



Clean, Sufficient, Affordable Water to All

LEGAL POLICY AND REGULATIONS ANALYSIS PAPER

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INTRODUCTION

The human right to water in Zimbabwe is threatened by arbitrary water disconnections, paltry budget allocation to water, poor quality of potable water, inadequate water supply with demand hugely outstripping supply and in some cities high charges for potable water. The human right to water is governed by numerous Acts of Parliament which include the 2013 Constitution of Zimbabwe, the Water Act (Chapter 20:24), the ZINWA Act (Chapter 20:25), Urban Councils Act (Chapter 29:15), Rural District Councils Act (Chapter 29:13), Public Health Act (Chapter 15:09), Administrative Justice Act (Chapter 10:28); 2013 National Water Policy, Government Notice 164 of 1913.

2013 CONSTITUTION OF ZIMBABWE

The Constitution of Zimbabwe, introduced provisions on procedural and substantive legal issues on the human right to water. The judiciary in Zimbabwe has applied provisions on the human right to water in a few cases. The human right to water forms part of Fundamental Human Rights and Freedoms contained in Chapter 4. Section 77(a) provide the right as follows:

Section 77 Right to food and water
Every person has the right to-

(a) Safe, clean and potable water;

And the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right.

Besides the above provision, Section 46 on Interpretation of Chapter 4 states that,

(1) When interpreting this Chapter, a court, tribunal, forum or body-

(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;

Section 34 provides that “*The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law*”.

Zimbabwe became a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 13 May 1991. General Comment 15 of the ICESCR states that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”¹ Zimbabwe is also a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women which requires State parties to ensure women have the right to “*enjoy adequate living conditions, particularly in relation to ... water supply*”.² Similarly Zimbabwe signed the Convention on the Rights of the Child, which requires State parties to combat

¹ http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf

² Article 14, paragraph 2(h). This is also recognised as part of the right to adequate housing – see UNHabitat Fact Sheet 21 at p8.

disease and malnutrition among children “*through the provision of adequate nutritious foods and clean drinking water*”.³

Section 44 obliges the State and every person, “and every institution and agency of the government at every level to respect, protect, promote and fulfill”⁴ human rights. The obligations to respect and protect are of immediate effect and are not subjected to availability of resources.

Sections 68(1) and (2) states that “every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair” and “any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct”⁵.

Section 86(2) states that human rights can be limited only in terms of a law of general application and also taking into account factors such as: the nature of the right concerned; the purpose of limitation; nature and extent of the limitation; need to ensure enjoyment of the right does not prejudice rights of others; the relationship between limitation and purpose; and whether there are any less restrictive means of achieving the purpose of the limitation⁶.

Section 2 states that:-

“2 Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”⁷

The Constitution of Zimbabwe has provisions which support principles underlying the promulgation of the human right to water. The provisions include Section 56 on equality and non-discrimination; Section 62 on access to information in so far as the information is required for the exercise or protection of a right and interests of public accountability; Section 73 on ecological sustainable development and protection of environment for the benefit of present and future generations; and Section 194 on basic values and principles governing public administration. S265(1) (a) of the Constitution enjoins councils to, within their spheres—(a) ensure good governance by being effective, transparent, accountable and institutionally coherent”.

³ Article 24, paragraph 2.

⁴ Constitution of Zimbabwe IBID

⁵ Constitution of Zimbabwe, Opcit

⁶ Constitution of Zimbabwe Amendment (No. 20) Act, 2013

⁷ IBID

PROVISIONS IN OTHER ACTS OF PARLIAMENT AND REGULATIONS ON THE HUMAN RIGHT TO WATER

ZINWA Act (Chapter 20:25)

The Act establishes the Zimbabwe National Water Authority and provide for its functions; appointment and functions of a board of the Authority; raising of charges for the provision of water and other services by the Authority; provide for the funds of the Authority; provide for the imposition and collection of a water levy; to repeal the Regional Water Authority Act [Chapter 20:16]; and to provide for matters connected with or incidental to the foregoing.

[Date of commencement: 1 January 2000.]

Section 5 which provides for the Functions of Authority states that;

(1) Subject to this Act, the Water Act [Chapter 20:24], and any other enactment, the functions of the Authority shall be—

(a) To advise the Minister on the formulation of national policies and standards on—

(i) Water resources planning, management and development; and

(ii) **Water quality** and pollution control and environmental protection; and

(iii) Hydrology and hydrogeology; and

(iv) Dam safety and borehole drilling; and

(v) **Water pricing**;

And

(b) subject to the Water Act [Chapter 20:24], to assist and participate in or advise on any matter pertaining to the planning of the development, exploitation, protection and conservation of water resources; and

(c) to exploit, conserve and manage the water resources of Zimbabwe with the object of—

(i) **securing equitable accessibility** and efficient allocation, distribution, use and development; and

(ii) providing, in both the short and the long term, **adequate water on a cost effective basis**; and

(iii) taking appropriate measures to minimize the impacts of droughts, floods or other hazards;

and

(d) to promote an equitable, efficient and sustainable allocation and distribution of water resources; and

(e) to encourage and assist local authorities in the discharge of their functions under the Rural District Councils Act [Chapter 29:13] and the Urban Councils Act [Chapter 29:15] with regard to the development and management of water resources in areas under their jurisdiction and in particular, the provision of potable water and the disposal of waste water; and

(f) to ensure that catchment councils discharge their functions in accordance with the Water Act [Chapter 20:24]; and

(g) to encourage and assist catchment councils to plan and co-ordinate the development and management of water resources in areas under their jurisdiction;

and

(h) to operate and maintain any water works owned or managed by the Authority and to sell any water therefrom, to dispose of waste water, to construct boreholes and to provide design and construction services; and

(i) to provide, at such fee as the Authority may determine, all forms of assistance, including technical assistance, personnel, advisory and training, information and other services to the Government, local authorities and catchment councils in connection with the exploitation, development, management and distribution of water resources; and

(j) to undertake research studies and develop a database on hydrological issues pertaining to or of interest to Zimbabwe and to publish the findings and any other data compiled by the Authority; and

(k) to conduct hydrological and geographical surveys and to produce plans, maps or other information necessary in the planning, development and exploitation of water resources and to publish any such surveys, plans, maps or other information; and

(l) to promote such mechanisms for the co-operative management of international water resources as the Minister may determine; and

(m) to carry out any function that may be conferred or imposed on the Authority by or under this Act, the Water Act [Chapter 20:24], or any other enactment.

(2) If, in the carrying out of the Authority's functions under this Act, any question arises as to what is to be considered to be the national interest, the question shall be decided by the President after consultation with the Minister and the Authority.

Although Section 5 makes reference to issues of availability, accessibility and quality which constitute aspects of the human right to water; its main thrust is on raw water and the background to the enactment of the Water Act informs the Act. Section 5(1)(e) states particularly that the Zimbabwe National Water Authority assist and encourage local authorities established in terms of the Rural District Councils Act and Urban Councils, whose responsibility is the provision of potable water. Therefore the responsibility to provide potable water lies with local authorities and ZINWA can only provide potable water where the local authority has no authority to do so.

The Act provides for the establishment of a water fund under the following sections:

S 39 Establishment and object of Water Fund

(1) There is hereby established a fund, to be known as the Water Fund, the management and control of which shall, subject to this Act, be vested in the Minister as trustee of the Fund.

(2) Subject to this Act, the object of the Fund shall be the development generally of the water resources of Zimbabwe.

S 41 Water levy

(1) The Minister may, in consultation with the Board, and with the approval of the Minister responsible for finance, by statutory instrument, impose a water levy on any person holding a permit issued in terms of the Water Act [Chapter 20:24].

S 43 Application of Fund

Moneys in the Fund shall be applied to the following purposes—

(a) payment to the Authority of such amount as the Minister considers the Authority will require for the purpose of meeting the expenditure incurred or to be incurred by the Authority in that financial year in performing such functions, other than commercial functions, as the Minister may approve:

Provided that no moneys shall be applied towards any expense that is not provided for in a budget approved by the Minister for the purposes of this section;

(b) reimbursing the Authority for the cost of administering the Fund;

(b1) payment annually to the catchment councils of such amount as the Minister considers the catchment councils will require for the purpose of meeting the expenditure to be incurred by them in discharging their statutory functions in terms of section 21 of the Water Act [Chapter 20:24]⁸;

(c) any other purpose which the Minister, after consultation with the Authority, considers will promote the development of water resources.

Urban Councils Act [Chapter 29:15]

Section 183 contains powers of Urban Local Authorities in relation to water supply.

183 Powers of council in relation to water supply

(1) A council may provide and maintain a supply of water within or outside the council area and for that purpose the council may—

(a) in accordance with the Water Act [Chapter 20:22] take such measures and construct such works, whether inside or outside the council area, as it considers necessary for the purpose of providing and maintaining a supply of water;

(b) enter into agreements for the purchase and sale of water and for any other thing necessary in connection with the maintenance and supply of water.

(2) It shall be lawful for a council to add fluoride to water intended to be supplied for consumption by the public.

(3) Where a council requires any servitude over land for the purposes of the supply of water and the owner of the land will not grant such a servitude, Part IX of the Water Act [Chapter 20:22] shall apply, *mutatis mutandis*, as if the council required the servitude in connection with a water right granted by the Administrative Court in terms of that Act.

The Act allows for disconnections of water supply on premises of consumers who fail to pay for any charges that are due.

Section 69 (2) (e) (i) of Schedule 3 of the *Urban Council's Act*, which stipulates that;-

“Without derogation to the generality of sub-paragraph (i), by-laws relating to matters referred to in that sub-paragraph may contain provision for all or any of the following;

(a)...

(b) **cutting off the supply of water**, after not less than twenty four hours' notice on account of;

(i) **failure to pay any charges which are due**; or

⁸ Inserted by the General Laws Amendment (No.2) Act 2002 promulgated on the 24th January, 2003 - with retrospective effect, in terms of clause 47 - from the 4th February, 2002

Section 198 (3) Subject to this Act, a council shall have **power to do any act or thing which, in the opinion or the council**, is necessary for administering or giving effect to any by-laws of the council.

Rural District Councils Act (Chapter 29:13)

POWERS AND DUTIES OF RURAL DISTRICT COUNCILS

Section 72 Powers in regard to sewerage and drainage

“Within any urban land a council may exercise all the powers in relation to sewerage and drainage that are conferred upon town councils by Part XII of the Urban Councils Act [Chapter 29:15]”.

Section 75 Owners and occupiers of land may be charged for services made available
Where—

(a) any stand, lot, premises or other area, whether with or without improvements, within the council area is or could reasonably be connected to any sewer, water main or electricity main of the council;

Public Health Act (Chapter 15:09)

The Act has provisions on sufficiency of water supply, availability of water, affordability for water services and sampling for quality of water.

S 64 Duty of local authority to furnish water supplies

(1) Every local authority, when required to do so by the Minister, **shall provide and maintain, or cause to be provided and maintained as far as may be reasonably possible, a sufficient supply of wholesome water for drinking and domestic purposes**, whether such supplies be derived from sources within or beyond its district, and for such purposes it may purchase or otherwise acquire any land, water works, springs, fountains, water rights and premises, or rights incidental thereto, within or outside its district, and may construct, equip and maintain any works necessary for collecting, pumping or storing water.

(2) Where such water supply has been provided, the local authority may by regulation compel the owner of every occupied premises within its district to the boundaries of which the local authority has brought such water to lay on such water to any such premises, and **may fix a minimum charge for such water**, whether used by the occupier or not; such charges shall be payable by the occupier, except in cases where the water is not laid on, when such charges shall be payable by the owner of the premises.

(3) In the event of the water supply of any district being undertaken by any person or company other than a local authority under any lawful contract or legal agreement whatsoever, this Part shall apply, *mutatis mutandis*, to such person or company in respect of such water supply as if such person or company were the local authority.

S 67 Powers to inspect water supplies

(1) The Chief Health Officer or any person duly authorized by him or any medical officer of any local authority may at all times enter any water works or gathering ground and inspect and examine any sources of water supply or any such water works, and take such sample of water as he may deem fit.

Administrative Justice Act (Chapter 10:28)

The Act has provisions on limitations of human rights and the conduct of administrative bodies.

S 3 Duty of administrative authority

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—

(a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and

(c) where it has taken the action, supply written reasons therefore within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(a) adequate notice of the nature and purpose of the proposed action; and

(b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable.

(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—

(a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or

(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including:

(i) the objects of the applicable enactment or rule of common law;

(ii) the likely effect of its action;

(iii) the urgency of the matter or the urgency of acting thereon;

(iv) the need to promote efficient administration and good governance;

(v) the need to promote the public interest.

2013 National Water Policy

The policy has conflicting provisions on affordability for water services and privatization of potable water provision. The policy gives prominence to primary water uses.

Paragraphs below contain the provisions on aspects of the human right to water:

1.3.2 Water Services Authorities and providers

In order to address a range of issues that include accountability for service provision, capacity, technical expertise and the ring-fencing of revenues, a distinction is introduced in this policy between Water Service Authorities and Water Service Providers. Water services include both water supply and sanitation.

Water Service Authorities

This policy designates Urban Local Authorities (ULAs or Urban Councils) and Rural District Councils (RDCs) as Water Services Authorities who have a duty to ensure efficient, affordable and sustainable access to water services are provided for all their current and potential consumers.

Water Service providers

The responsibility at operational level of providing water supply and sanitation services may be delegated by a ULA or RDC to a designated Water Services Provider which is a legal entity capable of

carrying out water supply and sanitation services on behalf of the ULA or RDC. Service Authorities will have the power and authority (through a revision of the Urban Councils Act and the Rural District Councils Act), to enter into contractual agreements with Service Providers if they do not supply the services themselves. Service Providers will be legal entities (public, private or mixed) that have the capacity to provide water supply and sanitation services to Service Authorities. A Service Provider could be ZINWA/NWSSU, Private Sector or any other legal entity. Individual ULAs and RDCs will have flexibility to decide on the model they want. The term "Water Services" includes water supply and sanitation services. They will collect payments from consumers based on government approved tariffs.

1.3.4 Establishment of a Water and Wastewater Services Regulatory Unit (WWSRU)

A Water and Wastewater Services Regulatory Unit will be set up as a section under Ministry of Water Resources Development and Management to:

- (i) Monitor all Water Supply and Sanitation Services;
 - (ii) Receive and assess tariff applications in collaboration with relevant ministries such as MLGRUD and MAMID; and
 - (iii) Oversee the licensing of Water Service Providers by Water Services Authorities.
- WWSRU will ensure that consultations among Water Service Authorities, Water Service Providers and Consumers are undertaken prior to adjustment of tariffs.

1.3.5 User payment for services

Users will cover at least recurrent costs of operation and maintenance of WSS infrastructure

1.3.6 Affordable service standards

Appropriate service standards that will not compromise basic WSS and for which the recurrent costs for affordable to users will be adopted, in particular during the recovery phase.

6.7 Water for primary needs

Water for primary needs is a RIGHT for all Zimbabweans – Primary Water is defined below. Access to WSS services in sufficient quantity and adequate quality to sustain life is a human right which is accompanied with the responsibility of all to meet their obligations to other users and water service providers. Equity in access to primary water by all Zimbabweans is a right. Specific attention to equity, that takes into account the different needs of different communities and inclusion of disadvantaged communities are integral to realising this right. Water for purposes other than to meet basic human needs is not a right.

Water required to meet basic human needs, termed 'Primary Water', shall be given the first and highest priority in the provision of WSS services. It includes water for direct personal consumption, personal household hygiene, food preparation and for household productive purposes such as gardening and household stock watering, not for commercial purposes.

In urban settings, because water treatment, transmission, storage and distribution through networks is expensive, primary water needs are based on lifeline tariffs and only in cases where people cannot afford to pay, can free life saving water per household of 10m³ per month be supplied. Given the administrative difficulty of determining who cannot pay, the option to provide 10m³ per month of free or cheaper water to all, accompanied with a 2 or 3 stage rising block tariff regime will be examined. This option permits poorer consumers to manage their consumption so that they stay within an allocation they can afford.

6.14 Water pricing

To achieve efficiency, water prices will be based on the user pays and polluter pays principles and be socially acceptable to different interest groups in the water sector. Subsidies will be targeted to users who are not in a position to pay the full cost of the service or where national interests would be compromised.

Water pricing will reflect the full costs of provision of water for all uses (capital and recurrent costs), except for primary water where the price will at least reflect the operation and maintenance costs during the recovery period and gradually shift towards full cost recovery during normal development.

Water pricing affects the economy as a whole and can impact the financial viability of activities dependent on the use of water. Water pricing therefore needs to be determined on the basis of thorough analysis of the impacts of the price of water in water dependent sectors. For hydropower generation the price will reflect the non-consumptive use of water.

Water pricing will be used as a demand management instrument to encourage efficient use of scarce water resources. Water pricing should be based on the quantity of water used by volume to manage demand and encourage conservation. Blend pricing is a form of cross subsidisation and does not comply with the principle of pricing covering the full costs of investments and operation and maintenance.

7.4.2 Service authorities and service providers

Urban local authorities are responsible for ensuring the welfare of urban residents through the provision of efficient and affordable water supply and sanitation services. However, a distinction is made between the responsibility of urban authorities to ensure that services are provided and the actual operation of services which may be more efficiently undertaken by a dedicated service provider as a function delegated by the local authority.

Designation of ULAs as water service authorities: In terms of this policy, Urban Authorities are designated as Water Services Authorities who have a duty to ensure efficient, affordable and sustainable access to water services for all their current and potential consumers.

Designation of water service providers: The responsibility at operational level of providing water supply and sanitation services may be delegated by a ULA to a designated Water Services Provider which is a legal entity capable of carrying out water supply and sanitation services on behalf of the ULA. Service Authorities will have the power and authority (through a revision of the Urban Councils Act), to enter into contractual agreements with Service Providers if they do not supply the services themselves. Service Providers will be legal entities that have the capacity to provide water supply and sanitation services to Service Authorities, and may be public, private or mixed entities. A Service Provider could be ZINWA/NWSSU, a private sector company or any other legal entity. Individual ULAs will have flexibility to decide on the model they want. Where a local Authority decides not to delegate the services and instead offer the services itself, it will utilise a ring-fenced entity within its local government structure, subject to the approval by the WWSRU.

Water Service Providers' contracts with local government will be subject to the oversight and approval of WWSRU. Contracts will include service targets and performance standards together with monitoring schedules and penalties for non-delivery and non-compliance.

Government Notice 164 of 1913

The by-law has provisions on removal of water meters, cut-off of water supply, limitation of water supply and prohibition or restriction of the uses of water.

Section 48 "The Council may, at any time at its own expense, disconnect and remove any meter and affix and substitute any other meter at its discretion".

Section 49 " The quantity of water which shall be registered by the meter as having been supplied to any consumer shall be deemed to be the quantity actually so supplied. The quantity of water so registered shall be paid for by such consumer at the rate or charge for the time being fixed by the tariff of the Council for water supplied by measure.

Every account for the supply so registered shall become due and payable on the date stated therein, and the service of such account in terms of section *sixty-one* of these Regulations shall constitute notice that the supply of water may be cut off if payment is not made on or before such date"⁹.

Section 59 " The Council may at any time limit the supply of water to such hours as it may decide, and prohibit water supplied by it to be used for any other purpose than domestic purposes".

⁹ added to by Amendment (No.9) RGN 489/52 with effect from the 30th May, 1952

Section 65 ” (1) The Council shall have the right at any time, without paying compensation and without prejudicing its rights to obtain payment for water supplied to any consumer, to prohibit or restrict the use of water from the municipal mains for the following purposes or any of them¹⁰—

- (i) watering or irrigating lawns, gardens or grounds, supplying fountains, washing paths or pavements, discharging water from taps or by means of a hose or otherwise over floors, windows, walls, trees, shrubs, flowers, grass, carriages, motor cars or other objects;
- (ii) filling swimming pools except for the first time after construction or after essential structural repairs, and except for the purpose of replenishing water lost as a result of normal use, evaporation or filter-cleaning;

(2) The Council may, on good cause being shown, and subject to such conditions as it may specify, exempt any person from any prohibition or restriction made in terms of [subsection \(1\)](#).

Right to Water Under Water Act (Chapter 20:24) and Structure of Act

The Water Act whose date of commencement was 1 January, 2000 aimed:

‘To provide for the development and utilization of the water resources of Zimbabwe; to provide for the establishment, powers and procedures of catchment councils and sub-catchment councils; to provide for the grant of permits for the use of water; to provide for the control of the use of water when water is in short supply; to provide for the acquisition of servitudes in respect of water; to provide for the protection of the environment and the prevention and control of water pollution; to provide for the approval of combined water schemes; to provide for matters relating to dam works; to repeal the Water Act [Chapter 20:22]; and to provide for matters incidental to or connected with the foregoing’¹¹.

The Act is presently administered by the Minister of Lands, Agriculture, Water, Climate and Rural Resettlement, who is afforded extensive executive powers under the Act.

1. Human Right to Water Under the Act

The Act establishes for powers of the Minister which include ensuring availability of water to all citizens for primary purposes; provision of affordable water to consumers in under-privileged communities; sufficiency of the country’s water resources to meet the reasonable needs of the nation; ensure quality and quantity of the country's water resources and regulating the supply of water by any person to consumers with respect to the quality of the service provided to consumers.

¹⁰ substituted by RGN 856/51 w.e.f. 19th October, 1951 and added to by RGN 621/73 w.e.f. 15th June, 1973

¹¹ Water Act (Chapter 20:24)

The 1976 Water Act attached water rights to land and title deeds. No one could easily sell the water right without relinquishing his or her land. The major shortfall of the 1976 Water Act was that it gave large scale commercial farmers who were mainly white section of Zimbabwean population, more access to water than other sections of the community. The 1976 Water Act excluded people without private land to use water for commercial agriculture. The term water right was by then given an impression of an inalienable right like the Bill of Rights in national constitution. Ground water was therefore viewed as a private resource and the Act also provided exemption permits for pollution with provisions for fines being low that it was not deterrent enough to stop pollution. The 1998 Water Act was enacted to respond to these challenges.

Section 4 (1)states that “no person shall be entitled to ownership of any water in Zimbabwe and no water shall be stored, abstracted, apportioned, controlled, diverted, used or in any way dealt with except in accordance with this Act”¹². The section prohibits private ownership of water. Section 6 (1)(b) mandates the Minister “to ensure the availability of water to all citizens for primary purposes and to meet the needs of aquatic and associated ecosystems particularly when there are competing demands for water.”¹³ Section 6(2)(d) of the same Act obliges the Minister to take into account the access needs of poor consumers by imposing a duty to “secure the provision of affordable water to consumers in under-privileged communities”¹⁴.

a) Powers of the Minister

Section 6 (1) For the purposes of this Act, the functions of the Minister shall be—

(a) to develop policies to guide the orderly and integrated planning of the optimum development, utilization and protection of the country's water resources in the national interest; and

(b) **to ensure the availability of water to all citizens for primary purposes** and to meet the needs of aquatic and associated ecosystems particularly when there are competing demands for water; and

(c) to ensure the equitable and efficient allocation of the available water resources in the national interest for the development of the rural, urban, industrial, mining and agricultural sectors.

(2) In the performance of his functions in terms of subsection (1), it shall be the duty of the Minister—

(a) to provide overall policy guidelines on the development, exploitation and utilization of water resources, ensuring that all components of the water cycle such as ground water surface water, evaporation, clouds and rainfall are recognized as being interdependent and forming part of a single water cycle;

(b) to ensure that water resources are managed, utilized and conserved in a manner consistent with national environmental approaches provided for in any enactment;

(c) to encourage participation by consumers in all the sectors referred to in paragraph (c) of subsection (1) and catchment councils in the development, exploitation and distribution of water resources;

¹² Water Act (Chapter 20:24)

¹³ IBID

¹⁴ IBID

- (d) **to secure the provision of affordable water to consumers** in underprivileged communities;
- (e) to ensure that water resources are utilized at all times in an efficient manner having special regard to its value and the economic and other benefits that may be derived from it;
- (f) to give effect to any international agreement, to which Zimbabwe is a party, on shared water course systems in a spirit of mutual co-operation;
- (g) to ensure that research is carried out and information is obtained and kept, on hydrological and hydrogeological matters such as—
 - (i) **the quality and quantity of the country's water resources;**
 - (ii) the utilization of the country's water resources;
 - (iii) resources needed to develop the country's water resources sufficient to meet the reasonable needs of the nation;
- (h) to promote efficiency and economy in the utilization of water resources and to encourage the use of water-saving technologies;
- (i) to regulate the supply of water by any person to consumers with respect to—
 - (i) **the quality of the service provided to consumers;** and
 - (ii) the protection of consumers from exploitation; without, however, impairing the efficiency of the person's operations;
- (j) to fix criteria for water allocation and the issue of permits for the use of water by catchment councils;
- (k) generally, to fix standards to be maintained in the exploitation, utilization, conservation and management of water resources , in respect of environmental water quality standards as set by the Minister for Environment in terms of the Environmental Management Act [Chapter 20:26].

Whilst the Sections on ownership of water and powers of the Minister have some good citations banning privatization of water and providing for availability, affordability, sufficiency and quality of water; Sections 4 and 6 have serious challenges on good governance. Powers are centralized in the Executive through the President and Minister responsible for water. The Act specifies that all water is vested in the President. Section 4(1) states that “no person shall be entitled to ownership of any water in Zimbabwe”. Therefore the faint legal content of the human right to water are placed under Ministerial powers rather than inalienable right accorded to citizens as specified under Section 77(a) of the 2013 Constitution of Zimbabwe.

The Act provides for appointment of officers and Secretary who may be necessary to carry out provisions of the Water Act and the exercise of their functions are subject to the directions and orders of the Minister. The Minister may delegate his or her powers to the Secretary or National Water Authority (ZINWA) as he or she thinks fit. Powers of officers and Secretary are contained on Sections 9 and 10.

The Minister after consultation with the National Water Authority, may in terms of water resource planning and development declare any catchment area a river system. Sections 12 and 13 compel the National Water Authority and Catchments to formulate a water development plan “for the purpose of ensuring the optimum development and utilization

of water resources in Zimbabwe”¹⁵. The outline plan indicate among other things major water uses, permissible levels of pollution, extent to which actual volumes within the river system should be apportioned between public and private development as well as specify the proportion of the available water in any catchment area within the river system concerned which should be reserved for indefinite period for future use or for the benefit of the environment. The outline plan indicates priorities in the utilization and allocation of water. Minister responsible for water is obliged to “give notice of the outline plan in the Gazette”¹⁶.

Minister responsible for water, in consultation with the Zimbabwe National Water Authority may by Statutory Instrument establish a Catchment Council whose functions, powers and procedures of operations are contained on Sections 21, 22 and 23 respectively. A Catchment manager does the day to day management and administration of the affairs of a catchment council. Catchment Council among other functions, regulate and supervise the exercise of rights to, and use of, water in respect of the river system for which it is established¹⁷.

b) Use of Water

Although there is no definition of underprivileged and though powers to balance concerns of the marginalized are vested in the Minister, the Act recognize the right to primary water. The right to water for primary uses implies that abstraction of water for primary purposes without storage does not require a permit. Generally permits are required for storage capacity of more than 5000 cubic meters (Section 32(2) & (4)), though catchment councils can limit abstraction of water for primary purposes if it is in the public interest and for ensuring equitable distribution (Section 33(1)). This limitation is subject to the Minister’s approval (Section 48).

S 32 Use of water for primary purposes

(1) Subject to section thirty-three and Part IX, any person may abstract water for primary purposes:

Provided that this subsection shall not be construed as conferring on any person a right, which he would not otherwise possess, to enter or occupy any land for the purpose of abstracting the water.

(2) A person who intends to construct water storage works capable of storing not more than five thousand cubic metres of water on a public stream for the storage of water for primary purposes shall in writing notify the catchment council, every other owner, lessee or occupier of riparian land which is contiguous to the proposed water storage works that—

(a) he intends to construct the proposed water storage works; and

(b) such owner, lessee or occupier may, on payment of an agreed proportion of the cost of construction and maintenance of the proposed water storage works, participate in the benefit of them.

(3) Any dispute concerning—

¹⁵ Water Act (Chapter 20:24)

¹⁶ Section 15(2)(a)

¹⁷ Section 21(1) (c)

- (a) the quantity of water abstracted, used or stored or the method of abstracting, using or storing water for primary purposes in terms of subsection (1); or
- (b) the cost referred to in paragraph (b) of subsection (2) or the proportion of such cost to be paid by the respective owners, lessees or occupiers concerned; shall be determined by a catchment council.
- (4) Notwithstanding this section, no person shall construct in a public stream water storage works capable of storing more than five thousand cubic metres of water for primary purposes except in terms of a permit issued in terms of this Part.

S 33 Power of catchment council to limit quantity of water abstracted for primary purposes

- (1) Notwithstanding anything contained in this Act, a catchment council may, if it thinks it necessary in the public interest to ensure the equitable distribution and use of water, by notice in the Gazette—
 - (a) a limit the quantity of water which may be abstracted for primary purposes by any person or class of persons within any area from any source of water;
 - (b) specify the maximum number of livestock an individual owner is entitled to water for the primary purposes.

c) Establishment of a Water Fund

Section 77 of the 2013 Constitution of Zimbabwe subjected fulfillment of the human right to water to the availability of resources. Section 69(2)(a) mentions the Water Fund which is established under the 1998 Zimbabwe National Water Authority Act.

Conclusion and Recommendations

The Water Act (Chapter 20:24) needs review so that it captures the human right to water provisions contained in the 2013 Constitution of Zimbabwe. Provisions on the human right to water dotted in other Acts of Parliament should be incorporated in the Water Act. The extent and power of Minister should echo the devolution clause in the Constitution so that there is good governance on water service delivery. The 2013 National Water Policy needs review and should echo the human right to water framework contained in the 2013 Constitution of Zimbabwe. Government Notice 164 of 1913 need review and should echo Section 86 the Constitution of Zimbabwe on limitations of rights

Recommendations on Principles that Should Guide Review of Water Act (Chapter 20:24)

a) Principle 1: Legal Content of the Human Right to Water

The Water Act (Chapter 20:24) should explicitly state the legal content of the human right to water provided for in the following Sections of the Constitution of Zimbabwe:

- i) Section 77(a) accords “every person the right to safe, clean and potable water” and “the state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right”.
- ii) The Act must spell out progressive realization as opposed to retrogressive measures.
- iii) The Act must provide for availability, accessibility (physical and economic), acceptability and quality of potable water.
- iv) The Act must provide for funding for potable water provision (resource availability).
- v) Section 46(1)(c) when interpreting human rights “a court, tribunal, forum or body **MUST** take into account international law and all treaties and conventions to which Zimbabwe is a party”. Zimbabwe is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR). General Comment 15 of ICESCR entitles everyone to **sufficient, safe, acceptable, physically accessible and affordable** water for personal and domestic uses.
- vi) The Act must specify what constitute sufficiency of water supply; safety of potable water; affordability of potable water and the minimum distance to be travelled for one to access potable water.

b) Principle 2: Respect, Protection and Fulfillment of the Human Right to Water

- i) Section 44 “The state and every person, including juristic persons and every institution and agency of the government at every level must respect, promote and fulfill the rights and freedoms set out in this Chapter”.
- ii) Section 68(1) “Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair”.
- iii) Section 68(1) “Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct”.
- iv) Section 86(2) “The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including: nature of the right; purpose of limitation; nature and extent of limitation;

- relationship between limitation and its purpose; less restrictive measures; and avoiding prejudicing rights and freedoms of others.
 - v) The Act must provide legal procedures, grounds, limitations and processes for water disconnections.
 - vi) The Act must specify obligations on the human right to water.
- c) Principle 3: Principles Underlying the Promulgation of the Human Right to Water.**
- i) Section 56(3) Equality and non-discrimination. “Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as *inter alia* gender, age and economic status.
 - ii) Section 62(1) and (2) Access to information in so far as the information is required in the interests of public accountability and exercise or protection of a right.
 - iii) Section 194(1)(e) “People’s needs must be responded to within a reasonable time, and the public must be encouraged to participate in policy-making”.
 - iv) Section 194(1)(f) “Public administration must be accountable to Parliament and to the people”.
 - v) Section 194(1)(h) “transparency must be fostered by providing the public with timely, accessible and accurate information”.
 - vi) The Act must target economically deprived areas on access and set framework for affordable tariffs.
 - vii) The Act must define framework on access to information on services rendered; knowledge of all rights, duties and penalties to which consumers may be subjected to; access to service delivery manual and periodic reports as well as public awareness.
 - viii) The Act must define principles of stakeholder participation.
 - ix) The Act must establish complaint handling procedures.