The Right to Water: A Comparative Study of Law in Indonesia and South Africa

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Abstract
Water is essential for human life, so it cannot be denied that water has an important role in fulfilling other human rights, such as the right to life and the right to health. This implies the importance of good regulations related to water resources to ensure access and fulfillment of the right to water. This research seeks to answer the question of how regulations related to the right to water in Indonesia and South Africa compare, and most importantly whether these regulations are in accordance with international conventions, namely General Comment Number 15 on the Right to water. South Africa was chosen as a comparative country because its Constitution explicitly mentions the right to water for its people. This research was conducted using a comparative method of relevant laws related to the regulation of the right to water in Indonesia and South Africa. The results showed that Indonesia and South Africa have good regulations related to the right to clean water. Regulations related to water resources in both countries also support the efforts of both countries to fulfill the right to water.

Keywords: Human Rights, Right to Water, Water Resources Regulation

1 This research was funded by the Unit Riset dan Publikasi of the Faculty of Law, Universitas Gadjah Mada. This research was carried out in the framework of the Student Research Grant of the Faculty of Law, Universitas Gadjah Mada in 2023.
A. Introduction

Water is an essential need for the life of living things. Water is essential as an enabler and sustainer both of life such as plants, animals, and humans, and of human civilization. In addition to consumption, water is also used in agriculture, plantations, industry, power generation, and so on. Increasing population and rapid development can affect the existence of water resources, including the availability of clean water for humans. The availability of clean water is affected by water pollution caused by population density and economic growth. Data from The United Nations World Water Development Report 2018 shows the following graph:

Graph 1. Comparison of Increased Water Demand, Population, and GDP

(Source: Boretti & Rosa., 2019)

The graph shows that water use continues to increase, which is influenced by the increasing population and growth of the world economy. This raises concerns about access to water in the future, even though water is categorised as a right. The right to water means giving everyone the right to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and household use. Water as a community right requires the state to carry out its obligation to fulfil the community’s right to water, especially clean water. Clean water is essentially water that is free from physical, chemical, and biological pollutants and can be used for purposes such as drinking, bathing, and cooking.

On the one hand, the state has the right to regulate the allocation and utilisation of existing natural resources. On the other hand, the state is also obliged to provide fair access to everyone to the benefits of existing natural resources, including fair access to clean water. The allocation and utilisation of water resources must provide fair access in the community, every community has the right to have equal access to clean water. Efforts that can be made by the state in fulfilling clean water can be done through legislation and policies. Caponera argues that:

“…a well conceived water legislation may constitute a means to implement water policy decisions and facilitate the rational utilization of water resources, while an inadequate water legislations can act as a hindrance to this utilization.”

In July 2010, through resolution 64/292, the UN General Assembly explicitly recognised the right to water as an embodiment of human rights. However, United Nations-Water said that billions...
of people still live without safely managed water and sanitation, especially marginalised groups who are often ignored, and sometimes face discrimination when they try to access the water services they need. Governments should take a human rights-based approach to improving water access, so that no group is left behind.\textsuperscript{10} The state has the principle of permanent sovereignty over its natural resources.\textsuperscript{11} Therefore, the state through its rights over the utilisation of natural resources is also obliged to fulfil the right to water with social justice.

In Indonesia, the regulation of water resources has been regulated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that “the earth, water and natural resources contained therein shall be under the control of the state and shall be utilised for the greatest prosperity of the people”. This provision implicitly indicates that the state has the obligation to guarantee every citizen access to water. Although Indonesia has abundant water resources, only 20\% of Indonesians have access to clean water, so there are still around 80\% of Indonesians who use water that is not suitable for health.\textsuperscript{12} Although regulations and policies on water in Indonesia have been established, the unequal access to clean water shows that Indonesia has not maximally realised social justice for clean water.

The problem of unequal access to clean water is not unique to Indonesia. It is also experienced by South Africa. South Africa has included the right to water in its constitution. South Africa states in its constitution that everyone has the right to have access to sufficient water.\textsuperscript{13} However, the provision of clean water in South Africa is also

\textsuperscript{13} Article 27 paragraph (1) letters b \textit{Constitution of the Republic of South Africa}, 1996.
an ongoing issue. By 2022, according to Greenpeace.org, 19% of the rural population in South Africa will not have access to a reliable water supply.\textsuperscript{14} Even still according to the same source mentioned, that water resources are distributed very unevenly, causing millions of South Africans to have to take drinking water taken in reservoirs more than 400 km away. Furthermore, Article 27 paragraph 2 of the South African Constitution states that:

"States shall take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of each of these rights".

The condition of the problem of access to clean water for the community in both countries is more or less the same, namely the existence of inequality regarding access to clean water. This illustrates that in both Indonesia and South Africa, the implementation of state obligations towards the fulfilment of access to clean water is still not optimal. In fact, access to clean water is the right of every person. Through these problems, it is necessary to analyse how the responsibilities of Indonesia and South Africa in fulfilling the right to clean water for their people, where the role of the state can be seen through the regulations that have been made. Regulation is one of the three important factors that influence the availability of water in an area, apart from the existence of adequate water resources, and the existence of infrastructure for water supply.\textsuperscript{15}

The urgency of conducting this research is because based on the data previously described, previous research shows that access to clean water for people in Indonesia is still unequal.\textsuperscript{16} Responding to this, this research is conducted with a comparative law study with the aim of providing a legal picture of the regulation of the right to water that is not only limited to the level of national law. The


\textsuperscript{15} Fadjri Alihar, “Penduduk dan Akses Air Bersih di Kota Semarang”, Jurnal Kependudukan Indonesia, Jakarta, Badan Riset dan Inovasi Nasional, Vol. 13, Num. 1, 2018, p. 70.

selection of South Africa as the object of this comparative research is based on the South African Constitution which has included provisions on the right to water. This research is also the first comparative legal research that focuses on the regulation of the right to water in Indonesia and South Africa.

This research is a type of normative research. This legal research uses a statutory approach, a comparative approach, and a conceptual approach. This research uses secondary data collected by means of desk research through literature study or document study. The data obtained in the research will be analysed by means of qualitative analysis presented in the form of text descriptions. The data that has been collected will then be categorised with the aim of adjusting to the needs in this study. Then the results of the research will be presented descriptively to describe the results of the research as a whole.

This research is expected to contribute to the future development of national law, particularly the optimisation of the fulfilment of the right to water in Indonesia. However, the law is not static, so legal changes are a necessity due to technological developments and the times.

B. Similarities and Differences in Regulations on the Fulfilment of the Right to Clean Water in Indonesia and South Africa

Similarities and differences in regulations regarding the fulfilment of the right to clean water can be seen starting from the highest regulations to the relevant regulations in both Indonesia and South Africa. The highest regulation in this case is the Constitution of the two countries, which in Indonesia is the Undang-Undang Dasar Negara Republik Indonesia (hereinafter abbreviated as UUD NRI 1945). Meanwhile, The South African Constitution is the Constitution of the Republic of South Africa. Apart from the constitution, the comparison of the regulation of the right to water also includes regulations at the level of laws in both countries that specifically mention the right to water.
Table 1. Compared regulations in Indonesia and South Africa

<table>
<thead>
<tr>
<th>Regulation in Indonesia</th>
<th>Regulation in Afrika Selatan</th>
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<tr>
<td>2. Undang-Undang Nomor 7 tahun 2019 tentang Sumber Daya Air.</td>
<td>2. Water Services Act No.108 of 1997;</td>
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1. **Comparison of Water Rights Arrangements in the Indonesian and South African Constitutions**

Under the Indonesian Constitution, the UUD NRI 1945 does not explicitly mention the right to water for communities. However, the 1945 Constitution has provisions that implicitly oblige the state (in this case the government) to fulfil the right to water. Firstly, Article 28H paragraph (1) UUD NRI 1945 which states that:

> “Every person has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy environment, and to receive health services.”

These provisions do not explicitly mention the right to water, but in order to realise other rights as mentioned in Article 28H, the right to water is mandatory and irreplaceable. In this position, access to clean water is a fundamental need for humans, therefore water is a basic human right.17 Based on its fundamental nature for humans, water plays an important role in fulfilling other human rights, such as the right to life and the right to health. Similar to Article 28H of the UUD NRI 1945, the fulfilment of the right to clean water is implicitly very important in realising the right to health. This right to health is enshrined in Law No. 36 of 2009 on Health (hereinafter referred to as the Health Law). Article 4 of the Health Law states that everyone has the right to health.

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Second, the provision that implicitly recognises the state’s obligation to fulfil the community’s right to water is Article 33 (3) of the UUD NRI 1945. Article 33 recognises the importance of water to meet the needs of the community, thus authorising the state to exercise control in order to realise the right to water. This article states that: “The earth, water, and natural resources contained therein shall be under the control of the state and shall be utilised for the greatest prosperity of the people”.  

As for South Africa, it also has regulations related to the right to water, even South Africa has specifically mentioned explicitly about the right to water in its constitution, namely the Constitution of the Republic of South Africa 1996. The Constitution plays a very important role in policy development in South Africa. Article 27 paragraph (1) letter b of the Constitution of the Republic of South Africa states that: “that everyone has the right to have access to sufficient water”. This provision in the South African Constitution then influenced the birth of the Water Services Act No.108 of 1997 and the National Water Act No.39 of 1998 in South Africa.

The explicit mention of the right to water in the South African constitution is positive. The reason is that the Constitution serves as the basic principles in the administration of a country and must always live up to the times (the living constitution). The regulation of the human right to water at the constitutional level shows South Africa’s seriousness in fulfilling the right to water for the people of South Africa. The constitution is generally recognised as the supreme law of the land. When rights are codified in the constitution, they can serve as a strong legal basis if people’s rights are violated by the state.

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18 Article 33 (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
or the private sector.\textsuperscript{21} This also applies to the right to water, which is explicitly regulated in the constitution, which is considered stronger than being regulated only at the level of law. Moreover, The right to water is also an important human right and a bridge to other human rights.\textsuperscript{22} The constitutional strengthening and protection of the right to water in South Africa stems from the fact that water is life.\textsuperscript{23}

This is where the differences between the Indonesian and South African Constitutions regarding the right to water can be seen. In Indonesia, the right to water is implicitly mentioned in the UUD NRI 1945, namely Chapter XA on human rights. South Africa explicitly mentions the right to water in the Constitution of the Republic of South Africa 1996, namely in Article 27 paragraph (1) letter b.

2. Comparison of Laws Governing Water Rights in Indonesia and South Africa

In Indonesia, the regulation of the right to water is explicitly mentioned in Undang-Undang Nomor 17 tahun 2019 tentang Sumber Daya Air or the Law Number 17 of 2019 concerning Water Resources (hereinafter referred to as the Water Resources Act). Referring to Article 3 letter A of the Water Resources Act, it is stated that the regulation of water resources aims to provide protection and ensure the fulfilment of people’s rights to water. The provisions regarding the right to water can also be seen in Article 6 of the Water Resources Act which expressly states that: “The State guarantees the people’s right to Water in order to fulfil the minimum daily basic needs for a healthy and clean life with sufficient quantity, good quality, safety, sustainability, and affordability”. Furthermore, further provisions regarding the fulfilment of the right to water in the Water Resources

\textsuperscript{22} Fachriza Cakrafaksi Limuris, Hak Rakyat Atas Air Bersih Sebagai Derivasi Hak Asasi Manusia Dalam Deklarasi Universal Hak Asasi Manusia, Jurnal Jentera, Jakarta Sekolah Tinggi Hukum Indonesia Jentera, Vol.4, Num.2, 2021, p.515.
\textsuperscript{23} CB Soyapi, \textit{Ibid}, p. 7.
Act according to Article 8 paragraphs (1) and (2) that:

(1) The people’s right to Water whose fulfilment is guaranteed by the state as referred to in Article 6 is a minimum daily basic need.

(2) In addition to the people’s right to Water whose fulfilment is guaranteed by the state as referred to in paragraph (1), the state prioritises the people’s right to Water as follows:
   a. daily basic needs
   b. people’s agriculture; and
   c. use of Water Resources for business needs to fulfil basic daily needs through the Drinking Water Supply System.

The provisions in the Water Resources Act, especially Article 6 and Article 8 paragraph (1) are very important in efforts to fulfil the right to water by the state (Government of Indonesia) towards its people. In this case, it can be interpreted that although the 1945 Constitution does not explicitly regulate the right to water, the regulations under it, namely the Water Resources Act, have outlined excellent provisions in efforts to fulfil the right to water for the people in Indonesia. The Water Resources Act not only regulates control by the state and the people’s right to water, but also regulates the government’s duties and authority over water resources (Chapter IV), provisions on water resources management (Chapter V), licensing (Chapter VI), water resources information systems (Chapter VII), empowerment and supervision (Chapter VIII), funding (Chapter IX), rights and obligations (Chapter X), community participation (XI), and coordination (Chapter XII).

Indonesia also has Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia or Law No. 39 of 1999 on Human Rights (hereafter referred to as the Human Rights Act). The Human Rights Act also does not explicitly mention the right to water. However, the Human Rights Act guarantees the fulfilment of other human rights. The realisation of these other human rights is inseparable from the fulfilment of the right to water. This can be seen in Article 9 of the Human Rights Law in realising the basic right, namely the right to life. As is known, the right to life cannot be separated from the fulfilment of the right to water. Water is mandatory and essential for
living things, including humans. This is reinforced by the fact that water is the largest component of the human body structure with a percentage of approximately 60%-70% of the weight of the human body.\(^\text{24}\)

In South Africa, the Water Services Act No.108 of 1997 outlines the national water supply and sanitation service delivery system, and service control. The preamble of this Act states, namely: “Recognises the right of access to safe water supply and basic sanitation necessary to ensure adequate water and an environment that is not harmful to health and well-being”. The Act also defines the human right to water and sanitation as mentioned in the explanation of Section 2 of Water Services Act No.108 of 1997, namely:

The main objects of this Act are to provide for:

a. the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being;

b. the setting of national standards and norms and standards for tariffs in respect of water services;

c. the preparation and adoption of water services development plans by water services authorities;

d. a regulatory framework for water services institutions and water services intermediaries;

e. the establishment and disestablishment of water boards and water services committees and their duties and powers;

f. the monitoring of water services and intervention by the Minister or by the relevant Province;

g. financial assistance to water services institutions;

h. the gathering of information in a national information system and the distribution of that information;

i. the accountability of water services providers: and

j. the promotion of effective water resource management and conser-

Section 3 of the Water Services Act No.108 of 1997 mentions the right of access to basic water supply and basic sanitation. This Act explicitly recognises the South African people’s right to water, which relates to access to water resources and sanitation. This can be seen in the explanation of Section 3, namely:

Right of access to basic water supply and basic sanitation

(1) Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

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

(4) The rights mentioned in this section are subject to the limitations contained in this Act.

Regulation on the right to water in South Africa is also regulated in the National Water Act No.39 of 1998. Based on Section 2 letters (a) and (b) of the National Water Act No.39 of 1998, it is stated that the purpose of this Act is to ensure that the country’s water resources are protected, used, developed, conserved, managed and controlled by considering, among others:

a. meeting the basic human needs of present and future generations;

b. promoting equitable access to water.

Water rights are further outlined in the National Water Act No.39 of 1998 Section 4 (1) on entitlement to water use that: “A person may use water in or from a water resource for purposes such as reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use, as set out in Schedule 1”. In addition to the Water Services Act No.108 of 1997, the legislative measures that are considered the most comprehensive in the regulation of water in South Africa are the National Water Act No.39 of 1998. Both Acts were passed following South Africa’s 1994 transition to a multiracial democracy. Both the Water Services Act No.108 of 1997 and the National Water Act No.39 of 1998 share the overriding principle.
of justice for all water users, including the need for the (South African) government to act to protect and safeguard water resources on behalf of all its people.\textsuperscript{25}

The similarity of the regulation as an effort to fulfil the right to clean water in Indonesia and South Africa is the existence of regulations that guarantee the fulfilment of the right to water for the people in both countries, especially to meet their basic needs. This provision can be seen in the Water Resources Act in Indonesia and the Water Services Act No.108 of 1997 in South Africa. In Indonesia, Article 6 of the Water Resources Act states that: “The State guarantees the people’s right to Water to fulfil their minimum daily basic needs for a healthy and clean life in sufficient quantity, good quality, safe, sustainable and affordable.”

In South Africa, the guarantee of the right to water to fulfil basic needs as stated in Article 2 and 4 of the National Water Act No.39 of 1998, where Section 2 letter a states: “to fulfil the basic human needs of present and future generations”. Meanwhile, Section 4 (1) of Water Services Act No.108 of 1997 also states “A person may use water in or from a water resource for purposes such as reasonable domestic use”. Reasonable in this case can mean adequate use of the water, meaning that it is not overused.

Based on the description above, the regulations governing the right to water in Indonesia and South Africa can not only be seen from the similarities, but also the differences. In particular, the fundamental thing that distinguishes regulations on the right to water in Indonesia and South Africa is the level of regulation. In Indonesia, UUDNRI 1945 essentially contains only the basic or principal rules of state life, while more detailed rules are usually set out further in the form of laws and regulations under it.\textsuperscript{26} This also applies to the right to water. Regulations governing the right to water for the commu-

ty are not explicitly outlined in the UUDNRI 1945, but are explicitly outlined at the level of the Law/Act, namely Water Resources Act.

Meanwhile, South Africa has regulations regarding the right to water starting from its Constitution, namely the Constitution of the Republic of South Africa. In terms of the level of regulation, the regulation on the right to water in the Constitution of South Africa is an advantage compared to Indonesia, where South Africa has explicitly regulated the right to water in the Constitution of the Republic of South Africa.

3. Compatibility between International Instruments and Water Rights Regulations in Indonesia and South Africa

The Universal Declaration of Human Rights (UDHR) does not explicitly mention the right to water. Article 25(1) of the UDHR asserts that: “everyone shall have the right to a standard of living that ensures health and well-being for himself and his family, including food, clothing, housing and health care and necessary social services.”27 The UDHR is the basis for the recognition, respect and fulfilment of human rights. The implementation of these rights is then regulated in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR was adopted by the United Nations General Assembly under Resolution 2200A (XXI) on 16 December 1966,28 as was the ICESCR.29

The Government of Indonesia has ratified the ICCPR on 28 October 2005 through Law of the Republic of Indonesia Number 12 Year 2005 on the Ratification of the International Covenant on

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Civil and Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik). The Indonesian government has also ratified the ICESCR on 28 October 2005. This ratification was marked by the issuance of Law No. 11/2005 on the Ratification of the International Convenant on Economic, Social and Cultural Rights (Kovenan Internasional tentang Hak-hak Ekonomi, Sosial dan Budaya). With the ratification of these two covenants, the Government of Indonesia is legally bound to guarantee the rights mentioned in the covenants. This is in line with the opinion that all aspects of life, nation and state are based on law.

Meanwhile, South Africa also ratified the ICESCR on 12 January 2015. South Africa became the 163rd State Party to the International Covenant on Economic, Social and Cultural Rights. South Africa ratified the ICCPR in 1998. Similar to Indonesia, South Africa is also obliged to guarantee and realise the human rights stipulated in the two international covenants. The right to water is an integral part of human rights. Materially-substantially, the right to water is part of the economic, social and cultural rights (ICESCR) Article 11 on food.

30 Undang-Undang Republik Indonesia Nomor 12 Tahun 2005 Tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik).
clothing and housing and Article 12 on health.\(^{35}\)

On 28 November 2002, the Committee on Economic, Social and Cultural Rights then provided its views on the right to water through General Comment No.15. This General Comment interprets the 1966 ICESCR which affirms the right to water in international law.\(^{36}\)

In this regard, the General Comment serves to clarify the content of treaty rights in greater detail, may outline potential violations of those rights and provide advice to states parties on how best to comply with their obligations under the treaty.\(^{37}\) General Comment No. 15 on the Right to Water has two normative content, namely:\(^{38}\)

a. The right to water contains freedoms and rights. These freedoms include maintaining access to water for the fulfilment of the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnection or contamination of the water supply. In contrast, “rights” include the right to a water supply and management system that allows equal opportunity for everyone to enjoy the right to water.

b. The elements of the right to water must be adequate for human dignity, life and health. Water should be treated as a social and cultural good, not just an economic good. The fulfilment of the right to water must also be sustainable, ensuring that the right can continue to be fulfilled for present and future generations.

The regulations governing the right to water in Indonesia and South Africa are consistent with General Comment No.15. The right to water in the General Comment is outlined in Article 2 that:

“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death

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from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”

In Indonesia, the Water Resources Act explicitly mentions the guarantee of sufficient water to fulfil basic daily needs. Article 6 of the Water Resources Act states that: “The State guarantees the people’s right to water to fulfil their minimum daily basic needs for a healthy and clean life in sufficient quantity, good quality, safe, sustainable and affordable”. In South Africa, Section 2 of the Water Services Act No.108 of 1997 specifically mentions the right of access to basic water supply and basic sanitation, namely: “the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being”. In addition, Section 4 (1) of the Water Services Act No.108 of 1997 also states “A person may use water in or from a water resource for purposes such as reasonable domestic use”. These provisions are in direct conformity with the provisions of General Comment No.15 on the right to water.

According to Article 6 of the Water Resources Act, the state guarantees the right to water that is safe, sustainable, and accessible to the people. With the guarantee of the right to water, the state is obliged to ensure access to water for the people. Section 3 paragraph (1) of Water Services Act No.108 of 1997 states that: “Every person has the right of access to basic water supply and basic sanitation.” In general, both regulations are in accordance with Article 10 of General Comment No.15, namely:

“The right to water contains both freedoms and rights. Freedoms include the right to maintain access to existing water supplies necessary to fulfil the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnection or pollution of water supplies. Conversely, rights include the right to a system of water supply and management that provides equal opportunities for people to enjoy the right to water.”

C. Conclusion

The right to water in Indonesia and South Africa are similar in their
regulatory aspects. The regulations in both countries have accommodated the state’s goal to fulfil the right to water for the people. The regulation of the right to water in both countries is generally in line with General Comment No.15 which places water as a right for everyone and the state has an obligation to implement it. The difference between the regulations in the two countries lies in the level of regulation. South Africa has a right to water regulation that is explicitly mentioned in its constitution, namely in Article 27 paragraph 1 of the Constitution of the Republic of South Africa, 1996. South Africa also has regulations that specifically address the right to water in the Water Services Act No.108 of 1997 and the National Water Act No.39 of 1998. As for the Indonesian Constitution, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 does not explicitly mention that the state is obliged to fulfil people’s right to water. However, the phrase right to water has been specifically mentioned in regulations under the UUD NRI1945, namely Law No. 17 of 2019 on Water Resources. Based on the results of this study, the problems related to inequality of water rights in Indonesia and South Africa are not entirely influenced by regulatory factors, Instead, regulation can be important in ensuring the fulfilment of the right to water in both countries.

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