the erroneous claim is made that positive duties are indeterminate, forward-looking, resource-intensive, and programmatic, thus requiring only progressive realisation as resources become available while duties of restraint are determinate, immediately realisable, and without resource implications.[74] Suffice to mention that perspectives asserting this strict dichotomy are now largely antiquated, with scholars such as Riedel and Fredman offering compelling

regional and domestic level (2015) 25.

72 Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, HRC (16 August 2007) UN Doc A/HRC/6/3 para 42.

73 For a discussion of the obligations to respect, protect and fulfil from the perspective of the right to water, see Chávarro (n 71) 29-38.

74 Fredman (n 64) 70.

critiques of how such characterisations are overdrawn and unhelpful, particularly in contexts of socio-economic rights such as water.[75]

The respect duty relates predominately to negative[76] duties where the state is obligated to exercise restraint. The African Commission in *SERAC* classifies the duty to respect as a 'primary level' obligation of the state, one that 'entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action'.[77] Ssenyonjo argues that the respect duty imposes an immediate obligation upon states under both the African Charter and ICESCR.[78] Further, Butlo maintains that the respect duty should not only be approached as encapsulating inaction and non-interference by the state in the liberal political philosophy of a minimalist state, one that interferes as little as possible with individual autonomy and freedom. Rather, Bulto argues for the state's role to be one of oversight (as opposed to interference) to ensure that the right holders enjoy their rights and freedoms in a manner akin to 'the night watchman state', a role that ensures that no danger ensues.[79] Indeed, this conception of the respect duty aligns with an ubuntu-inspired understanding of correlative duties defended in chapter 3.

Throughout General Comment 15 the ESCR Committee identifies various obligations that the state must respect, with a particular focus on the state to refrain from engaging in practices or activities that deny or limit equal access to adequate water, and the arbitrary interference with customary or traditional arrangements for water allocation. These concerns firmly resonate with Namibia where the majority of those with precarious access to water reside in rural areas.[80] The ESCR Committee also mentions unlawfully diminishing or polluting water, for example, through waste from state-owned facilities or through use and testing

75 Fredman (n 64) 70-84; E Riedel 'Core obligations in social rights and human dignity' in M Geis et al (eds) *Festschrift für Friedhelm Hufen* (2015) 79.

76 Cf Koch's critique as to whether there can in fact be such a thing as a 'negative' obligation given the difficulty in identifying an obligation of non-interference that is devoid of some sort of positive measure. I Koch *Human rights as indivisible rights: The protection of socio-economic demands under the European Convention of Human Rights* (2009) 17.

77 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 45.

78 M Ssenyonjo 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15 *International Journal of Human Rights* 969 975.

79 Bulto (n 22) 92.

80 GC15 (n 2) para 21.

of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.[81]

Bulto observes that the respect duty, relative to other duties, does not generally involve resource distribution or reallocation.[82] The respect duty, therefore, does not readily aid in improving the situation of those who do not have the conditions necessary for the enjoyment of a given right. In the water context, it does not necessarily require the immediate allocation of a safe and adequate quantity and quality of water to those who did not previously enjoy the right.[83] Rather, the respect duty would often preserve the *status quo* by ensuring that there is effectively no regression from a previously-enjoyed right to water.[84]

The protect duty relates to actions or omissions that interfere with water resources through conduct such as pollution, diversions and inequitable allocations. However, the protect duty is not only violated at the state's hand; third parties, which may include states and non-state actors, can interfere with the right. As this analysis focuses on the state, it is the state that must take measures to prevent third parties – whether individuals, groups or corporations – from interfering in any way with the enjoyment of the right to water.[85] As Fredman asserts, the duty to protect 'introduces a three-way relationship between the state, the right holder … and the perpetrator of the breach'.[86] Indeed, it is precisely this three-dimensional protect duty that Nigeria was found to have violated in *SERAC* by failing to protect the Ogoni peoples' rights – including life, water, food and the environment – from private oil companies.[87]

To comply with the duty to protect, the Namibian state is required to adopt necessary and effective legislation and other measures, as well as to ensure the existence of effective remedies for the protection of rights

81 As above.

82 Cf Holmes and Sunstein who argue that all rights are positive in the sense that they attract budgetary implications: S Holmes & C Sunstein *The cost of rights: Why liberty depends on taxes* (1999) 1.

83 Bulto (n 22) 92.

84 As above.

85 GC15 (n 2) para 23.

86 Fredman (n 64) 73.

87 Bulto (n 22) 94.

holders.[88] Other measures may be administrative, budgetary and judicial in nature.[89]

According to the ESCR Committee, the state's protect duty includes measures that restrain third parties from denying equal access to adequate water, and polluting or inequitably extracting from water resources, including natural sources, wells, and other water distribution systems.[90] The protect duty applies where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties as the state must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water.[91]

To comply with the protect duty of preventing and remedying right to water violations by third parties, the state is obliged to establish an effective regulatory system 'which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance'.[92] On the persuasive authority of the decision of the African Commission in *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [93] in the context of the Chadian civil war, the protect duty arises even where the state was not actively involved in the violation of the rights.

Finally, the fulfil duty turns to the obligations that the state must actively take to facilitate opportunities by which the rights can be enjoyed. This duty requires positive measures by the state to assist individuals and communities in enjoying the right to water. This obliges the state to take steps to ensure that there is education concerning hygienic water use, protection of water sources, and methods to minimise water wastage.[94] Where individuals or groups are unable to realise their right to water themselves, the state is obliged to fulfil their right.[95] The obligation to fulfil thus requires the state to adopt necessary measures directed towards the full realisation of the right to water.[96] The ESCR Committee states that this

88 GC15 (n 2) para 23; *SERAC* (n 77) para 46.

89 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' adopted 22-26 January 1997 para 6, reprinted in 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691 (Maastricht Guidelines).

90 GC15 (n 2) para 23.

91 As above.

92 GC15 para 24.

93 (2000) AHRLR 66 (ACHPR 1995) paras 19-20.

94 GC15 (n 2) para 25.

95 As above.

96 GC15 para 27.

includes obligations such as according sufficient recognition of the right within the national political and legal systems, preferably by legislative implementation; adopting a national water strategy and plan of action; ensuring affordability; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.[97]

The ESCR Committee also specifies the obligation on the state to ensure that water is affordable. This speaks to the second-order scarcity of the adaptive capacity of the state to manage first-order scarcity by adopting measures to ensure access to water does not result from financial constraints. To meet its obligations, the state may adopt measures such as (i) the use of a range of appropriate low-cost techniques and technologies; (ii) appropriate pricing policies such as free or low-cost water; and (iii) income supplements.[98] Among the positive steps that should be adopted are included comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for not only the present but also future generations. The ESCR Committee further identifies strategies and programmes that may include:[99]

(a) reducing depletion of water resources through unsustainable extraction, diversion, and damming;
(b) reducing and eliminating contamination of watersheds and water-related ecosystems by substances such as radiation, harmful chemicals, and human excreta;
(c) monitoring water reserves;
(d) ensuring that proposed developments do not interfere with access to adequate water;
(e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation, and loss of biodiversity;
(f) increasing the efficient use of water by end-users;
(g) reducing water wastage in its distribution;
(h) response mechanisms for emergency situations; and
(i) establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

It is important to stress the interdependence of the state's trilogy of duties here. Inasmuch as these three duties are largely assessed separately above, they seldom exist independently, as we see in decisions such as

97 As above.
98 As above.
99 GC15 para 28.

SERAC. Just as it is frequently affirmed that social and economic rights are interdependent, interrelated and indivisible,[100] so too should the state's duties attract the same characterisation and qualities. While the level of emphasis in the application of these duties varies depending on the context, the need to meaningfully enjoy some of the rights demands concerted action from the state in terms of more than one of the three duties.[101] For example, the state's duty to protect the right to water, while ordinarily necessitating abstention, also requires that the state ensure judicial remedies where the right is breached.[102] In the same vein, the duty to respect cannot be dissociated from the duty to protect as the non-interference by the state in the enjoyment of the right would prove inadequate in the face of a right to water violation by third parties.[103] This approach is consistent with the argument advanced in chapter 3 of using the trilogy of duties approach for conceptual clarity and systematic analysis.[104]

In light of the respect, protect, fulfil framework, what follows is an analysis of what I advance as the two distinct tiers of the obligations that flow from a right to water in Namibia. These are the *core* normative content obligations and *general* normative content obligations. The argument will be made for the former as attracting irreducibility, urgency and immediacy, while the latter is being subject to the temporal requirement of progressive realisation. First, I will offer a defence of the minimum core content obligations concept in the context of water before addressing those general normative content obligations that are to be progressively realised.

6.5 The core content of obligations flowing from a right to water

In this part I make the case for a minimum essential/core content of obligations, flowing from a right to water, that Namibia must realise. The ESCR Committee affirms in General Comment 3[105] that state parties retain various core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the ICESCR rights. General

100 Maastricht Guidelines (n 89).

101 *SERAC* (n 77) para 48.

102 Bulto (n 22) 98.

103 As above.

104 I Koch 'Dichotomies, trichotomies or waves of duties' (2005) 5 *Human Rights Law Review* 8.

105 General Comment 3: The Nature of States Parties' Obligations (art 2.1, para 1, of the Covenant), CESCR (14 December 1990) UN Doc E/1991/23.

Comment 15 takes forward this principle by identifying nine non-derogable,[106] immediate, core content obligations:[107]

(a) to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
(b) to ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups;
(c) to ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
(d) to ensure personal security is not threatened when having to physically access water;
(e) to ensure equitable distribution of all available water facilities and services;
(f) to adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalised groups;
(g) to monitor the extent of the realisation, or the non-realisation, of the right to water;
(h) to adopt relatively low-cost targeted water programmes to protect vulnerable and marginalised groups; and
(i) to take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.

These core obligations are not exhaustive. I propose that these core obligations would be engaged as *starting points* in determining the Namibian state's specific core obligations as opposed to being prescriptive. In addition, a right to water's minimum core obligations under General Comment 15 are to be read with the Nairobi Principles,[108] the latter explicitly specifying only three core obligations. Similar to General Comment 15, the Nairobi Principles mention access to a minimum essential amount of water as well as the state's obligation to ensure safe physical access to water facilities and services based on waiting times and distances travelled. Uniquely,

106 GC15 (n 2) para 40.
107 GC15 para 37.
108 Nairobi Principles (n 4) para 92.

however, the Nairobi Principles also mention the state's core obligation to '[r]efrain from using access to water as a political tool'.[109] The political tool concern doubtlessly is in response to water precariousness experienced across Africa, and where 'hydropolitics' sometimes manifest as political leverage for vulnerable electorates.[110]

It is appropriate to note that, in fulfilling their water core obligations, General Comment 15 emphasises that developing states are to be provided with international assistance and cooperation, especially economic and technical, by developed ICESCR state parties and other actors.[111] While the ESCR Committee anchors the obligation of international assistance and cooperation textually in article 2(1) of ICESCR, a full analysis of the obligations of developed contracting ICESCR state parties as regards developing states such as Namibia is outside the ambit of this book.[112]

I turn to examine the minimum core content obligations framework, which I argue is substantively akin to the Constitution's non-negatable essential content of a right to water.

6.5.1 A constitutional defence of minimum core and essential content

While not entirely identical, the concepts of minimum core and non-negatable essential content in article 22(a) of the Constitution share a common philosophical basis and significant doctrinal similarities.[113] The terms thus are invoked interchangeably in this chapter. While the minimum core concept is the subject of longstanding debate in both domestic and international human rights law, this analysis will take a bespoke approach to the Namibian context where the minimum core debate has barely found traction.

109 As above.

110 See M Kitissou et al (eds) *The hydropolitics of Africa: A contemporary challenge* (2007).

111 GC15 (n 2) para 38.

112 For an analysis of the meaning of 'international assistance and cooperation' and whether ICESCR obliges developed states to transfer resources to developing states and whether developing states are obliged to seek such 'assistance and cooperation', see Ssenyonjo (n 78) 983; A Khalfan 'Development cooperation and extraterritorial obligations' in Langford & Russell (n 60) 396.

113 See Riedel (n 75) 79, who identifies three notions of core obligations: a minimum threshold; a minimum core obligation; and a minimum core content of rights. The terminological shifts by the ESCR Committee in terms of the minimum core has over time been traced through the 'minimum subsistence rights'; 'minimum essential levels'; 'international minimum threshold'; 'core content'; 'minimum core obligations'; and 'core obligations'. L Forman et al 'Conceptualising minimum core obligations under the right to health: How should we define and implement the "morality of the depths"' (2016) 20 *International Journal of Human Rights* 531 536.

The primary social-moral attractiveness in asserting a minimum core concept is the reality that many Namibians do not enjoy the most basic content of their right to water, as exposed in chapter 1. Beyond social-moral reasoning, this part will develop legal arguments of a normative and constitutional nature to justify the assertion of the minimum core concept for human rights under the Constitution, generally, and for a right to water, specifically. First, we commence with an analysis of the origins of the minimum core concept.[114]

Origins of the minimum core

The minimum core concept represents the idea that certain essential elements of a right are absolute, irreducible and unrelinquishable. The concept finds greatest prominence in the context of positive obligations that arise out of both civil-political and socio-economic rights. The normative-cum-philosophical undergird of the minimum core is aptly articulated by Örücü in 1986, who draws on German and Turkish perspectives on the irreducible essential content of a right.[115] Örücü queries how far a right can be regulated and limited before it reaches the state of being vacuous or illusory. He analyses the issue by arguing for three distinct parts of a right: the 'guaranteed core' which is indefeasible, the 'circumjacence' which is defeasible, and an 'outer edge'.[116] In other words, a right has a membrane that divides the circumjacent area from the core of a right.[117]

The minimum core concept today is a standard that is well-entrenched in international human rights law, most notably in General Comment 3 where the ESCR Committee took the view that

> a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum

114 For a historical development of MC, the emergence of the core concept, see Forman et al (n 113) 532.

115 E Örücü 'The core of rights and freedoms: The limit of limits' in T Campbell et al (eds) *Human rights: From rhetoric to reality* (1986) 37.

116 Örücü (n 115) 46.

117 Örücü (n 115) 48. See also Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Annex, UN Doc E/CN.4/1987/17 para 25: 'States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.'

> core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) [ICESCR] obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[118]

General Comment 3 has found subsequent endorsement in various substantive ESCR Committee General Comments that assert minimum core obligations for education,[119] housing[120] and, indeed, water. Here, I argue for the minimum core concept based on the use of international agreements as interpretative aids for constitutional Bills of Rights, as established in chapter 4.

When the ESCR Committee was established in 1985, the urgency of clarifying the normative content of each of the ICESCR rights was identified as among the principal challenges to be addressed by the Committee.[121] Alston, in a 1987 article published while serving as the founding Rapporteur of the ESCR Committee, observed that ICESCR rights were particularly vague in their normative implications, a reality attributed to ICESCR not being based upon any significant bodies of domestic jurisprudence when contrasted with the International Covenant on Civil and Political Rights (ICCPR) and the civil-political rights therein.[122] Alston further draws on ICESCR's drafting history to make a case for an absolute minimum core content and entitlement of each right that cannot be diminished under the pretext of permitted 'reasonable differences'.[123]

118 General Comment 3 (n 105) para 10. I will return to address the issue of the potential limitation of minimum core obligations, as the last sentence of this paragraph suggests, later in this chapter.

119 General Comment 13: The Right to Education (Art 13 of the Covenant), CESCR (8 December 1999) UN Doc E/C.12/1999/10.

120 General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant), CESCR (13 December 1991) UN Doc E/1992/23.

121 P Alston 'Out of the abyss: The challenges confronting the new UN Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332 351.

122 As above.

123 Alston (n 121) 352-353; see also B Andreassen et al 'Assessing human rights performance in developing countries: The case for a minimal threshold approach to the economic and social rights' in B Andreassen et al *Human rights in developing countries*

While the intellectual development of the minimum core under international human rights law is often attributed to Alston, the concept's genesis has been traced by scholars such as Young[124] and Riedel[125] to earlier domestic constitutional law, specifically the German basic law[126] (*grundgesetz*) and the now obsolete 1961 Turkish Constitution.[127] More recently, the essential content concept has been incorporated in recent constitutions of Kenya,[128] Hungary[129] and Angola.[130] What these provisions share is that they all expressly assert an 'essential content' of certain constitutional rights that are peremptory and categorical, thus lying beyond the reach of permissible limitation. This, I argue in the next part, is a feature shared by Namibia's Constitution.

Constitutionally justifying the minimum core/essential content

The most compelling argument for embracing a minimum core approach for fundamental rights such as water is anchored in the text of the Namibian Constitution. As explained in chapter 3 of the book, 'the text is the surest guide' to constitutional interpretation. Article 22 of the Constitution states:

1987/1988: A yearbook on human rights in countries receiving narcotic aid (1988) 333.

124 K Young *Constituting social and economic rights* (2012) 81.

125 Riedel (n 75) 79.

126 German Basic Law art 19(2) (official translation): 'In no case may the essential content (*wesengehalt*) of a basic right be encroached upon.' See German analysis of the essential content in I Leijten *Core socio-economic rights and the European Court of Human Rights* (2018) 123-141.

127 See discussion of the Turkish Constitutional Court's approach to limitations that encroach upon the core of a right in Örücü (n 115) 50, who refers to examples – albeit vague – such as where a limitation makes the exercise of a right or freedom extremely difficult or even impossible, it binds a right to such conditions as to make it impotent, it is explicitly prohibitive, it is implicitly prohibitive, it takes away its efficacy, and so forth.

128 2010 Kenyan Constitution art 24(2)(c): 'Despite clause (1), a provision in legislation limiting a right or fundamental freedom – *shall not limit the right or fundamental freedom so far as to derogate from its core or essential content*' (my emphasis).

129 2011 Hungarian Constitution art 1(3): 'The rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and *in respect of the essential content of such fundamental right*' (my emphasis).

130 2010 Angolan Constitution art 236(e): 'Alterations to the Constitution must … *respect essential core* rights, freedoms and guarantees' (my emphasis).

> Limitation upon Fundamental Rights and Freedoms
>
> Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
> (a) be of general application, *shall not negate the essential content thereof*, and shall not be aimed at a particular individual;
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.[131]

The limitation of rights clause in article 22(a) protects the *essential content* of fundamental rights. It thus envisages a 'limit on the limitations' that can be placed upon fundamental rights as specified in the general rights limitation clause of article 22(b), in addition to a specific article's internal limitation provisions.

In dissecting the meaning of a right's essential content under article 22(a), the cumulative nature and effect of the following limitations elements are to be emphasised: the limitation (i) shall be of general application; (ii) *shall not negate the essential content of any fundamental right* or freedoms; and (iii) shall not be aimed at a particular individual. This analysis will sharpen its focus on the second element of essential content.

The Constitution makes no further reference to the meaning or scope of the essential content of a right, and there is a paucity in scholarship critiquing the phrase.[132] However, the Namibian Supreme Court has relied on the essential content concept in *Attorney-General v Minister of Justice* when called upon to consider the content of the right to a fair trial in article 12 of the Constitution, stating:[133]

> *[T]he essential content of* [the Article 12 right to a fair trial] in the determination of all persons' 'civil rights and obligations or any criminal charges against them' and that the rest of the sub-articles, which only relates to criminal trials, expounds on the minimum procedural and substantive requirements for hearings of that nature to be fair. A closer reading of [Article] 12 in its entirety makes it clear that its substratum is the right to a fair trial. The list of specific rights embodied in [Article] 12(1)(b) to (f) *does not, in my view, purport to be exhaustive* of the requirements of the fair criminal hearing and as such *it*

131 My emphasis.

132 See also F Bangamwabo 'The justiciability of socio-economic rights in Namibia: Challenges and opportunities' (2013) 5 *Namibia Law Journal* 85.

133 *Attorney-General v Minister of Justice* 2013 (3) NR 806 (SC) para 17 (my emphasis).

> *may be expanded upon by the Courts in their important task to give substance to the overarching right* to a fair trial.

Further, the Supreme Court in *Alexander v Minister of Justice* considered section 21 of the Extradition Act of 1996 that had imposed an absolute prohibition upon the granting of bail for persons subjected to extradition proceedings. This was held to be a limitation that completely negated the essential content of the right to liberty protected under article 7 of the Constitution. Relying on article 22(a), section 21 was found to be unconstitutional as it had 'completely trumped' the right to liberty, which was constitutionally impermissible as a fundamental right's essential content could not be negated.[134] Non-negatability should be understood as implying the immediacy of compliance with the state's obligations that form part of the right's essential content under article 22(a).

To buttress the Constitution's textual justification of the essential content of a right, I argue for a purposive, transformative and re-invigorative approach that affirms a right to water's non-negatable and immediate minimum obligations through normative anchorage in the value of ubuntu. Chapter 3 has elaborated upon the four interrelated principles of ubuntu – community, interdependence, solidarity and dignity – to argue for ubuntu as a constitutional value. Collectively, these principles normatively justify recognising and determining minimum core obligations of fundamental rights generally, and specifically water. The individual person is part of the community, but the individual's needs and concerns are not inferior to those of the community.

Ubuntu demands that society affirms the value of every individual, with the individual's status being equal to that of the community. Particularly in the context of water provision that requires compliance with duties retaining resource implications, ubuntu rejects an adversarial notion of interests between the individual and the community in the distributive decision-making process. The state is responsible for all individuals and communities. Accepting the minimum core aspects of a right to water would allow us to give credence to the notion that every individual is significant and is entitled, as an assertion of the non-negatable essential content of their right, to quantity and quality of water not only for their survival but also for a dignified life. Dignity here is in the ubuntu sense – the indispensable concern for one's livelihood and socio-economic well-being – and thus justifies a right to water's various immediate positive duties articulated in this chapter, duties that are borne by the state as the primary duty bearer for the *AQuA* elements of water. This drives home

134 *Alexander v Minister of Justice* 2010 (1) NR 328 (SC) paras 119 & 126.

the interdependence principle in ubuntu, which is motivated by a shared responsibility to one another and avoids the risk of indefinitely postponing the state's water obligations to the detriment of the right-holder.

An ubuntu-inspired approach to the minimum core is also instrumental in ensuring that those obligations that the state is to discharge are framed such that they move human interests from the periphery to the centre. The aim is to safeguard the sense of ubuntu – in the dignitarian sense – of individuals and the community given their inextricability.[135] Ubuntu thus allows us to counteract the potential limitation of an understanding of the minimum core's scope as referring merely to those minimum essential levels of water that relate to human survival interests.[136] A right to water would be significantly diminished if only the minimum essential levels for human survival were obligatory. Indeed, neither would ubuntu as a re-invigorative constitutionalism paradigm or transformative constitutionalism countenance such a narrow interpretation.[137]

I will turn to the democratic legitimacy and institutional competency reasons advanced by the South African Constitutional Court for rejecting the minimum core approach. These concerns are concomitant to the institutional justiciability objections to a right to water that were already addressed in chapter 5 and are navigated through an application of the deliberative democracy model that I have advanced.

Reconciling minimum core with the bounded deliberation model

Having advanced a constitutional defence of the minimum core, the challenge here is how to reconcile the minimum core approach with the bounded deliberative democracy model propounded in chapter 5 to address institutional justiciability concerns arising from a right to water. The potential difficulty is that embracing the minimum core undermines the effectiveness of a bounded deliberation model as it does not sit well with the non-negatable and immediate nature of minimum core obligations, which would be outside the remit of deliberation between state organs. The concern is that a bounded deliberation model may leave

135 See S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Human Rights Law Journal* 1.

136 D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1 11; S Fredman *Comparative human rights law* (2019) 70-71.

137 Similarly, Winkler argues against a narrow survival interests approach; Winkler (n 11) 121. It can further be argued that ubuntu's upper threshold excludes the provision of those goods that may be considered luxuries, particularly where individuals continue to lack a basic level of material welfare.

the scope for non-compliance with the state's water obligations, leaving open the possibility of advancing reasons to justify a negation from the essential content of a right when adjudicating the state's obligations. Another objection is that the minimum core approach would introduce an intrusive rule-based approach which, as Steinberg has argued, is likely to stifle institutional conversation and collaboration between the state's three organs.[138]

In response, I argue that the ostensible incongruence between a bounded deliberation model and minimum core obligations can be overcome and reconciled. First, it is again stressed that the minimum core argument outlined above is constitutionally entrenched as it flows from the text of the Constitution: Article 22(a) asserts the non-negatable essential content of a right. It is only the non-core aspects of the right – the 'circumjacence' and outer edge – that can be the subject of deliberation and reasoned justification. Any normative undesirability arguments against the minimum core concept are thus subsidiary to the Constitution's predetermined imperatives.

Second, it is pertinent that the Constitution's Bill of Rights provisions do not explicitly identify the precise aspects of each right as forming part of the essential content that is beyond negation. It would, therefore, be within the realm of legitimate deliberation by the courts to decide what falls within the essential content through judicial review.[139] This may be obvious with respect to certain aspects of a right. For example, the right to a fair trial would doubtlessly include the presumption of innocence as part of its essential content. For many rights, however, the essential content may be less obvious. Indeed, in the context of a right to water, a court would effectively first need to determine, through a process of deliberation, precisely which aspects of the state's obligations would fall within the essential and non-negatable core of a right to water. This process would inevitably involve constitutional interpretation that considers the text, as 'the surest guide', and which is purposively interpreted while embracing transformative and re-invigorative constitutionalism paradigms. Nevertheless, given the normative paucity on the substantive content of a right to water in the Constitution, recourse should also be had to an amalgamation of extraneous authorities that are strictly persuasive yet compelling as normative resources, such as ESCR Committee's General Comments, the African Commission Principles and Guidelines, and the WHO Guidelines.

138 C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264 274.

139 Ssenyonjo (n 78) 975.

Given the soft law nature of these normative resources, nothing prevents the courts from engaging with the content of the express core obligations and individually adjudicating whether a specific core obligation forms part of the essential content of a right to water under the Constitution. The bounded deliberative democracy model thus is relevant and useful in deliberating as to whether or not a given obligation actually forms part of the right's core.

From the perspective of evidence, this signifies an important clarification of the burden of proof upon the state, as the primary duty bearer, to justify its actions and not the right holder who may be in an already disadvantaged socio-economic position. The state's justificatory burden is critical to realising an ethos of transformative constitutionalism in achieving meaningful socio-economic justice for all. Once the court has made a determination that a specific obligation forms part of the core, then that duty would be cast in stone such that a failure to comply with a said duty would constitute a violation by the state without the further possibility for inter-institutional engagement through bounded deliberation. The Supreme Court's approach in both *Alexander v Minister of Justice* and *Attorney-General v Minister of Justice*, discussed above in the context of liberty and fair trial rights respectively, substantiate the feasibility of this approach.

The core obligations would thus include all tripartite duties under a right to water. For example, the duty to respect includes the core obligation of the state to refrain from using water as a political tool. The duty to protect would include the core obligation of the state to ensure that, in addition to its constitutive organs, third parties do not contaminate existing water sources. The duty to fulfil would include a core obligation on the state to ensure that each individual has access to water of a quantity and quality that ensures not just the bare necessaries of life, but a dignified life as informed by ubuntu.

The approach proposed ensures that bounded deliberation as a model for adjudicating water's justiciability remains pivotal, given its normative appeal as constructed in chapter 5. The state would be required to justify the measures it has taken to fulfil the core obligations of the right and justify its actions or inaction, with limited scope for judicial deference to the other organs of the state. At the same time, it allows room for inter-institutional deliberation on the state's obligations to play a meaningful role in adjudicating the non-core aspects of a right to water's obligations. Appropriately, the bounded deliberative democracy model can most fully and effectively be deployed when courts seek to evaluate the aspects of the state's compliance with the progressively realisable dimensions of water

in light of the resource constraints of the state. It is to the progressive realisation dimension of the state's obligations that I will turn later in this chapter.

At this juncture it is necessary to highlight the strict nature of the essential content approach in article 22(a) of the Constitution as materially distinguishable from the minimum core approach under General Comment 15 read together with General Comment 3. It will be recalled that General Comment 3 – while taking the view that several minimum core obligations arise from each socio-economic right – also allows a state 'to attribute its failure to meet at least its minimum core obligations to a lack of available resources' where it has demonstrated that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[140]

Article 22(a) of the Constitution, however, takes a strict approach – the essential content of a right *shall not* be negated. The state can offer no justification even on the basis of resource considerations. Therefore, this aspect of General Comment 3's minimum core approach must yield to article 22(a), given that the Constitution is not 'equivocal or uncertain'.[141] A similar construction is advanced in the Maastricht Guidelines that compel 'minimum core obligations irrespective of national availability of resources or other factors or difficulties'.[142]

The essential content of a right is irrefutably non-negatable. This thus forecloses the prospect of the state invoking the principle in General Comment 3 to justify its failure to meet its minimum core obligations for a right to water based on resource limitations. Further, as this analysis is undertaken in the specific setting of Namibia, one of the foremost normative debates on the minimum core as determining a common universal minimum core that is unresponsive to country-specific needs is rendered redundant.

6.5.2 Distinguishing South African comparative jurisprudence on minimum core

A reading of the Constituent Assembly Debates to the Constitution sheds little light on the drafters' choice of protecting a right's essential content that cannot be negated. However, this drafting style was not novel when the Constitution was drafted as it found expression in domestic and

140 General Comment 3 (n 105) para 10.

141 *Kauesa v Minister of Home Affairs* 1994 NR (HC) 135 141. See analysis in ch 4.

142 Maastricht Guidelines (n 89) para 9.

international law settings, although not with the precise formulation of article 22(a) of the Constitution. I have already addressed the international law setting in the analysis of the ESCR Committee's General Comment 3. I turn to consider domestic constitutional jurisprudence on the minimum core with the view to distinguish those comparative South African decisions – being an appropriate comparator, as argued in chapter 1 – that have considered and rejected the minimum core approach in adjudicating socio-economic rights.[143]

In *Makwanyane*[144] the South African Constitutional Court, in deciding the constitutionality of the death penalty, was called upon to interpret the content of the right to life: whether the imposition of the death penalty negated the essential content of the right.[145] Section 33(1)(b) of the 1993 Interim South African Constitution asserted that the law of general application may limit the rights entrenched in the Bill of Rights, provided that such limitation, even where it was reasonable and necessary, 'shall not negate the essential content of the right in question'. Six of the judges in *Makwanyane* had considered the essential content text but found interpretative difficulty in determining its exact meaning and scope. They thus preferred to decide on other grounds such as reasonableness and values, including dignity and ubuntu.[146] Notably, the non-negatability of the essential content of a right formulation was subsequently omitted from section 36 in the final 1996 South African Constitution's limitation of rights clause. Commentators maintain that this omission was a consequence of *Makwanyane's* difficulty in determining the exact meaning of the essential content of the right.[147]

Over a decade later, in *Mazibuko*,[148] five applicants who were residents of the township of Phiri in Soweto sought to challenge the City of Johannesburg's water policy in the South African Constitutional Court. The principal issue for our purposes was whether the supply of free basic water of 6 kilolitres per month to every account holder in the

143 See critique in Fredman (n 136) 71-73.

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

145 *Makwanyane* (n 144) paras 39, 98, 103 & 132-134.

146 *Makwanyane* (n 144) (Chaskalson P) paras 132-134; (Ackermann J) para 167; (Didcott J) para 175; (Kentridge J) paras 193-195; (Mohamed J) para 298, (O'Regan J) para 343.

147 See analysis in H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany: A comparative analysis* (2002) 362-364.

148 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC). For a concise analysis of right to water decisions in South African courts, see J Dugard et al 'Determining progress on access to water and sanitation: The case of South Africa' in Langford & Russell (n 60) 237-242.

City – regardless of the household size – was in conflict with section 27(1)(b) of the 1996 South African Constitution. Following the South African Constitution's two-part formulation of socio-economic rights, section 27(1)(b) entrenches a human right to access sufficient water, while the state is enjoined by section 27(2) to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.

Relevant here is the Constitutional Court's approach in adjudicating the water policy of the City in relation to the minimum core concept as a proper interpretation of the relationship between section 27(1) and 27(2) of the South African Constitution.[149] In *Mazibuko* the minimum core issue arose as the applicants had invited the Court to determine the content of their right to water under section 27(1)(b) by quantifying the amount of water sufficient for a dignified life, which the applicants had argued was 50 litres per person per day.[150]

The Court recognised the minimum core argument as originating from international law, specifically the ESCR Committee's General Comment 3 minimum core approach.[151] The Court noted its earlier rejection of the minimum core that the state is obliged to provide in South African constitutional socio-economic rights adjudication, as seen in *Grootboom*[152] and *Treatment Action Campaign*[153] on housing and health rights respectively. The Court considered the minimum core approach inappropriate for two major reasons. The first reason arose from the text of the South African Constitution while the second was from an understanding of the proper role of courts in South Africa as a constitutional democracy. The Court reasoned that sections 27(1) and (2) must be read together to delineate the scope of the positive obligation to provide access to sufficient water imposed upon the state. The Court found that no right to claim 'sufficient water' from the state was conferred immediately but the state was obligated to take reasonable legislative and other measures progressively to achieve the right to sufficient water within available resources.[154]

149 *Mazibuko* (n 148) para 44. See critique in Fredman (n 136) 71-73.

150 *Mazibuko* (n 148) para 50.

151 *Mazibuko* (n 148) para 52. Both the *Mazibuko* High Court and Supreme Court of Appeal decisions had prescribed a minimum quantity of water per person per day of 50 litres and 42 litres respectively.

152 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) paras 29-33.

153 *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC) paras 26-34.

154 *Mazibuko* (n 148) para 56.

It is worth noting that a significant body of scholarship exists that is critical of the Constitutional Court's repeated rejection of the minimum core.[155] However, the South African Constitution's textual approach to the enforcement of socio-economic rights – and the jurisprudence flowing therefrom such as *Mazibuko* which applies reasonableness as the standard of review – can for our purposes be materially distinguished from the Namibian Constitution's approach on a purely textual basis.[156] As I have argued, article 22(a) affirms that every fundamental right in chapter 3 of the Namibian Constitution retains a non-negatable essential content with immediate obligations that the state must realise. This, therefore, affirms a binding application of an essential content/minimum core approach when evaluating a right to water, as a right implied from the express right to life in article 6 of the Constitution. Embracing a minimum core approach further prevent rights holders from the peril of suffering irreparable harm to their lives, health and human dignity if they do not receive urgent assistance in terms of water provision,[157] a reality that transformative and re-invigorative constitutionalism paradigms would not countenance.

6.6 Water's general obligations: Temporality and resources limitations

We can accept that a right to water, as part of the broader category of socio-economic rights, gives rise to various duties placed upon the state that demand resources and that may not be immediately realised but are to be achieved through, among others, legislative, policy and programmatic measures. These progressively realisable aspects of a right to water form the circumjacent, which is the non-core part of the right. This would almost invariably bring to the fore two key concerns: *temporality* – the time scale within which the duties must be fulfilled for the right to be fully realised; and *resources* – the reality of limited state resources to give effect to the full scope of its duties to realise the right. Crucially, resources should not unduly emphasise financial and budgetary allocations. It should instead be understood as the more dynamic approach of natural, human, regulatory, and educational resources, as Skogly argues.[158] In the context of water, it is a second-order difficulty maintained in chapter 5.

155 See D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 145; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 163.

156 In addition, South Africa is now also a party to ICESCR and therefore the normative objections to minimum core obligations are of diminished force.

157 Liebenberg (n 155) 164.

158 S Skogly 'The requirement of using the "maximum of available resources" for human rights realisation: A question of quality as well as quantity?' (2012) 12 *Human Rights Law Review* 393; Fredman (n 136) 75.

To address these issues in our Namibian setting, we turn to international law as an interpretive resource given that the Constitution is silent on the standard of adjudication for socio-economic rights. These temporal and resource considerations are most prominently captured through the 'progressive realisation' of socio-economic rights subject to 'available resources' as a principle to guide the state. This principle is captured in article 2(1) of ICESCR, which frames the duty of states as undertaking steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the [ICESCR] rights'. Riedel, writing in the context of the ICESCR's *travaux préparatoires*, sums up the concern that the principle of progressive realisation sought to address as follows:[159]

> It was alleged, *inter alia*, that the minimum core concept might be used by States as an excuse or escape hatch to limit the scope of the wider ambit of the rights in question, that in the end the minimum core would represent the ceiling of the right in question, and thus limit the dimension of progressive and full realization of rights, and reduce the State Party obligations to a bare minimum.

While the analysis here is inspired by the progressive realisation formulation under ICESCR, it does not exclusively locate itself in that treaty. Indeed, the progressive realisation principle is absent from the African Charter, which may invite the view that all rights therein present immediate and peremptory obligations on the state to take necessary legislative and other measures.[160] While there is a significant threshold difference of obligations between ICESCR and the African Charter, the African Commission has (controversially) subjected the state's obligations to realise socio-economic rights under the African Charter to the progressive realisation subject to the availability of resources,[161] despite the absence of a textual premise in the African Charter.

The issues arising out of the state's general obligations mirror those of justiciability and the proper role of the courts when adjudicating the state's duties where resource and temporal limitations may be cited for non-compliance with their obligations. The Namibian Constitution –

159 Riedel (n 75) 79.

160 C Odinkalu 'Analysis of paralysis or paralysis by analysis: Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 351.

161 *Purohit & Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84; *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 206; Nairobi Principles (n 4) paras 13-15; see also M Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter' (2011) 29 *Netherlands Journal of Human Right*s 358 387.

unlike the Kenyan[162] and South African[163] Constitutions, for example – does not expressly subject rights to progressive realisation. However, it can reasonably be argued that those duties that do not require immediate compliance can still be subjected to temporal and resource considerations.[164]

While accepting the reality that any state, particularly developing states such as Namibia, would face difficulties in realising the full right to water, there nonetheless is an obligation to take steps and to demonstrate when full content realisation of the right will be achieved.[165] The state must not remain passive but must, as a baseline obligation, move as expeditiously and effectively as possible towards that goal.[166] Chapter 5 has debunked the argument that socio-economic entitlements in the context of the Constitution's Principles of State Policy (PSPs) are but unenforceable goals and aspirational. However, it is to be accepted that certain aspects of the obligations arising out of socio-economic rights such as water are to be realised progressively over time. The principal danger with progressive realisation is that it invites the view that the duties, being aspirational, cannot be enforced through the courts, and risks an indefinite postponement of achieving the underlying right to water. Chapter 5, relying on *Mwilima*, has indeed already established that resource limitations cannot serve to overrule a constitutional fundamental right claim.

Valuable here is the approach of the ESCR Committee's General Comment 3[167] in bifurcating the obligations of conduct and obligations of result, drawing on international law on state responsibility. This approach offers clarity as to the temporality of the state's duties as obligations of *conduct* are concrete and immediate, while obligations of *result* are more aspirational. The full realisation of a right to water would constitute an obligation of result. However, the duty to institute legislative and other measures would be an unqualified obligation of conduct. Through this conception, a right to water would give rise to an *immediate* obligation to

162 2010 Kenyan Constitution art 21(2).

163 The Constitution of the Republic of South Africa, 1996 sec 27(2).

164 An alternative approach is offered by Fredman who, in seeking to 'reconcile the need for progressive realization without giving up on the substantive content of [a socio-economic] right', relies on Alexy's concept of 'principles as optimisation requirements' whereby a principle is a norm that must be realised to the greatest extent possible given the legal and factual possibilities. Fredman (n 136) 73; Fredman (n 64) 73; R Alexy *A theory of constitutional rights* (2004) 45-57.

165 General Comment 3 (n 105) para 9.

166 As above; Bulto (n 22) 100.

167 General Comment 3 (n 105) para 9; Fredman (n 136) 70.

take steps towards that goal.[168] It is these steps that would be the subject of judicial scrutiny and accountability through bounded deliberation and would allow for an interpretative approach that gives substance to transformative constitutionalism in achieving socio-economic justice.

The court's role would be to hold the state accountable by determining the content of the various duties of the state and seeking justifications for the redistributive measures, in a deliberative manner, where there has been inadequate compliance. As argued in chapter 5, this reinforces accountability through the state's duty of explanation.[169] Even where the state's justifications for inadequate compliance are acceptable in the judgment of the court, there would remain forward-looking obligations on the state to substantiate the steps it will take to comply with its duties towards full realisation through is distributive decisions. This is given that the state's obligations of conduct towards realising the full right to water should be regarded as immediate, constant and continuous.[170]

In the context of Namibia's duties to realise the *AQuA* content of a right to water, the approach of both the Drinking-Water Quality Guidelines and the Special Rapporteur is instrumental. When considering the progressive realisation of water supply, the phraseology employed in measuring water supply is that of access to improved drinking water sources by households. Improved drinking water is a proxy for a water source that 'by the nature of its construction and design adequately protects the source from outside contamination, in particular by faecal matter'.[171] The underlying assumption here is that improved sources are more likely to supply safe drinking water than unimproved sources. As such, the Drinking-Water Quality Guidelines present the improvement of water supply technologies thus:[172]

168 See also Maastricht Guidelines (n 89) para 7: 'The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right … The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.'

169 Fredman (n 64) 103.

170 Bulto (n 22) 108.

171 Drinking-Water Quality Guidelines (n 6) 85.

172 As above.

Unimproved drinking-water sources	**Improved drinking-water sources**
unprotected dug well	piped water into dwelling, yard or plot
unprotected spring	public tap or standpipe
cart with small tank or drum provided by water vendor	tubewell or borehole
tanker truck provision of water	protected dug well
surface water (river, dam, lake, pond, stream, canal, irrigation channel)	protected spring
bottled water[173]	rainwater collection

A Namibian illustration of how the Drinking-Water Quality Guidelines can be applied in the adjudicative process may be helpful here. Where a rural community has been relying on an unimproved drinking water source such as an unprotected dug well at independence in 1990, when the Constitution was adopted, and yet continues to presently rely on such unimproved source, then there would be a strong claim that the state has failed to comply with its positive duties in relation to a right to water. It would be spurious for the state to seek to justify its inaction to improve the community's water source based on resource limitations, or that taking positive measures would inevitably require the lapse of time before realising the AQuA elements of that community's right to water.

Indeed, an adequate and appropriate response to a right to water claim in Namibian courts would be intimately tied to the remedial possibilities arising from the state's failure to comply with its obligations. This would require innovative remedies to be introduced by Namibian courts, such as supervisory orders that require judicial oversight over the state's plan to

173 Bottled water is considered 'improved' only when the household uses drinking water from an improved source for cooking and personal hygiene. Drinking-Water Quality Guidelines (n 6) 85.

remedy right to water needs. An analysis of remedial options is, however, beyond the ambit of this book.[174]

6.7 Conclusion

Having addressed the legal basis and justiciability objections to a right to water in earlier constituents of this book, this chapter has sought to move the analysis to a more palpable argument of what a right to water's substantive and normative content would entail. This has been pursued by employing the evaluative framework of the *AQuA* elements set out principally in General Comment 15. This allows a right to water claim to retain qualitative and quantitative features that can feasibly be determined by a court and enforced based on the Namibian state's correlative obligations.

I have argued that these obligations entail minimum core obligations that are immediate and general obligations that are subject to deliberativism, a process that includes the organs of the state, with courts as the forum. The model advanced ensures that the temporality justifications for non-realisation of the substance of a right to water through the state's duties do not provide an indefinite excuse for non-compliance in the face of pervasive water needs in Namibia as exposed in the Special Rapporteur's report. Moreover, the model I advance ensures that distributive decisions for resources are subject to the deliberative competence of courts, with the state bearing a burden of justification in realising a right to water while guided by values including ubuntu.

174 See H Taylor 'Optimisation through innovation: Judicial exercise of discretionary remedial power to enforce the State's positive human rights duties' unpublished DPhil thesis, University of Oxford, 2019.

7 CONCLUSION: *OMEYA OGO OMWENYO*

The status of water as a binding human right has been the subject of increasing debate and scholarship internationally. The traditional rationales for an enforceable human right to water can be roughly placed into three categories.[1] The first is to act as a legal bulwark against social and economic inequality.[2] The second is that governments should guarantee provision of certain 'primary goods' essential for the realisation of all other rights and responsibilities.[3] The third is to advance governmental accountability.[4] As discussed in chapter 4, several recent constitutions, such as those of Zimbabwe, Kenya and South Africa, have explicitly included the right to water as a provision in their Bills of Rights. The 2010 UN General Assembly Resolution[5] has also driven the right to water debate internationally. Further, initiatives such as the African Commission Guidelines on the Right to Water in Africa, which were published in July 2020, are a welcome development to place water higher up on the social, political and legal agenda.[6] Namibia is somewhat a latecomer to the human right to water debate, an idea of which the time has come. This book has therefore argued for a human right to water that can be claimed through the Namibian courts. A right to water is implied from the right to life in article 6 of the Constitution.

In normatively justifying a right to water as an implied right, I argued for interpretative approaches that include asserting transformative constitutionalism and the substantive coinage of re-invigorative constitutionalism. This has offered a robust basis upon which a

1 R Larson et al 'The human right to water' in S Dadson et al (eds) *Water science policy and management: A global challenge* (2020) 181.

2 As above.

3 As above.

4 As above.

5 Resolution adopted by the General Assembly on 28 July 2010: 'The human right to water and sanitation' UNGA (3 August 2010) UN Doc A/RES/64/292.

6 See also African Commission Guidelines on the Right to Water in Africa (adopted during the 26th extraordinary session of the African Commission on Human and Peoples' Rights held from 16 to 30 July 2019, in Banjul, The Gambia).

constitutional right to water is founded, particularly through recourse to the value of ubuntu. International law's relevance to right to water claims in the domestic courts is also expressed in the context of directly applicable treaties and the interpretative value offered by 'soft law' sources.

The book also addressed the various justiciability concerns that may arise: normative, institutional (competence and legitimacy) and textual (focusing on Principles of State Policy (PSPs)). Most pertinently, in employing the distinction between first and second order scarcity, we are able to carve out a legitimate and effective judicial role in holding the state to account in complying with its right to water duties. These duties flow from the content of a right to water I develop from a critical application of the Nairobi Principles, General Comment 15, the Drinking-Water Quality Guidelines, as well as ubuntu.

Since COVID-19 emerged and became a pandemic that rapidly spread across the globe in early 2020, there has been an increasing focus by states and non-state actors to ensure that all populations have access to basic water and sanitation needs. Water has been prioritised to ensure that the most vulnerable in society can mitigate the spread of COVID-19 by complying with basic hygiene.[7] The mantra of *hands*, *space*, *mask* has been repeated with the aim of reminding populations to thoroughly wash their hands frequently so as to prevent them from contracting or spreading COVID-19. However, the most basic of minimum core water needs of many, especially in informal settlements in Namibia, were not met. The Namibian government, to its credit, did put in place important interventions when the COVID-19 pandemic arose to increase access to potable water. For example, under the state of emergency regulations adopted in response to COVID-19 in Namibia, the Namibian President adopted regulations to ensure that local authorities were to ensure that residents with arrears and suspended water services have their water supply reconnected and that those without access to water supply are provided with access to potable water.[8] While the prioritisation of water in times of pandemic is appropriate, access to water should be the minimum entitlement of every individual and community, irrespective of the existence of a public health emergency.[9]

7 Food and Agriculture Organisation 'Building water access for a COVID-19 response', http://www.fao.org/land-water/overview/covid19/access/en/ (accessed 2 July 2021).

8 Government Notice 104 – Directive Relating to Regional Councils and Local Authority Councils: COVID-19 Regulations sec 2; NAMWater 'Clean water for a healthy nation during the lockdown period', https://www.namwater.com.na/images/docs/Media_NW_Lockdown_Period_Initiatives.pdf (accessed 2 July 2021).

9 S Chigudu *The political life of an epidemic: Cholera, crisis, and citizenship in Zimbabwe*

This book offers a scholarly analysis of and justification for socio-economic rights through a right to water in Namibia. Socio-economic jurisprudence is acutely limited in Namibian courts, yet socio-economic injustice that prominently manifests through access to water challenges is a painfully pervasive reality in Namibia. The book thus is an endeavour to turn on the legal taps to allow right to water claims to be brought in Namibian courts. Ultimately, the aim is to realise the sense of ubuntu for all by giving substance to the adage that *omeya ogo omwenyo*.[10]

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10 An Oshindonga language expression translating to 'water is life'.

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