



South Africa's water crisis: The idea of property as both a cause and solution

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1 INTRODUCTION

Water is an essential¹ but scarce resource.² According to a report on

¹ Water is essential for people, plants and animals to survive on earth. Water is further vital for inter alia health, religious purposes, as well as responsible socio-economic growth. Barrett D & Jaichand V "The right to water, privatised water and access to justice: tackling United Kingdom water companies' practices in developing countries" (2007) November 3, 2006 *South African Journal of Human Rights* 561; Crow B & Sultana F "Gender, class and access to water: three cases in a poor and crowded delta" (2002) 15(8) *Society & Natural Resources: An International Journal* 709; Cullet P *Water law, poverty, and development water reforms in India* (Oxford: Oxford University Press 2009) 8-17; Seckler D, Barker R & Amarasinghe U "Water scarcity in the twenty-first century" (1999) 15 *International Journal of Water Resources Development* 29; Thompson H *Water law a practical approach to resource management & the provision of services* (Cape Town: Juta 2006) 3; Vandermyde R "My water, my rights: ethics and implications of water privatisation" (2015) available at <http://digitalcommons.augustana.edu/cgi/viewcontent.cgi?article=1001&context=ethicscontest> (accessed 17 April 2017).

² Thompson (2006) 1; United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 15 "The right to water" (Articles 11 & 12 of the Covenant) (29th session, 2003) [UN Doc E/C 12/2002/11] (20 January 2003).

South Africa's water sector in 2016,³ an estimated 663 million people worldwide do not have access to sufficient and safe water for domestic use.⁴ Due to factors, such as, water pollution,⁵ climate change,⁶ and population and industry growth,⁷ the demand for water is still on the increase.⁸ It is forecast that the world will face a 40 per cent water supply shortfall by 2030, which will unavoidably impact on the availability of drinking water, sanitation and food production.⁹ The said water report offers a particularly gloomy picture for South Africa: not only is the country plagued by severe hydrological drought conditions,¹⁰ but it has a poor record of water conservation, outdated and inadequate water treatment infrastructure, and faces lingering concerns about the quality and degradation of the already limited amount of available water.¹¹ In South Africa, the increasing scarcity of, and demand for, water result in prolonged conflicts¹² and catastrophes, including poverty¹³ and human suffering.¹⁴ South Africa's political history, characterised by a reality of inequitable access to water,¹⁵ adds additional and unique challenges to the field of water resource regulation. The water law framework under the previous political regime provided specifically for a category of "private water"¹⁶ and was heavily based on riparian rights that benefitted White riparian farmers, excluding the majority of South Africans from access to water rights.¹⁷

³ Barradas S, Shepherd D & Theron R (eds) "A review of South Africa's water sector" (2016) *Creamer Media's Water Report* 1-35.

⁴ Barradas, Shepherd & Theron (2016) 7.

⁵ Barradas, Shepherd & Theron (2016) 7.

⁶ Barradas, Shepherd & Theron (2016) 10-11.

⁷ Barradas, Shepherd & Theron (2016) 7.

⁸ In the light hereof, it is envisaged that the number of people directly affected by problems related to access to sufficient water is expected to increase to five billion by the year 2025. Rügger V "Water distribution in the public interest and the human right to water: Swiss, South African and international law compared" (2014) 10(1) *Law, Environment and Development Journal* 3; World Health Organisation & UNICEF "Progress on sanitation and drinking-water" (2013) available at http://apps.who.int/iris/bitstream/10665/81245/1/9789241505390_eng.pdf (accessed 26 March 2017).

⁹ Barradas, Shepherd & Theron (2016) 7; Takacs D "South Africa and the human right to water: equity, ecology, and the public trust doctrine" (2016) 34 *Berkeley Journal of International Law* 58.

¹⁰ Barradas, Shepherd & Theron (2016) 14.

¹¹ Barradas, Shepherd & Theron (2016) 14; Barrett & Jaichand (2007) 545; Gleick PH "The human right to water" (1998) 1(5) *Water Policy* 487.

¹² Gleick PH "Water and conflict: fresh water resources and international security" (1993) 18(1) *International Security* 79.

¹³ Cullet (2009) 17-19; Klasen S "Measuring poverty and deprivation in South Africa" (2000) 46(1) *Review of Income and Wealth* 33.

¹⁴ As far as it concerns socio-economic needs, specifically. Pienaar GJ & Van der Schyff E "The reform of water rights in South Africa" (2007) 3(2) *Law Environment and Development Journal* 181.

¹⁵ It is trite that access to land, and therefore natural resources attached to land, such as, water and minerals, were previously restricted and available only to the White minority of the country due to the strict apartheid policy that applied in South Africa. See the introduction of the *White Paper on a National Water Policy for South Africa* (1997).

¹⁶ Preamble of the National Water Act 36 of 1998.

¹⁷ Tewari DD "A detailed analysis of evolution of water rights in South Africa: an account of three and a half centuries from 1652 AD to present" (2009) 35(5) *Water SA* 702.

To rectify these inequalities, and to establish a society based on social justice and fundamental human rights, the first democratic government¹⁸ of South Africa promulgated the Constitution of the Republic of South Africa, 1996 (Constitution). Of specific relevance in the context of water resources, are the rights entrenched in sections 24 and 27. Section 24 provides for the right to have the environment, water resources included, protected for the benefit of present and future generations. Section 27(1)(b) affords the so-called right to access to sufficient water. The latter right imposes specific positive duties¹⁹ on the State.²⁰ The positive obligations of the State to realise the section 27(1)(b) water right against the backdrop of a history of inequitable access to water,²¹ is concretised by section 27(2). Section 27(2) stipulates that “the state must take reasonable legislative measures to achieve the progressive realisation of the right to have access to sufficient water”. In adherence to this obligation,²² the National Water Act 36 of 1998 (NWA) was promulgated.

The primary aim of the NWA was to “provide for fundamental reform of the law relating to water resources” in South Africa.²³ The preamble of the Act states that water is “a scarce natural resource that belongs to all people”. In the new water law dispensation, as introduced by the NWA, private control of water is abolished and the national government is appointed as the public trustee of the nation’s water resources.²⁴ A system that provides for water allowances granted at the discretion of government replaced the old system that provided for exclusive rights to water use that was generally to the detriment of the majority of South Africans.²⁵ From a property law perspective this transformation is very relevant, to the extent that it highlights important dimensions of the interface between property and water. Research done up

¹⁸ The terms “government”, “State” and “public authority” are often used interchangeably and synonymously. Unless a particular meaning is attributed to a specific term in this contribution, the term “State” refers to an independent and sovereign entity that can be distinguished from the other States, and has certain administrative tasks to be carried out for its proper functioning. These administrative tasks are carried out by the “government”. “Government” refers to the authoritative body responsible for the formulation and execution of policies which ensure law and order in the State. The term “government” includes the sum total of the legislative, executive and judicial bodies who are engaged in making, administering and interpreting the law. Following this understanding, the term “State” carries a meaning broader than a “government”. Both the terms “State” and “government” fall within the definition of “public authorities”.

¹⁹ Section 7(2) of the Constitution places a suite of positive and negative duties on the State to respect, protect, promote and fulfil all of the rights in the Bill of Rights. Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (Cape Town, Pretoria: University Press 2005) 30-56; *Jaftha v Schoeman and Others, Van Rooyen v Stolz and Others* 2005 (1) BCLR 78 (CC) [31-34]; Klare K “Legal culture and transformative constitutionalism” (1998) 14 *South African Journal of Human Rights* 149.

²⁰ Soltau F “Environmental justice, water rights and property” (1999) *Acta Juridica* 250, s 7(2) read with ss 27(1)(b) and 24(b)(i) of the Constitution.

²¹ Du Plessis AA “A government in deep water? Some thoughts on the state’s duties in relation to water arising from South Africa’s Bill of Rights” (2010) 19(3) *Review of European Community & International Environmental Law* 318.

²² Blumm MC & Guthrie RD “Internationalizing the public trust doctrine: natural law and constitutional and statutory approaches to fulfilling the saxon vision” (2012) 45 *University of California Davis Law Review* 788.

²³ Long title and s 2 of the NWA.

²⁴ Section 3 of the NWA.

²⁵ Pienaar & Van der Schyff (2007) 181.

to date neither established, nor confirmed, aspects, such as, whether the concept introduced an institutional regime change; or whether the notion of *res publicae* has been statutorily introduced through the concept of public trusteeship. The implications that the statutorily introduced concept of public trusteeship might have on water as property, and the property regime within which water is regulated in South Africa still have to be determined.

This article sets out to achieve two aims: i) to conceptually examine whether or not the idea of “property in water resources” may have contributed to South Africa’s water crisis, and ii) to question the extent to which the transformed property regime in terms of the NWA may offer solutions for some of the country’s persistent water problems. The discussion follows the following structure: the first part reviews the meanings attributed to the idea of property and property rights regimes; in the light of the latter analysis, the article proceeds to consider the causal nexus between the idea of property and the said water problems in South Africa; thereafter it examines the potential role of property in solving such problems.

2 THE IDEA OF PROPERTY

Property is a prominent notion that features in our everyday lives.²⁶ Yet, despite the importance of property, there is remarkably little scholarly work on what property in the legal context entails.²⁷ Renowned property law scholars, like Underkuffler, argue that even in prominent scholarly works, the author often assumes that he or she and the reader share a working understanding of “property”, moving almost directly to aspects, such as, the subject of property or the concept of ownership.²⁸ In fact, some proffer that the concept of property defies definition.²⁹ Factors hindering a single, comprehensive

²⁶ Gray K & Gray SF “The idea of property in land” in Bright S & Dewar JK (eds) *Themes and perspectives* (Oxford: Oxford University Press 1998) 15; McHarg A, Barton B, Bradbrook A & Godden L “Property and the law in energy and natural resources” in McHarg A, Barton B, Bradbrook A & Godden L (eds) *Property and the law in energy and natural resources* (Oxford: Oxford University Press 2010) 4; Snare F “The concept of property” (1972) 9 *American Philosophical Quarterly* 200; Trelease FJ “Government ownership and trusteeship of water” (1957) 45(5) *California Law Review* 639.

²⁷ It would be a mistake to assume that diverging conceptual or definitional approaches to the property concept is a new legal issue. Grace F *The concept of property in modern Christian thought* (Urbana: The University of Illinois Press 1953) 3; Kaser M *Roman private law* 2 ed (Durban: Butterworths 1968) 80; Lipton JD “A revised ‘property’ concept for the new millennium” (1999) 7 *International Journal of Law and Information Technology* 175; Longo JP “The concept of property and the concept of compensation on compulsory acquisition of land” (1983) *University of Tasmania Law Review* 279; Underkuffler LS *The idea of property: its meaning and power* (Oxford: Oxford University Press 2003) 11; Ziff B *Principles of property law* 5 ed (Toronto: Carswell 2010) 1.

²⁸ Bowen E “The concept of private property” (1925-1926) *The Cornell Law Quarterly* 41; George A “The difficulty of defining ‘property’” (2005) 25 *Oxford Journal of Legal Studies* 793; Underkuffler (2003) 11.

²⁹ The difficulty in defining property can be ascribed to a number of factors. The first of these is the difference in how lay people and lawyers understand the concept of property. Another would be that, when the meaning of property is examined (by both the layman and lawyer), the initial reaction seems to be an attempt to define only private property. The idea of property is recognised in both ordinary language as well as in various technical legal languages. Alchian AA “Some economics of property rights” (1965) 30 *II Politico* 817; Graham N *Landscape property, environment, law* (Oxfordshire: Routledge 2010) 25; Gray & Gray (1998) 15; Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (Cape Town: Oxford University Press 2009) 4; Mostert *The constitutional protection and regulation of*

definition of property include: (i) the context in which the concept property is used;³⁰ (ii) the function for which the concept is used;³¹ (iii) confusing use of terminology; and (iv) inconsistent use of the already perplexing terminology. Due to the limited scope of this contribution, it is not possible to explore the effect and relevance of each of these factors in depth. However, to provide a workable understanding of the idea of property for present purposes, brief reference is made to the function of the law of property, and more specifically, the function of the legal concept of property.³²

Waldron³³ argues that the function of the law of property is to provide a set of rules that governs access to, and the control of, a wide variety of resources. Waldron asserts the concept of property to have an allocative function when stating that property revolves around the idea that resources are separate objects that belong to particular individuals.³⁴ Sax explains this allocative function of property when he states that where property rights are assigned to individuals, at least in the example of land, ownership would “routinely produce socially desirable use allocations”.³⁵ This explanation, with its reference to ownership, however only speaks to the allocative function of private property. Although private property seems to be the most prominent property arrangement, it is not inclusive enough. The concepts of common property and public property, for example, provide different or alternative rules for the allocation of use and access rights to resources that fall outside the traditional “private” understanding of property.

It is submitted that when property rights are allocated, a complex set of rights and duties is established that characterises the relationship of individuals amongst each other with respect to a particular “object”, “thing” or “resource”. According to Glück,³⁶ this “complex of rights and duties” defines the property regime within which an “object”, “thing” or “resource” is regulated. It may be a private property regime, a common property regime or a public property regime.

property in South Africa and Germany. A comparative analysis (Heidelberg: Springer-Verlag 2002) 11; Mossoff A “What is property? Putting the pieces back together” (2003) 45 *Arizona Law Review* 372; Munzer SR *A Theory of property* (Cambridge: Cambridge University Press 1990) 16; Penner JE *The Idea of Property in Law* (New York: Oxford University Press 1997) 2; Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691; Van der Walt AJ “Property, social justice and citizenship; property law in post-apartheid South Africa” (2008) 19 *Stellenbosch Law Review* 328; Waldron J *The right to private property* (New York: Oxford University Press 1988) 26.

³⁰ Pienaar & Van der Schyff (2007) 188; Mostert (2002) 13-14.

³¹ Mostert (2002) 11.

³² Alexander GS & Peñalver EM *An introduction to property theory* (New York: Cambridge University Press 2012) 5.

³³ Waldron (1988) 35.

³⁴ Waldron (1988) 35.

³⁵ Sax JL “Some thoughts on the decline of private property” (1982) 58 *Washington Law Review* 487.

³⁶ Glück P “Property rights and multipurpose mountain forest management” (2002) 4 *Forest Policy and Economics* 129.

2.1 Private property regime

Private property regimes are the most familiar in property scholarship. This is so, because people typically want to know what is theirs, how and to what extent they may use it, and how they can protect it.³⁷

In a private property regime, ownership is a pivotal property right. The system of private property holdings generally refers to a “thing” as the “object” of a property right.³⁸ Although “ownership” offers only one possible way of allocating private property rights in a private property regime,³⁹ ownership provides to its holder, whether it is held by the government or an individual, the exclusive authority to determine how the resource, or thing, in question is used.⁴⁰ From the available literature it may be accepted that “ownership” generally refers to the most “complete”, “strong” or “absolute” right that a legal subject can have regarding property, a resource or a thing.⁴¹

Notably, these “absolute and complete” rights of individual ownership are not as “absolute” as one may expect.⁴² In fact, various limitations and duties are generally imposed on the rights or entitlements of an owner in a private property regime. On the topic of limitations, States or governments, for example, have a wide range of regulatory powers and have the discretion to limit the private property rights by way of inter alia statutory measures.⁴³ Private, exclusionary ownership rights may further be limited by private property rights of other individuals in terms of limited real rights (the rights of others), creditors’ rights,⁴⁴ and neighbour law.⁴⁵ Notably, the rights or entitlements of

³⁷ Merrill TW & Smith HE “What happened to property in law and economics?” (2001) 111(2) *The Yale Law Journal* 357.

³⁸ Things susceptible to the private property regime include independent corporeal or incorporeal objects, which are susceptible to legal control and which are valuable and useful to a legal subject or person. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* 5 ed (Durban: Butterworths 2006) 21-22.

³⁹ Waldron J “What is private property?” (1985) 5 *Oxford Journal of Legal Studies* 328.

⁴⁰ Goldberg JCP “Introduction: pragmatism and private law” (2012) 125 *Harvard Law Review* 1640; Van der Walt AJ *Constitutional property law* 3 ed (Cape Town: Juta 2011) 109.

⁴¹ Alchian (1965) 818; Katz L “Exclusion and exclusivity in property law” (2008) 58 *University of Toronto Law Journal* 278; Kaser M *Eigentum und Besitz im älteren römischen Recht* 2 ed (Wiemar: Böhlau 1956) 195; Vandeveld KJ “The new property of the nineteenth century: the development of the modern concept of property” (1980) 29 *Buffalo Law Review* 328; Van der Walt (2011) 109; Welch (1983) 166.

⁴² Van der Walt AJ “Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation” (2002) *Tydskrif vir die Suid-Afrikaanse Reg* 254; Van der Walt (2011) 109.

⁴³ Alchian (1965) 818; Katz (2008) 313.

⁴⁴ Badenhorst, Pienaar & Mostert (2006) 321; Van der Walt AJ & Pienaar GJ *Introduction to the law of property* (Claremont: Juta 2009) 86-88.

⁴⁵ In terms of the maxim “*sic utere tuo ut alienum non laedas*”, an owner may exercise his or her indefinite right to use, control and dispose of the property in question only to the extent that the use of the owner’s right does not damage that of his or her neighbour’s property. Van der Merwe CG *Sakereg* (Durban: Butterworths 1979) 185.

the private law owner (although they are restricted) are recognised in law and protected by various private law legal remedies.⁴⁶

In essence, therefore, the rules governing access to, and use of, resources in a system of private property are organised around the idea that resources are separate objects, each assigned and therefore exclusively belonging to an individual, accepted that its use may be limited by the State or other private individuals.

2.2 Common property regime

The common property regime is often contrasted with the private property regime. While the private property regime acknowledges that property may belong to a certain private individual, the common property regime refers to “things” that are open to all individuals.⁴⁷ The common property regime is particularly well-suited for the management of “common resources”, “common-pool” or “open resources”⁴⁸ (whose uses are available to all). The contrast between private property and common property is also evident from Barnes’s account which defines common property as rights of access rather than private rights of exclusion.⁴⁹ Because of their features, things regulated in a common property regime cannot belong to any person individually and are therefore asserted to have no owner. These things are perceived as “objects” subjected to special group entitlements, which allow all interested parties to make use of them. The notion of “common property” may be linked to the Roman law concept of *res omnium communes*. In accordance with the Roman law explanation of *res omnium communes*, the contemporary term “common property” is frequently used to refer to “interests for which there is a shared right of use conferred on all”.⁵⁰

The common property regime allocates rights, including, but not limited to, use, management, exclusion and access to a shared resource to a specific community or group of people to regulate the preservation, protection, maintenance, and consumption of the common resource.⁵¹ The rules that allocate rights to resources in the common

⁴⁶ Depending on the specific legal system or context at hand, such remedies include, for example, real remedies (*rei vindicatio*, *actio negatoria*, interdict, or declaratory order), delictual remedies (*actio ad exhibendum*, *condictio furtive*, and *actio legis aquiliae*), and the enrichment action. Badenhorst, Pienaar & Mostert (2006) 241-267; Van der Walt & Pienaar (2009) 144-164.

⁴⁷ Rose CM “Romans, roads, and romantic creators: traditions of public property in the information age” (2003) 66 *Law and Contemporary Problems* 923.

⁴⁸ Common or common-pool resources refer to systems where it is difficult to limit human access, or where one person’s use of the commons does not subtract a certain quantity from another user, the term open-access resources may refer to resources that are characterised by unrestricted access to all members of society. Barnes (2009) 2; Grafton RQ, Squires D & Fox KJ “Private property and economic efficiency: a study of a common-pool resource” (2000) 43 *Journal of Law & Economics* 680; Ostrom E “The challenge of common-pool resources environment” (2008) available at <http://www.environmentmagazine.org/Archives/Back%20Issues/July-August%202008/ostrom-full.html> (accessed 15 February 2017).

⁴⁹ Barnes (2009) 153.

⁵⁰ Ziff (2010) 8.

⁵¹ Barnes (2009) 153; Crow & Sultana (2002) 711; Ciriacy-Wantrup SV & Bishop RC “‘Common property’ as a concept in natural resources policy” (1975) 15 *Natural Resources Journal* 714; Grafton RQ, Squires D

property regime are organised on the basis that each resource is in principle available for the use of society alike.⁵²

2.3 Public property regime

In terms of the historic Roman law, *res publicae* included things belonging to the public; which had to be used in the interest of the public; and which were open to the public by operation of law.⁵³ The classic examples of Roman law *res publicae* were inter alia bridges, roads, harbours and rivers.⁵⁴ This preliminary Roman law understanding of *res publicae* provides a theoretical foundation for understanding the public property regime. The term *res publicae* (public property) seemingly describes the character of the ownership of public property, namely, public or State ownership; and it describes the use to which the property is put, namely, that the property should be used in the public interest.⁵⁵

In a public property regime, “things”, “objects” or resources generally vest in a government, public authority or the State.⁵⁶ Scholars therefore often refer to “State or public ownership” when deliberating “things” in a public property regime.⁵⁷ It should from the outset be emphasised that this public property conception of “ownership” is detached from the self-serving and exclusionary interests normally associated with private ownership.⁵⁸ The State does not hold the property with the same title as property that is for sale (private property).⁵⁹ It should rather be understood in the light of the judgment in *Anderson & Murison v Colonial Government*,⁶⁰ where De Villiers CJ conceptualised the idea that the State is the custodian of the seashore (the public property) on behalf of the public.⁶¹ More-recent studies reveal that the State’s legal title

& Fox KJ “Private property and economic efficiency: a study of a common-pool resource” (2000) 43(2) *Journal of Law & Economics* 681; Waldron (1988) 41; Welch (1983) 166.

⁵² Waldron (1988) 41; Ziff (2010) 8.

⁵³ Rose (2003) 96.

⁵⁴ Rose (2003) 96; see also Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56.

⁵⁵ Barnes (2009) 154.

⁵⁶ Van der Vyver JD “The Étatisation of public property” in Visser DP (ed) *Essays on the history of law* (Cape Town: Juta 1989) 261.

⁵⁷ The terms “public property”, “State property” or “collective property” are often used to refer to the property regime describing the State’s, or some public agency’s responsibility to control the resource in question. Barnes (2009) 154; Page J “Reconceptualising property: towards a sustainable paradigm” in Edgeworth B, Moses L & Sherry C (eds) *Property Law review: multiple perspectives on the law of real and personal property* (Sydney: Thomson Reuters 2011) 94; Rose CM “The comedy of the commons: commerce, custom, and inherently public property” (1986) 53 *The University of Chicago Law Review* 716; Waldron (1988) 41; Ziff (2010) 9.

⁵⁸ Rose (2003) 99; Van der Schyff E “South African natural resources, property rights, and public trusteeship” in Grinlinton D & Taylor P (eds) *Property rights and sustainability: the evolution of property rights to meet ecological challenges* (Leiden: Martinus Nijhoff 2011) 329; Barnes (2009) 154.

⁵⁹ Habdas M “Who needs a park or a city square? The notion of public real estate as *res publicae*” (2011) 4 *TSAR* 628.

⁶⁰ (1891) 8 SC 296-297.

⁶¹ Similar examples are found in s 2(4)(o) of the National Environmental Management Act 107 of 1998, s 3 of the Mineral and Petroleum Resources Development Act 28 of 2002, ss 2(c) and 11 of the National Environmental Management: Integrated Coastal Management Act, and s 3 of the NWA.

is underpinned by a stewardship principle that emphasises and defines the State's fiduciary duty towards the public property.⁶²

The public property regime effectively separates the ownership, control and management of the public property, on the one hand, and the actual use thereof, on the other.⁶³ Whereas "ownership" usually vests in the State that controls and manages public property by a group of elected individuals, the statutorily regulated use and access rights reside with the public.⁶⁴ In a public property regime, the extent of use and access rights to resources must, by the State or government, be structured, allocated, protected and governed in such a way that they meet the needs and purposes of society as a whole, and not only the needs of individuals.⁶⁵ It can therefore be accepted that, in a public property regime, the State or public authority is authorised to establish use and access rules for the general public to ensure that the property is used in such a way that it promotes the public interest. The State's authority to regulate use and access rights in public property is a particularly important feature of a public property regime. As will be indicated below, this feature can be used to curb the abuse of public property; to ensure more prudent use of such property; and to ultimately improve the quality, quantity and accessibility thereof for the public's use and in the public interest.⁶⁶

The idea of property, as canvassed above, is expected to provide the necessary contextual information 1) to understand the relevance and impact (positive and negative) of the different property regimes within South Africa's water sector, and 2) to establish whether the statutorily introduced, public trusteeship based property regime in water resources law transformed the property regime whereby water is regulated.

3 PROPERTY AS A CAUSE OF SOUTH AFRICA'S WATER CRISIS⁶⁷

In order to determine how the idea of property may have contributed to South Africa's water crisis, this part reflects on the property regimes that previously regulated water in South Africa. A comprehensive historical study falls beyond the scope of this article. The main principles are however discussed to indicate how the country's water crisis emanated from the idea of property. The discussion of the different property regimes divide into four broad periods: the period prior to colonisation; the period of Roman-Dutch rule from 1652 to the beginning of the 19th century; the colonial period under British control from 1806; and the period under apartheid rule.

Prior to colonisation, under the early African customary law,⁶⁸ water was regarded as part of the "commons".⁶⁹ In terms of the land tenure system that was

⁶² Viljoen G *Water as public property: a parallel evaluation of South African and German law* (Unpublished LLD thesis, University of North West 2016) 203.

⁶³ Viljoen (2016) 79.

⁶⁴ Viljoen (2016) 79.

⁶⁵ Waldron (1988) 40.

⁶⁶ See part 4 below.

⁶⁷ It should be kept in mind that there are more reasons and factors that contributed to South Africa's water crisis. These include, amongst others, climate change, severe drought conditions, water infrastructure capacity, and politically charged motives in disaster management.

applied during this period, land and water were free or common to all members of the community and could not be owned privately.⁷⁰ Access to water resources was freely available to all members of the community, but where appropriate, regulated in accordance with the interests of the entire community or tribe.⁷¹ Tewari⁷² explains that, in the pre-colonial era, water rights were “not contested among individuals in the community”. African customary law thus seems to have recognised the common nature of water resources by availing water to the community or tribe as a whole, and not as a resource available for individual or private use. Due to the fact that the rules for the allocation of rights in water as a common resource were organised on the basis that water is in principle available for the use of members of the community alike,⁷³ it can be inferred that water was regulated in terms of the common property regime under African customary law.⁷⁴

Following the arrival of the Dutch at the Cape in 1652, the settler colonising community increasingly encroached on the native communities’ common resources.⁷⁵ As a result, many Khoikhoi farmers lost access to land and water, and were forced to work on *Vereenigde Oost-Indische Compagnie* (VOC) farms.⁷⁶ The VOC, which occupied the position of the State at the Cape,⁷⁷ started to adapt and develop its Roman and Roman-Dutch rules to control and regulate the uses of water resources.⁷⁸ The VOC is said to have established laws in its own interest, and as a result, the majority African population was sidelined.⁷⁹

The *Placaat of van Riebeeck* of 10 April 1655,⁸⁰ for example, shows that the VOC adopted the position that it had the right to control the use of the running streams of Table Valley.⁸¹ Under Dutch rule, the status of the VOC as *dominus fluminis* (the Roman law doctrine of State ownership or State control) of the water resources was therefore

⁶⁸ Tewari (2009) 694.

⁶⁹ Feris L “The public trust doctrine and liability for historic water pollution in South Africa” (2012) 8(1) *Law Environment and Development Journal* 11.

⁷⁰ Feris (2012) 11; Tewari (2009) 695.

⁷¹ Young CL *Public trusteeship and water management: developing the South African concept of public trusteeship to improve management of water resources in the context of South African water law* (Unpublished PhD-thesis, University of Cape Town 2014) 20.

⁷² Tewari (2009) 694.

⁷³ Waldron (1988) 41; Ziff (2010) 8.

⁷⁴ See part 2.2 above.

⁷⁵ Tewari (2009) 695.

⁷⁶ Tewari (2009) 695.

⁷⁷ Hall CG & Burger AP *Hall on water rights in South Africa* 4 ed (Cape Town: Juta 1974) 11.

⁷⁸ The Dutch, accustomed to the water law principles of Roman law, as introduced in Holland, adapted and applied their water law principles to the Cape. Hall CG *The origin and development of water rights in South Africa* (Oxford: Oxford University Press 1939) 1; Tewari (2009) 695; *Transvaal Canoe Union v Garbett* 1993 (4) SA 829 (SCA); Vos WJ *Principles of South African water law* (Cape Town: Juta 1978) 1.

⁷⁹ Tewari (2009) 695.

⁸⁰ The *Placaat of van Riebeeck* prohibited persons from bathing and washing their clothes in the streams of Table Bay Valley as it endangered the hygiene of other water users. Hall & Burger (1974) 1.

⁸¹ Hall (1939) 13.

upheld.⁸² Although it was unclear whether the actual "ownership" of water belonged to the citizens in common or was the property of the State,⁸³ research confirms that individuals held certain rights to water under Dutch rule.⁸⁴ Whereas the State controlled water resources, and as individuals were able to obtain water rights in the State controlled resource, it can be accepted that water resources were during this period regulated in terms of a public property regime.⁸⁵

In 1806, the British occupied the Cape. As a result, the Roman-Dutch regulatory framework had to make way for the English legal regime. The English law influence on the country's water regulatory regime is evident from the judgment of Bell J in *Retief v Louw*,⁸⁶ wherein the Court ignored the *dominus fluminis*-principle and applied the so-called riparian principle. The Court was called upon to decide on the rights of riparian owners to the water of a stream running through their land.⁸⁷ In his judgment, Bell J held that an upper riparian owner might, when using the water of a public stream, diminish its flow if he or she did not injure any other riparian owner in his or her reasonable use that is common to all riparian owners.⁸⁸ In effect, Bell J established a system of "proportional sharing"⁸⁹ by stating that "landowners have each a common right in the use of water which, at every stage of its exercise by any one of the proprietors, is limited by a consideration of rights of other proprietors".⁹⁰ It follows that, in terms of the riparian ownership principle, individuals owning land adjacent to a river derived usufructuary rights to use the water thereof.⁹¹

Another important development under British rule, was the definition and categorisation of different forms of water, namely, private or public water. The headnote of *Van Heerden v Wiese*⁹² defined and categorised the forms of water as follows:

"Our law recognises two classes of natural streams or watercourses, viz., public and private. Under the designation of public streams are included all perennial rivers, navigable or not, and all streams which, although not large enough to be considered as rivers, are yet perennial, and are capable of being applied to the common use of the riparian proprietors. A river may sometimes become dry in the heat of summer without forfeiting its character of a perennial, and therefore public, river. The

⁸² Viljoen (2016) 170.

⁸³ Movik S & De Jong F "Licence to control: implications of introducing administrative water use rights in South Africa" (2011) 7(2) *Law Environment and Development Journal* 69.

⁸⁴ Viljoen (2016) 170.

⁸⁵ See part 2.3 above.

⁸⁶ *Retief v Louw* (1874) 4 Buch 165 (*Retief case*).

⁸⁷ In the *Retief* case, the downstream owner sued the upstream owner, who had diverted the whole of the stream's summer flow and thus deprived the downstream owner of water for drinking purposes and irrigation.

⁸⁸ Hall & Burger (1974) 34-35.

⁸⁹ Hall & Burger (1974) 4.

⁹⁰ Similarly, in *Vermaak v Palmer* (1876) 6 Buch 25, Smith J held that the upper owner was not entitled to the unlimited enjoyment of the water rising on the land; Hall & Burger (1974) 47; Tewari (2009) 697-698.

⁹¹ Movik & De Jong (2011) 69; Saxer SR "The fluid nature of property in water" (2010) 21 *Duke Environmental Law & Policy Forum* 53.

⁹² *Van Heerden v Wiese* (1880) Buch AC 5.

general rule that a person may deal as he chooses with water rising on his own land, is subject to the limitation that the water thus rising is not the source, or the main source, of a public stream; and also that no rights have been acquired to the water by prescription.”

The riparian doctrine and the principle that recognises two classes of natural streams or watercourses became the cornerstones of South African water law.⁹³ This is clear from the Water Act 54 of 1956 that was promulgated under the apartheid regime. Section 1 of the 1956 Water Act defined “private water” as all water that rises or falls naturally on any land or naturally drains or is led onto a piece of land, while it also provided for “public water”, and defined it as any water flowing or found in or derived from the bed of a public stream. In the case of private water, section 5(2) of the Act stated that the exclusive use or rights of private water could be exercised by the landowner on whose land the water originated or over which it flowed.⁹⁴ In the case of public water, section 10(1) of the Act stipulated that every riparian owner was entitled to the use of surplus water of a public stream for domestic, watering, agricultural and urban purposes. Although the 1956 Water Act did not provide certainty regarding the ownership of water,⁹⁵ it can be asserted that the use of water was derived from and linked to the (private) ownership of land. Exclusive use rights of private water could therefore be exercised by a landowner on whose property the water had its origin, or over which it flowed. In the case of public water, the right to use water was linked to riparian ownership.⁹⁶ In the case of private water, the right to use water was derived from the ownership of land over which the water flowed or where the origin of the water source was situated.⁹⁷ In terms of this system, the private claims of riparian landowners to public water and claims of landowners in relation to private water were acknowledged to the extent that the Appellate Division held in *Minister of Waterwese v Mostert*⁹⁸ that the extinction of water rights amounted to their expropriation, thereby effectively categorising these rights as “private property”.⁹⁹

This regulatory regime that allows for water use rights emanating from private ownership, shows a clear inclination towards a private property regime which is characterised by private, exclusive use rights in the property at hand. This regulatory framework resulted in the unequal allocation of water rights, because land ownership (which was linked to access to water) generally resided in the hands of the White minority. Consequently, the majority of Black¹⁰⁰ South Africans were denied access to

⁹³ Vos (1978) 4-5.

⁹⁴ Vos (1978) 8.

⁹⁵ Pienaar & Van der Schyff (2007) 183.

⁹⁶ Pienaar & Van der Schyff (2007) 183.

⁹⁷ Pienaar & Van der Schyff (2007) 183.

⁹⁸ *Minister van Waterwese v Mostert en andere* (1964) 2 SA 656 (A) 669.

⁹⁹ Van der Schyff E *The constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD thesis, University of North West 2006) 258-259, 283-285.

¹⁰⁰ The terms “Black South Africans”, “Black people” or “Black majority” are used as defined by the Broad-Based Black Economic Empowerment Act 53 of 2003. The Act defines “Black people” as a generic term which includes Africans, Coloureds and Indians.

sufficient water.¹⁰¹ Pienaar and Van der Schyff¹⁰² summarise the prejudiced allocation of water rights in the apartheid period as follows:

“In terms of the 1956 Act riparian owners had the right to use public water in public streams [...]. The right of private owners to use water in rural areas (farms) which had its source on the land or flowed over the land was a direct consequence of their landownership. Although there was no finality over the ownership of water, the use of water was derived from and linked to the ownership of land:

- (a) In the case of public water, riparian ownership;
- (b) In the case of private water, ownership of the land over which the water flowed or where the source of the water was situated;
- (c) In the case of water servitudes, only those granted by the owner of the servient tenement.”

In 1991, the South African government embarked on a process of negotiations with representatives of the non-White majority of South Africa to eradicate the system and legacy of apartheid.¹⁰³ Only after the establishment of a democratic government, and the adoption of the Constitution, a new era of constitutional transformation and the pursuit of social justice was embarked on.¹⁰⁴

4 PROPERTY AS A REGULATORY INSTRUMENT TO COMBAT SOUTH AFRICA'S WATER CRISIS

The NWA was promulgated with the primary aim to “provide for fundamental reform of the law relating to water resources”.¹⁰⁵ The preamble to the Act states that water is “a scarce natural resource that belongs to all people”. In terms of the NWA, private control of water is abolished and the national government is appointed as the trustee of the nation’s water resources.¹⁰⁶ In fact, as will be indicated below, the NWA and its introduction of the notion of public trusteeship, introduced an institutional regime change and materialised the idea of State control of South Africa’s water resources that could recover South Africa from its water crisis.

4.1 Public trusteeship

Some scholars argue that the public trust concept originated in the jurisprudence of the United States of America (USA).¹⁰⁷ The principles underpinning the Anglo-American

¹⁰¹ Kidd M *Environmental law* (Cape Town: Juta 2011) 65.

¹⁰² Pienaar & Van der Schyff (2007) 183.

¹⁰³ Mostert H “Land restitution, social justice and development in South Africa” (2002) 119 *The South African Law Journal* 400; Van der Walt AJ “Rights and reforms in property theory-a review of property theories and debates in recent literature: part iii” (1995) 3 *Tydskrif vir Suid-Afrikaanse Reg* 518-519; Van der Walt (2008) 326.

¹⁰⁴ Currie I & De Waal J *The Bill of Rights handbook* 5 ed (Cape Town: Juta 2008) 1, 7; Preamble of the Constitution.

¹⁰⁵ Long title and s 2 of the NWA.

¹⁰⁶ Section 3 of the NWA.

¹⁰⁷ Blumm & Guthrie (2012) 791; Glazewski J *Environmental law in South Africa* 2 ed (Durban: LexisNexis Butterworths 2005) 17. See also Pienaar & Van der Schyff (2007) 183-184; Van der Schyff (2009) 79-152; Van der Schyff E “Unpacking the public trust doctrine: a journey into foreign territory” (2010) 13(5)

public trust doctrine are believed to have also been statutorily enshrined in the NWA in South Africa. An in-depth exposition of the development and complexities of the Anglo-American public trust doctrine falls beyond the scope of this article. To provide an understanding of the general gist of the Anglo-American public trust doctrine, it suffices to state that, at the most elementary level, the Anglo-American public trust doctrine recognises the principle that some natural resources, and the role they play in sustaining life and the economy, are deemed so important that should be protected for the benefit of the public.¹⁰⁸ In order to do so, a distinction is made between private property rights, on the one hand, and public rights, on the other.¹⁰⁹ In terms of the doctrine, the State as sovereign acts as trustee of the public rights in certain natural resources, and entrenches the public's right of access to specified uses, such as, fishing, navigation and commerce.¹¹⁰ This distinction originated from the decision in *Illinois Central Railroad Co v Illinois* 1892 (146) US at 387 (*Illinois case*).

Traditionally, the application of the Anglo-American public trust doctrine was limited to certain natural resources. At the time that the *Illinois* case was decided, the doctrine, for example, applied only to tidal and navigable water, as well as the soil covered by these waters.¹¹¹ In this case, the Court explained that a distinction exists between property that is owned by the State that could freely be disposed of, and property "owned" and managed by the State on behalf of all the citizens and in the interest of the entire nation.¹¹² Although the State remained owner of both categories of property, the "modus" of ownership of these distinct forms of property differed. With regard to the first category, the State was a party in private law, and held the title to the property in question as private owner. In contrast, it was decided that property "owned" and managed by the State on behalf of all the citizens was subject to a form of public ownership. In *Shively v Bowlby* (*Shively case*),¹¹³ the Court elaborated on the nature and meaning of "public ownership". The Court explained that the title in, or dominium of, the tidal and navigable water, and the soil thereunder, belonged to the sovereign or State as the representative of the nation for the public benefit.¹¹⁴ The natural resources in question were incapable of private occupation; and their natural and primary uses, including navigation, fishing or commerce, were public in nature.¹¹⁵ In the *Shively* case, Justice Gray effectively argued that the State's control and ownership of property subject to the public trust doctrine are supreme, "subject only to the

PER/PELJ 123; Young CL *Public trust and res publicae in South African law. Towards a unified regulatory system of water in light of the National Water Act 36 of 1998* (Unpublished LLB dissertation, University of Cape Town 2009) 12-14.

¹⁰⁸ Van der Schyff E "Stewardship doctrines of public trust: has the eagle of public trust landed on South African soil?" (2013) *The South African Law Journal* 375; Zellmer SB & Harder J "Is water property?" (2007) 39(2) *Nebraska Lawyer* 7.

¹⁰⁹ Van der Schyff (2006) 114; Young (2009) 158.

¹¹⁰ Saxer (2010) 53.

¹¹¹ Dunning HC "The public trust: a fundamental doctrine of American property law" (1988-1989) 19 *Environmental Law* 516-517; Van der Schyff (2006) 114.

¹¹² Van der Schyff (2013) 376-377.

¹¹³ *Shively case* 1.

¹¹⁴ *Shively case* 1, 11, 12.

¹¹⁵ Van der Schyff (2013) 375.

paramount right of navigation and commerce".¹¹⁶ Public trust resources belonged to the State, but the State did not become the owner in the ordinary private law sense. The title in public trust property vested in the State as public trustee, with the nation as beneficiary.¹¹⁷

The Court in the *Illinois* case expanded the reach of the doctrine to non-tidal navigable waters, and to other resources of "special character" or "public concern" that had to be protected for intergenerational use.¹¹⁸ Joseph Sax¹¹⁹ further encouraged the development and expansion of the doctrine to ensure environmental protection. The legislatures and judiciaries of different states in the USA considered arguments made by Sax. In some states, only subtle expansion could be observed, while the development of the doctrine in other states was "bold and daring", resulting in the increase of public trust uses¹²⁰ and the expansion of the reach of the doctrine to resources not previously affected by it.¹²¹ The expansion of the public trust doctrine emphasised the State's inherent duty to protect certain natural resources for the benefit of current and future citizens.¹²² The expansion of the traditional public trust doctrine highlighted more than the fiduciary obligations of the different states to protect public access and use of certain natural resources. The public trust doctrine accordingly developed beyond its initial "public ownership and access" model to a duty to protect certain natural resources for the sole benefit of current and future generations.¹²³

The assumption that the South African concept of public trusteeship was borrowed or transplanted from the Anglo-American public trust doctrine may not be entirely correct,¹²⁴ reasons being that South African law originated from the Roman-Dutch law and was further influenced by English law. Reference to the Anglo-American regime as a place of origin of legal principles for South African law is therefore strange from the outset.¹²⁵ Further, it should be noted that the Anglo-American public trust doctrine expanded and developed to different degrees in different American states.¹²⁶ Uncertainty therefore exists as to how the public trust doctrine is applied from one state

¹¹⁶ *Shively* case 1, 56.

¹¹⁷ Van der Schyff (2013) 378.

¹¹⁸ Saxer (2010) 64; Van der Schyff (2013) 377.

¹¹⁹ Sax JL "The public trust doctrine in natural resource law: effective judicial intervention" (1970) 68 *Michigan Law Review Association* 471-566. Olsen referred to Sax's work seminal work as the "leading treatment" on the public trust doctrine: Olson J "The Public trust doctrine: procedural and substantive limitations on the governmental reallocation of natural resources in Michigan" (1975) 2 *Detroit College of Law Review* at 162.

¹²⁰ The expansion is, for example, also depicted in the uses of the public that kept pace with the changing needs of society.

¹²¹ Van der Schyff (2013) 377.

¹²² Van der Schyff (2013) 378.

¹²³ Van der Schyff (2013) 378.

¹²⁴ Pienaar & Van der Schyff (2007) 184; Viljoen (2016) 186; Young (2009) 15, 146.

¹²⁵ Viljoen (2016) 186.

¹²⁶ Young (2014) 254-255, 158, 160.

to the next.¹²⁷ This raises the question about which variant of the Anglo-American public trust doctrine finds application in South African law.¹²⁸ Although valuable lessons may be learnt from Anglo-American law in the process of demystifying the concept of public trusteeship, it seems unlikely that what we find in South Africa's NWA is a virtual "copy" or replica of the Anglo-American public trust doctrine. In fact, in the light of the historical development of South Africa's water regulatory regime, one cannot agree to the wholesale or blanket importation of the foreign public trust doctrine into South African law. The South African concept of public trusteeship is rather a domestic product of statutory origin, resulting from South Africa's own legal development.¹²⁹ Therefore, the NWA neither merely introduced the Anglo-American public trust doctrine, nor did it re-affirm the public nature of water and legal principles that applied to the nation's water resources under African customary law and Dutch rule. The *White Paper on a National Water Policy for South Africa* of 1997 (NWP) makes it clear that the government intended to create a doctrine of public trust that is designed to fit the specific circumstances of South Africa:

"To make sure that the values of our democracy and our Constitution are given force in South Africa's new water law, the idea of *water as a public good* will be redeveloped into a doctrine of public trust which is *uniquely South African* and is designed to fit South Africa's specific circumstances." [Own emphasis]

The policy principles contained in the NWP were given force by the NWA. In terms of the NWA, the national government is appointed as the public trustee of the country's water resources. All of South Africa's water resources, including surface and groundwater, are defined as part of an "inalienable public trust" that is the fiduciary responsibility of the national government.

The implications that the statutorily introduced concept of public trusteeship might have on water as property and the property regime within which the scarce water resources are regulated in South Africa seem infinite and have to be determined. The question of whether the concept of property may curb the nation's water crisis, is of specific relevance.

4.1.1 *The Reserve*

When water as property is discussed, the Reserve, as defined by chapter 1, read with the explanatory note of chapter 3 of the NWA, needs consideration. The "Reserve" can be defined as the quantity and quality of water required to satisfy basic human needs and to protect aquatic ecosystems in order to secure ecologically sustainable development. It follows that the Reserve consists of two parts, namely, the basic human needs reserve and the ecological reserve. It is part of the fiduciary duty of the public trustee to assess the needs of the Reserve, and to make sure that the determined amount of public trust water required to meet such needs, is set aside.

¹²⁷ For example, a distinction made between the high-tide states (where the public trust resources may not be owned privately) and the low-tide states (where private ownership of trust property is possible). Saxer (2010) 111; Young (2009) 14.

¹²⁸ Young (2009) 14.

¹²⁹ Van der Schyff (2011) 330.

4.1.1.1 Basic human needs reserve

The first part of the Reserve, the basic human needs reserve, imposes on the public trustee a duty to reserve such water required to ensure that all people have access to sufficient water for inter alia drinking, food preparation and personal hygiene.¹³⁰ Since the promulgation of the Constitution, much legal development has taken place regarding the meaning, content and enforcement of the right of access to sufficient water. There are at least three court decisions in recent years that show the progress made.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,¹³¹ (*Bon Vista* case), the applicants launched an urgent application to restore the residents of a block of flats' water supply after the respondents (the local authority)¹³² disconnected their supply. The Court then elaborated on the responsibility of the local authority to realise the constitutional water right, even in the event of consumers not being in a position to pay the State for its water services provision.¹³³ Budlender AJ held that the *Bon Vista* case implicated the stated authority with the responsibility or duty to respect the right of access to water as per section 7(2) of the Constitution. Budlender AJ stated:¹³⁴

“On the facts of the case, the applicants had existing access to water before the Council disconnected the supply. The act of disconnecting the supply was *prima facie* in breach of the Council's constitutional duty to respect the right of access to water, in that it deprived the applicants of existing access.”

The *Bon Vista* case shows that section 7(2) of the Constitution imposes the very duty on government to realise the constitutional water right.¹³⁵ The section determines that the State must “respect, protect, promote and fulfil” the rights in the Bill of Rights. Liebenberg¹³⁶ indicates that each of the terms of the duty to respect, protect, promote and fulfil has its own particular meaning. Regarding the duty to “respect”, the State is precluded from law or conduct that infringes upon the enjoyment of certain rights. Kotzé¹³⁷ argues that the duty to “protect” will, for example, oblige the State to take measures to protect vulnerable people against violations of their rights, while the duty to “promote and fulfil” will typically mean that the State must provide people with access to socio-economic entitlement where they currently lack such access.¹³⁸

¹³⁰ Takacs (2016) 80.

¹³¹ 2002 (6) BCLR 625 (W).

¹³² The Southern Metropolitan Local Council of Johannesburg, the Council, or the Municipality.

¹³³ Du Plessis (2010) 321.

¹³⁴ *Bon Vista* case par [20].

¹³⁵ Pieterse M “Towards a useful role for section 36 of the Constitution in social rights cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council” (2003) 120 (1) *The South African Law Journal* 43.

¹³⁶ Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* (Claremont: Juta 2010) 82-87.

¹³⁷ Kotzé LJ “Phiri, the plight of the poor and the perils of climate change: time to rethink environmental and socio-economic rights in South Africa?” (2010) 1(2) *Journal of Human Rights and the Environment* 147.

¹³⁸ Kotzé (2010) 147.

Seven years after the judgment in the *Bon Vista* case, the Constitutional Court had to determine the content and meaning of the constitutional right of access to water by quantifying the amount of water sufficient for a dignified life in *Mazibuko v The City of Johannesburg and others*,¹³⁹ (*Mazibuko* case).¹⁴⁰ The Constitutional Court however refrained from quantifying the right of access to water and rejected the idea that socio-economic rights in the South African Constitution contain a “minimum core”.¹⁴¹ The Court hence did not impose an obligation on the State to literally provide people with unlimited amounts of, or access to, water. Rather, the State is merely obliged to progressively provide access to water through legislative and other measures within its available resources. It is agreed with Du Plessis¹⁴² who states that the *Mazibuko* case emphasised the idea of “progressive realisation” of the right of access to water when the Court held that the constitutional right of access to water does not place on the government limitless duties in relation to the provision of access to water resources.

The third and last judgment, is that of *Federation for Sustainable Environment and Others v Minister of Water Affairs*,¹⁴³ (*Federation* case). Silobela is a residential area that constitutes part of the Carolina mining and farming community in the Mpumalanga Province of South Africa.¹⁴⁴ The Carolina community suffered from acid mine drainage that contaminated the water.¹⁴⁵ After Carolina’s water was contaminated, the municipality provided access to clean drinking water through temporary tanks, which the residents argued were inadequate.¹⁴⁶ Some of the tanks were never refilled and some consumers had to walk long distances to the tanks.¹⁴⁷ In this case, the applicants (residents of Carolina, represented by the Federation for Sustainable Development and the Silobela Concerned Community) approached the High Court to compel the respondents (inter alia the Minister of Water Affairs, the Sibanda District Municipality and the Luthuli Local Municipality) to provide a regular supply of safe drinking water in terms of Regulation 3 of the Water Regulations.¹⁴⁸ The applicants further argued that the lack of daily access by residents to an effective and reliable supply of potable water constituted a violation of their constitutional right of access to sufficient water.¹⁴⁹ The Court acknowledged the duty of the respondents to provide water to the residents of

¹³⁹ 2010 (3) BCLR 239 (CC).

¹⁴⁰ Stewart L & Horsten D “The role of sustainability in the adjudication of the right to access to adequate water” (2009) 24 *SAPL* 488.

¹⁴¹ Kotzé (2010) 154.

¹⁴² Du Plessis (2010) 321.

¹⁴³ (2012) ZAGPPHC 128.

¹⁴⁴ *Federation* case par [3].

¹⁴⁵ *Federation* case par [4].

¹⁴⁶ Fuo ON “The right of access to sufficient water in South Africa: comments on *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128” (2013) 20(2) *Murdoch University Law Review* 29.

¹⁴⁷ *Federation* case par [4, 5]; Fuo (2013) 29.

¹⁴⁸ *Federation* case par [6].

¹⁴⁹ *Federation* case par [6].

Carolina based on the former's constitutional and other legislative duties.¹⁵⁰ The Court held:¹⁵¹

“[...T]he Municipality must strive to resolve as speedily as possible the water problem in Silobela and Carolina. It must equally have a progressive plan to achieve this objective and must engage and inform the community of the steps and progress of doing so [...]. These respondents are accountable to the communities. In my view, the orders sought be reasonable and should therefore be granted.”

It is clear from the brief discussion of the right to have access to sufficient water as enshrined in section 27(1)(b) of the Constitution, that not only the right that it gives, but also the duty and responsibility to implement and protect the constitutional right, are binding on the courts, all government departments and organisations, and all South Africans.¹⁵² Since much of the content, meaning and relevance of the constitutionally entrenched right to accessible water resources have been developed, the quality and degradation of the already limited amount of available water in South Africa remains a critical challenge.

4.1.1.2 Ecological reserve

Section 24 of the Constitution affords everyone the right to an environment that is not harmful to his or her health or wellbeing¹⁵³ and to have the environment protected for the benefit of present and future generations.¹⁵⁴ Scholars, such as, Currie, De Waal, Kotzé, and Du Plessis,¹⁵⁵ indicate that when section 24 is read with section 7(2) of the Constitution, the State incurs both negative and positive duties to respect, protect, promote and fulfil the environmental right. Sections 24(b)(i)-(iii), for example, list a number of positive State obligations, namely, to inter alia promote conservation, and to secure ecologically sustainable development. In adherence to these obligations; to protect the ecosystems that underpin the country's water resources, now and into the future,¹⁵⁶ the NWA obliges the public trustee to assess the needs of the ecological reserve, and to make sure that this amount of water, of an appropriate quality, is set aside.¹⁵⁷ Only once the Reserve is set, the remaining water can be allocated and licensed.¹⁵⁸

¹⁵⁰ *Federation* case par [10].

¹⁵¹ *Federation* case par [24].

¹⁵² Sections 7 and 40 of the Constitution.

¹⁵³ Kotzé LJ “The judiciary, the environmental right and the quest for sustainability in South Africa: a critical reflection” (2007) 16(3) *Review of European, Comparative & International Environmental Law* 298; s 24(a) of the Constitution.

¹⁵⁴ Section 24(b) of the Constitution.

¹⁵⁵ Currie & De Waal (2008) 527; Kotzé LJ & Du Plessis AA “Some brief observations on fifteen years of environmental rights jurisprudence in South Africa” (2010) 3(1) *Journal of Court Innovation* 158, 165.

¹⁵⁶ NWP 5.2.2; Saxer SR “Managing water rights using fishing rights as a model” (2011) 91 *Marquette Law Review* 108.

¹⁵⁷ Takacs (2016) 80. The various tools, procedures and guidelines in the determination and updating of the Reserve are too numerous to list here.

¹⁵⁸ Takacs (2016) 80.

4.1.2 *The allocation of water use rights*

The national government's title to water resources is characterised by the fiduciary responsibility to inter alia protect, use, develop, conserve, manage and control water resources in a sustainable manner for current and future generations.¹⁵⁹ The principle mechanism to achieve this aim, is the institution of water use rights.

Generally,¹⁶⁰ all water use rights, including the taking and storing of water, activities which reduce stream flow, waste discharges and disposals, controlled activities (activities which impact detrimentally on a water resource), altering of a watercourse, removing water found underground for certain purposes, and recreation, are subject to official government authorisation by way of a licence or permit. This system, being flexible, enables the government to ensure that the nation's water is put to the best possible use, or that impairments to the resource are limited, because they have the authority to reject or approve applications for water use licences, depending on whether or not the proposed water use will contribute to achieving the aim of the NWA.

Failure to obtain a water use licence or permit, may give rise to severe penalties. Section 151(1)(a) of the NWA makes it clear that it is an offence to use water without the required water use licence. Should anyone be convicted of such an offence, section 151(2) of the same Act provides that such person is liable, on the first conviction, to a fine or imprisonment for up to five years, or both a fine and such imprisonment. Upon a second conviction, the offender is liable for a fine or imprisonment for up to 10 years, or both a fine and such imprisonment. Another risk, especially for industries, emanating from

¹⁵⁹ The legal framework, as founded on the concept of public trusteeship, defines the public trustee's fiduciary responsibilities and sets parameters within which the public trustee should execute its public trust responsibilities. In the light of s 2 of the NWA, the public trustee must, in executing its fiduciary responsibility, "ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account, amongst other factors, –

- (a) meeting the basic human needs of present and future generations;
- (b) promoting equitable access to water;
- (c) redressing the results of past racial and gender discrimination;
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
- (e) facilitating social and economic development;
- (f) providing for growing demand for water use;
- (g) protecting aquatic and associated ecosystems and their biological diversity;
- (h) reducing and preventing pollution and degradation of water resources;
- (i) meeting international obligations;
- (j) promoting dam safety;
- (k) managing floods and droughts, and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation."

¹⁶⁰ It should however be noted that a water user may in certain instances be exempted from acquiring authorisation or deemed to be a lawful user of water. Schedule 1 stipulates that everyone is entitled to water for reasonable domestic purposes, including but not limited to domestic gardening, animal watering, fire-fighting and recreational use. Section 4(2) of the NWA articulates that any person may continue the lawful use of water in terms of the previous Water Act 56 of 1956, subject to any conditions regarding the substitution of the right of use by the new licensing procedure in terms of the NWA.

unlicensed water use, is set out in section 155 of the NWA. In terms thereof, the Minister may approach the High Court for an interdict or any other appropriate order against any person who has contravened any provision of the NWA. The court may therefore order to discontinue any activity that is held to be in contravention of the NWA.

The purpose of this licensing or permitting system is of particular importance for the country's water crisis. The said system not only guides, but also imposes a specific duty on, the decision-making authority to carefully allocate or reject the application of water use rights to achieve the aim of the NWA. The licensing or permitting system can be of further benefit in curbing the nation's water crisis, because once a licence or permit is allocated, it binds its holder to responsible water use. In terms of section 28 of the NWA, all water licence applications that have been approved, are subject to conditions. Conditions typically entail the duration of the authorisation, limits on volumes of water uses, waste discharge requirements, and so forth.¹⁶¹ Sections 53 to 55 of the NWA deal with the consequences of contraventions of licence conditions and provide for the possibility of inter alia the retraction of entitlements to use water. The consequences of contraventions range from the responsible authority requiring the licensee to take remedial action,¹⁶² failing which it may take the necessary action and recover reasonable costs from that person,¹⁶³ to the suspension or withdrawal of a licence by the public authority.¹⁶⁴ These forms of regulatory control are conducive to what was envisioned with the adoption of the notion of public trusteeship over water resources, vesting the authority over water resources in the national sphere of government.

Water use rights are generally regarded as property rights, but from the above exposition it is clear that its holders do not own the water itself.¹⁶⁵ The legal title in South Africa's water resources is held by the national government or public trustee. It is important to note that the introduction of the concept of public trusteeship into South Africa's water regulatory framework did not necessarily result in a wholesale transfer of water to "State ownership". The national government's title as public trustee differs from the title a State would hold in land intended for sale. Rather, a system that provides for water allowances granted at the discretion of government replaced the system that provided for exclusive rights to water use.¹⁶⁶ As the NWA does not acknowledge private, individual or exclusionary rights in water, and as the holder of the water right cannot freely decide on the unlimited use or exploitation of the resource, it seems, at face value alone, that water cannot be subject to private, exclusionary water rights. The introduction of the notion of public trusteeship therefore denotes a major transformation that affected the property rights regime of South Africa whereby water

¹⁶¹ Van Koppen B & Schreiner B "Priority general authorisations in rights-based water use authorisation in South Africa" (2014) 16 *Water Policy* 2.

¹⁶² Explanatory note Part 10 of the NWA.

¹⁶³ Explanatory note Part 10 of the NWA.

¹⁶⁴ Explanatory note Part 10 of the NWA.

¹⁶⁵ Salman SMA & Bradlow DD *Regulatory frameworks for water resources management a comparative study* (2006) *The World Bank Washington DC* 63.

¹⁶⁶ Pienaar & Van der Schyff (2007) 181.

resources are managed by elevating the public interest above any private interests in the resource. This is particularly clear from the creation of the Reserve and water use allocations, as the public trustee is mandated to structure the resource in a way that prioritises basic human needs and ecological sustainability.

4.2 Water as public property

The Supreme Court of Appeal, in the case of *Mostert Snr and another v S* 2010 (2) All SA 482 (SCA), recently engaged with the classification of water as property in the NWA's regulatory regime and decided it to be *res omnium communes* (common property).¹⁶⁷ This judgment however stands to be criticised. Young¹⁶⁸ correctly argues that the Supreme Court of Appeal in this case failed to properly analyse the distinctions made between the Roman and Roman-Dutch law concepts of *res omnium communes* and *res publicae* (public property). In fact, considering the relevant sections of the NWA, it seems as if it is rather the public property regime that finds application in the NWA's regulatory framework.

As indicated above,¹⁶⁹ public property generally entails things, objects or resources that belong to the public; that are used in the interest of the public; and which are open to the public by operation of law. Their legal title vests in the State or government, and is publicly regulated for, and on behalf of, the public. The same sentiment is found in the NWA. Whereas public property generally belongs to the public, the preamble of the NWA confirms that water is "a scarce natural resource that belongs to all people". Notably, the legislature did not use the language of "water being the people's common heritage" or "water belonging to the nation" as found in the National Environmental Management Act 107 of 1998 (NEMA)¹⁷⁰ and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA),¹⁷¹ respectively. These formulations rather coincide with the common property regime. It can therefore be confirmed that both the public property regime and the regime instituted by the NWA regulate "things", "objects" or "resources" that belong to the public.

Furthermore, the "function" or "purpose" of water to promote the public interest is also explicitly acknowledged in the NWA. Sections 1 to 4 of the NWA, for example, provide for guiding principles that recognise the basic human needs of present and future generations, and the need to promote social and economic development.

¹⁶⁷ In order to establish whether the water was capable of being stolen in terms of the common law, the Supreme Court of Appeal had to establish whether the water contained in the Lomati River was private or public in nature. The Court concluded that public water, whether running in a river or stream, is classified as *res omnium communes*, or common property, and therefore not susceptible to ownership. The implication of water not capable of ownership, is that it cannot be stolen. A riparian owner who abstracts more water from a water resource than that to which he or she is legally entitled, does therefore not commit the common law offence of theft, but only commits a statutory offence under s 151 of the NWA.

¹⁶⁸ Young (2014) 138.

¹⁶⁹ See part 2.3 above.

¹⁷⁰ Section 2(4)(o) of the NEMA.

¹⁷¹ See the preamble of the MPRDA.

With reference to the feature of public property being open to the public by operation of law, reference is made to Schedule 1, as well as sections 3(2), 4 and 21 of the NWA. Schedule 1 lists water uses, available to all, that do not require prior authorisation. The latter sections do not only confirm that water should be allocated equitably and used beneficially in the public interest, but emphasise the legal title of the State as “public owner” to grant rights in respect of water resources to private individuals.¹⁷² The authority of the State to regulate water is firmly entrenched in section 3 of the NWA. It should be emphasised that the authority and fiduciary responsibility over water resources in South Africa primarily vest in the national sphere of government.¹⁷³ It is argued that water as a natural resource is inherently so important to the existence and wellbeing of the people of the country, and that so many decisions in other governmental spheres impact on water use, that the legislature intentionally bound the national government in its entirety with a fiduciary responsibility as far as water as a natural resource in South Africa is concerned.¹⁷⁴ Such duty therefore binds all three branches of government, namely, the executive, the judiciary and the legislature.¹⁷⁵ The Constitution not only divides governmental power between the executive, judiciary and legislature, but in terms of section 40(1) also between national, provincial and local spheres of government.¹⁷⁶

Within this public property water regulatory regime, the public trustee is ultimately entrusted with regulatory mechanisms for the allocation of water use rights.¹⁷⁷ The allocation of water use rights hinges on a complex administrative decision making process¹⁷⁸ that includes an assessment of whether and to what extent the proposed water right may influence basic human needs or impair the ecological status of the water. The review process ultimately results in the official allocation or refusal of a water right. The public water regulatory framework therefore requires rational and effective decision making processes. The latter are ensured through mechanisms, such as, careful planning by means of the Reserve and other regulatory and enforcement instruments. Planning therefore goes beyond the mere allocation of water rights, but should set out development and management priorities in the water sector that fall within the parameters of the NWA. It is within this broader framework of planning that decisions regarding the regulation of water rights must be made. The State's decision making authority must structure, allocate, protect and govern access and use rights in

¹⁷² Young (2014) 82.

¹⁷³ Preamble, s3(1) and s3(3) of the NWA.

¹⁷⁴ Van der Schyff (2013) 381.

¹⁷⁵ Chapters 4, 5 and 8 of the Constitution.

¹⁷⁶ Section 155(7) of the Constitution sets out a basic structure according to which governmental power is divided between the different spheres and branches. In fact, s 155(7) provides a constitutional basis for the national government's fiduciary responsibility with regard to South Africa's water resources. In terms of the section, the national government and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5. It may therefore be stated that the national government and all its repositories with decision making or legislative power are obliged to execute a fiduciary responsibility when regulating the country's water resources.

¹⁷⁷ Saxer (2011) 93.

¹⁷⁸ See part 4.1.2 above; Takacs (2016) 78.

water in such a way that it does not only protect the water resource, but that the access and use rights also meet the needs and purposes of society as a whole, as well as the needs of individuals of current as well as further generations.

5 CONCLUDING REMARKS

South Africa experienced a legal transformation in the way water resources are allocated. The transformation was necessitated by the fact that the previous regulatory regime, as regulated by the Water Act 54 of 1956, contributed to South Africa's water crisis in a number of ways. The distinction made between private and public water was not only strange from a hydrological perspective, but resulted in competing claims in private water resources and even promoted the segregation of development of the different ethnic races. Although the Act did not explicitly determine who the owner of water was, it confirmed that the exclusive use rights of private water could be exercised by a landowner on whose property the water had its source, or over which it flowed. Land ownership (which was linked to access to water) generally resided in the hands of the White minority, thereby limiting who actually enjoyed access to water. Consequently, low income individuals, generally the majority of Black South Africans, were denied access to sufficient water as they either could not afford it, or did not have riparian land rights.

The national legislature statutorily introduced a unique concept of public trusteeship into South Africa's water regulatory framework that not only altered the nature of ownership, but also introduced an institutional regime that re-defined property rights. The legal title to all water resources now vests in the State. In terms of the concept of public trusteeship, all of South Africa's water resources, including surface and groundwater, are defined as part of an "inalienable public trust" that is the fiduciary responsibility of the national government. We are therefore witnesses to a transformation in which property rights were redefined, often to the disadvantage of property owners that previously enjoyed access to water as an "extension" of land ownership.

This transformation affected the property rights regime of South Africa whereby water resources are managed, by elevating the public interest above any private interests in the resource and defining the national government's claim to the resource as fiduciary. The national government's title as public trustee therefore differs from the private title a State would hold in land intended for sale. The national government's title in water resources is characterised by the fiduciary responsibility to inter alia redress past inequalities, and to protect, use, develop, conserve, manage and control water resources in a sustainable manner for current and future generations.

Amid South Africa's current water crisis, some may argue that progress in implementing the new public property water regulatory regime has been slow, some even speculate that it constitutes policy failure. Such analysis however underestimates the scale of the transformation challenge (especially when basic human needs are considered) and the substantial legal development made thus far within the property

regime whereby water is regulated for the benefit of all persons, now, and for the future. In fact, the power of the transformed property regime whereby water resources are managed, for resolving the country's water crisis lies inter alia in the fact that it democratised control over the use of water resources in South Africa; a much needed development to rectify past inequalities in post-apartheid South Africa. The judgments of the *Bon Vista*, *Mazibuko* and *Federation* cases not only developed and promoted the content and meaning of the constitutional right of access to sufficient water for all, but highlighted how the public trusteeship-paradigm can be used to ensure government accountability where the State fails to uphold its public trust duties. The public trust regulatory regime is particularly relevant for eliminating the country's water crisis, as it offers the necessary mechanisms to achieve lasting protection of water resources, and ultimately strengthening sustainable water resources management. The latter includes regulation and enforcement mechanisms, which represent a sophisticated response to the growing pressures on South Africa's water resources. The goals of, for example, water conservation or reduced water use can be, and are already, achieved by regulation and enforcement. Statutory measures, such as, the determination and creation of the Reserve, or the administrative water use licensing or permitting system, enable access to environmental information as well as transparent, rational decisions to be made about the use of water resources. In fact, the licensing or permitting system provides the holders thereof with secure and substantive legal rights, while at the same time maintaining sufficient flexibility to ensure that the objectives of the NWA can be met.