

The concept "beneficial use" in South African water law reform

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ABSTRACT

The concept "beneficial use" plays a pivotal role in South African water law reform. It forms the foundation of the mechanism to make water use rights available for the reform of the allocation of water use entitlements. The mechanism involves that water use rights that were unexercised in the two years before the promulgation of the *National Water Act* 36 of 1998 are not defined as existing lawful water uses. Where the concept "beneficial use" is utilised to cancel unexercised water use rights, it can cause potential hardship. Some people whose rights have been cancelled believe that they should be able to rely on the property clause in section 25 of the *Constitution* of 1996 to either have the legislation declared unconstitutional or to demand compensation. Section 25 of the *Constitution* of 1996 prohibits the arbitrary deprivation of property and states that property may only be expropriated for a public purpose or in the public interest, subject to compensation. Section 25(4) states, however, that the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources. It is clear from this that reforms to bring about access to water are allowed by the property clause. One of the main questions discussed in this thesis was whether section 32 of the *National Water Act* 36 of 1998 that made more water available for distribution for reform purposes by cancelling unexercised water user rights, leads to an arbitrary deprivation or an expropriation of property. It should be noted that section 32 of the *National Water Act* did not constitute an arbitrary deprivation of property, as sufficient reason exists for water law reform. A possible constitutional challenge based on the lack of due process of law because of the retrospective operation of the section may possibly be averted because of the existence of section 33 of the *National Water Act*. Section 33 of the Act mitigates hardship by allowing unexercised water uses to be declared existing lawful water uses in certain circumstances where a good reason for the non-exercise of the water use right existed. Even in cases where section 33 does not prevent section 32 from being regarded as an arbitrary deprivation of property because there still was not a proper procedure, the government will probably be able to show that the limitation in section 32 is, in terms of section 36(1) of the *Constitution* of 1996, reasonable and justifiable in an open and democratic society.

Despite the fact that section 25(1) prohibits arbitrary deprivations, it does not prohibit the government from regulating competing rights to use water even though some people may be negatively affected by the regulation. Because the Minister merely acts as public trustee of the nation's water resources on behalf of the national government in terms section 3(1) of the *National Water Act*, it cannot be claimed that the government acquired the cancelled water use rights. A claim that compensation should be paid for an expropriation of property will therefore not succeed. Compensation is only payable in

terms of section 22(6) and section 22(7) of the *National Water Act* 36 of 1998 for a loss of existing water entitlements, such as existing lawful water uses or existing licences. A court should thus consider interpreting section 25 by providing for compensation where an individual was unfairly burdened and was therefore denied the protection of the equality clause in section 9 of the *Constitution* when his unexercised water use rights were cancelled by section 32.

The concept "beneficial use" currently restricts the content of the water use entitlement existing in terms of section 4 of the *National Water Act* 36 of 1998. The loss of the entitlement when *inter alia* a licence for an existing lawful water use is refused, is not protected by the payment of compensation when water is used in an unfair or disproportionate manner, because such utilisation would not be regarded to be beneficial use. It became apparent that in terms of the current water law dispensation in South Africa, the possibility of compensation for an amendment of a water use licence and the refusal of a licence for an existing lawful water use implies that a water use entitlement is a right in property. The fact that section 22(7) of the *National Water Act* states that the amount of the compensation must be determined in accordance with section 25(3) of the *Constitution* implies that the legislature also recognises that a water use entitlement is constitutional property. Section 22(7) of the *National Water Act* underlines the basic premises of the *National Water Act* by subjecting the amount of the compensation that is payable to the same limitations that restrict the entitlement to use the water. The stipulations of section 22(7) draw the attention to the fact that the exercise of both existing lawful water uses and water use licences as rights in property is subject to basic principles of the *National Water Act* such as the Reserve and the concepts "public trusteeship" and "beneficial use" of the water resources.

The fact that compensation is only payable when there has been severe prejudice to the economic viability of an undertaking implies that water use entitlements have to be exercised at the time of the application for the compensation to be payable. The concept "beneficial use" - in the sense that a water use must not be wasteful or polluting and in the sense that only water use entitlements that are being exercised are protected - thus restricts the water use entitlement as a property right. During the research, American and Australian water law reform and their interpretation of their property clauses were compared to water law reform in South Africa and the South African property clause.

Furthermore, Australian policy to encourage more beneficial water use by the trade in water entitlements or allocations, was also discussed. South Africans will likely in future be encouraged to trade in water use entitlements or allocations. The objective with allowing the trade in water use entitlements or allocations is to encourage people to rather use water for uses with a high value instead of uses with a lower value. In this way the

concept "beneficial use" may be broadened to include water allocation or entitlement trading. However, it was argued that a disproportionate impact on third parties would mean that water allocation or entitlement trading would in some cases not be regarded as beneficial use anymore.

Key words: Beneficial use; public trusteeship; custodianship; water law reform; right of access to sufficient water; water allocation; *National Water Act* 36 of 1998; equality; section 9 *Constitution* of 1996; section 25 *Constitution* of 1996; section 27(1) *Constitution* of 1996; section 195 *Constitution* of 1996; *res omnium communes*; water use rights; water use entitlement; water allocation or entitlement trading; statutory property; deprivation; expropriation; constructive expropriation; acquisition; American public trust doctrine; Australian *National Water Initiative*.

OPSOMMING

Die konsep "voordelige gebruik" speel 'n sleutelrol in die hervorming van die Suid-Afrikaanse waterreg. Die konsep vorm die grondslag van die meganisme om watergebruiksregte beskikbaar te stel vir die hervorming van die toekenning van watergebruiksregte. Die meganisme behels dat watergebruiksregte, wat nie in die twee jaar voor die inwerkingtreding van die *Nasionale Waterwet* 36 van 1998 uitgeoefen is nie, nie gedefinieer word as bestaande wettige watergebruik ingevolge artikel 32 van die Wet nie. Waar die konsep "voordelige gebruik" ingespan word om ou orde-regte te kanselleer, kan mense egter nadelig daardeur getref word. Sommige van die mense wie se regte gekanselleer is, glo dat hulle in staat moet wees om hulle op die eiendomsklousule in artikel 25 van die *Grondwet* van 1996 te beroep om die wetgewing ongrondwetlik te laat verklaar of om vergoeding te eis. Artikel 25 verbied die arbitrêre ontneming van eiendom en lui dat eiendom slegs onteien mag word vir 'n openbare doel of in die openbare belang en onderworpe aan vergoeding. Artikel 25(4) lui egter dat die openbare belang ook die nasie se verbintenis tot grondhervorming beteken, en tot hervormings om billike toegang tot al Suid-Afrika se natuurlike hulpbronne te bewerkstellig. Dit blyk duidelik hieruit dat hervormings om toegang tot water te bewerkstellig deur die eiendomsklousule toegelaat word. Een van die belangrikste vrae wat in hierdie proefskrif bespreek word is of artikel 32 van die *Nasionale Waterwet* 36 van 1998, wat meer water beskikbaar gestel het vir die doeleindes van hervorming deur ongebruikte watergebruiksregte te kanselleer, lei tot 'n arbitrêre ontneming of 'n onteiening van eiendom. Daar is tot die slotsom gekom dat artikel 32 van die *Nasionale Waterwet* nie arbitrêr is nie omdat voldoende rede vir die hervorming bestaan. 'n Moontlike beswaar teen die grondwetlike geldigheid van die klousule, wat gegrond is op 'n gebrek aan 'n behoorlike proses omdat die artikel 'n terugwerkende uitwerking het, mag dalk afgeweer word vanweë die uitwerking van artikel 33 van die Wet. Artikel 33 versag die uitwerking van artikel 32 deur toe te laat dat 'n ongebruikte waterreg tot 'n bestaande wettige watergebruik verklaar kan word in sekere gevalle waar 'n goeie rede vir die nie-gebruik van die reg bestaan het. Selfs waar artikel 33 nie verhinder dat artikel 32 as arbitrêr beskou word nie omdat daar steeds 'n gebrek aan 'n behoorlike prosedure was, sal die regering waarskynlik kan bewys dat die beperking in artikel 32 ingevolge artikel 36(1) van die *Grondwet* redelik en regverdigbaar is in 'n oop en demokratiese samelewing. Ten spyte daarvan dat artikel 25 arbitrêre ontnemings verbied, verhinder dit nie die regering om mededingende watergebruiksregte te reguleer nie, al kan dit sommige mense nadelig tref. Omdat die Minister bloot die openbare trustee van die nasie se waterbronne is namens die nasionale regering ingevolge artikel 3(1) van die *Nasionale Waterwet*, kan dit nie betoog word dat die regering die gekanselleerde watergebruiksregte verkry het nie. 'n Eis dat vergoeding

betaal moet word vir 'n onteining van eiendom sal dus nie slaag nie. Vergoeding ingevolge artikel 22(6) en 22(7) van die *Nasionale Waterwet* 36 van 1998 is slegs betaalbaar vir 'n verlies aan bestaande wateraansprake soos bestaande wettige watergebruike of bestaande lisensies. 'n Hof moet egter oorweeg om artikel 25 so uit te lê dat vergoeding toegestaan word waar 'n onbillike las aan 'n individu opgelê word en hy dus nie deur die gelykheidsklausule in die *Grondwet* beskerm word wanneer sy ongebruikte waterregte deur artikel 32 gekanselleer word nie.

Verder beperk die konsep "voordelige gebruik" tans die inhoud van die aanspraak om water te gebruik wat ingevolge artikel 4 van die *Nasionale Waterwet* bestaan. Die verlies van die aanspraak, onder meer waar 'n lisensie vir 'n bestaande wettige watergebruik geweier word, word nie deur die betaling van vergoeding beskerm wanneer water op 'n onregverdigde of oneweredige manier gebruik word nie. Dit word nie as voordelige gebruik beskou nie. Dit het duidelik geword dat ingevolge die huidige waterregbedeling in Suid-Afrika die moontlikheid van vergoeding vir die wysiging van 'n watergebruikslisensie en die weiering van 'n lisensie vir 'n bestaande wettige watergebruik impliseer dat 'n watergebruiksaanspraak 'n reg in eiendom is. Die feit dat artikel 22(7) van die *Nasionale Waterwet* bepaal dat die bedrag van die vergoeding ingevolge artikel 25(3) van die *Grondwet* bepaal moet word, impliseer dat die wetgewer erken dat 'n watergebruiksaanspraak grondwetlike eiendom is. Artikel 22(7) van die *Nasionale Waterwet* onderstreep basiese uitgangspunte van die Wet deur die bedrag van die vergoeding wat betaalbaar is vir 'n beperking van sekere watergebruiksaansprake te onderwerp aan dieselfde beperkinge wat die watergebruiksaanspraak beperk. Die bepalinge van artikel 22(7) vestig die aandag daarop dat die uitoefening van beide bestaande wettige watergebruike en watergebruikslisensies as regte in eiendom onderworpe is aan basiese beginsels in die *Nasionale Waterwet* soos die Reserwe en die konsepte "openbare trusteeskap" en "voordelige gebruik" van die waterbronne.

Die feit dat vergoeding net betaalbaar is in gevalle waar daar ernstige nadeel was aan die ekonomiese lewensvatbaarheid van 'n onderneming, impliseer dat watergebruiksaansprake uitgeoefen moet word ten tyde van die aansoek om vergoeding. Die konsep "voordelige gebruik" - in die sin dat 'n watergebruik nie water mag vermors of mag besoedel nie en in die sin dat slegs watergebruiksaansprake beskerm word deur die betaling van vergoeding wanneer hulle uitgeoefen word - beperk dus die watergebruiksaanspraak as 'n reg in eiendom. Tydens die navorsing is Amerikaanse en Australiese waterreghervorming en hul interpretasie van hul eiendomsklausules met Suid-Afrikaanse waterreghervorming en die Suid-Afrikaanse eiendomsklausule vergelyk.

Australiese beleid om mense aan te moedig om water meer voordelig te gebruik deur die dryf van handel in verhandelbare watergebruikaansprake of watertoekennings, is ook

bespreek. Die oogmerk met die verhandeling in die aansprake en toekennings is om gebruikers aan te moedig om water te gebruik vir gebruike met 'n hoër eerder as 'n lae waarde. Op hierdie wyse sal die konsep "voordelige gebruik" uitgebrei word om handel in watertoekennings of - watergebruiksaansprake in te sluit. Dit is egter betoog dat 'n oneweredige impak op derdes sal beteken dat handel in watertoekennings of - watergebruiksaansprake in sommige gevalle nie meer as voordelige gebruik beskou sal word nie.

Sleutelwoorde Voordelige gebruik; openbare trusteeskap; rentmeesterskap, waterreghervorming; reg van toegang tot voldoende water; watertoekennings; gelykheid; *Nasionale Waterwet* 36 van 1998; artikel 9 *Grondwet* van 1996; artikel 25 *Grondwet* van 1996; artikel 27(1) *Grondwet* van 1996; artikel 195 *Grondwet* van 1996; *res omnium communes*; watergebruiksregte; watergebruiksaanspraak; handel in watergebruiksaansprake of -toekennings; statutêre eiendom; ontneming; onteining; konstruktiewe onteining; verkryging; Amerikaanse leestuk van die *public trust*; Australiese *National Water Initiative*.

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In memory of my late parents

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The concept "beneficial use" in South African water law reform

CHAPTER 1

INTRODUCTION

1.1 Problem statement

The right of access to sufficient water¹ was entrenched in the *Constitution* of 1996 mainly because years of racial discrimination has resulted in black people being denied access to sufficient water. The riparian system of water law in terms of which access to water was linked to access to land meant that black people had limited access to water because they had limited access to land. In the *National Water Act*² of 1998 it is stated that water is a scarce and unevenly distributed national resource that belongs to all the people, but the discriminatory laws and practices of the past have prevented equal access to water. The Act was promulgated to provide for fundamental reform of the law relating to water use and water resources.³ The national government has overall responsibility for the equitable allocation of water for beneficial use and the redistribution of water.⁴

The right of access to sufficient water⁵ forms a part of the cluster of so-called socio-economic rights in the *Bill of Rights* in the *Constitution*. In the *locus classicus* of socio-economic rights, the *Grootboom*⁶ case, the Constitutional Court explained that the realisation of socio-economic rights, like the right of access to sufficient water, is the key to the advancement of race and gender equality.⁷ The advancement of racial and gender equality forms one of the core objectives of the *National Water Act*.⁸ The purpose of the *National Water Act*⁹ is *inter alia* to ensure that the nation's water resources are protected, used and developed in ways which take into account the promotion of equitable access to water and the redressing of the results of past racial and gender discrimination. This purpose is tempered by the purpose that the nation's water must be used in ways which take into account the efficient, sustainable and beneficial use of water in the public interest. Moreover, the basic human needs of present and future generations must also be taken into account.

1 S 27(1)(b) of the *Constitution of the Republic of South Africa* of 1996 (hereafter the *Constitution*).

2 Preamble to the *National Water Act* 36 of 1998.

3 Long title of the *National Water Act* 36 of 1998.

4 Preamble to the *National Water Act* 36 of 1998.

5 S 27(1)(b) of the *Constitution* of 1996.

6 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

7 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23. See Chapter 3.

8 S 2 *National Water Act* 36 of 1998.

9 S 2 *National Water Act* 36 of 1998.

The *National Water Act*¹⁰ states that the national government, acting through the Minister, is the public trustee of the nation's water resources. The Minister is ultimately responsible to ensure that water is allocated equitably and *used beneficially* in the public interest, while promoting environmental values.¹¹ It is the achievement of these purposes of the *National Water Act*¹² and the achievement of these responsibilities of the Minister that form the foundation of the problem discussed in this thesis:

How does the concept "beneficial use" influence South African water law reform?

1.2 Objectives of the study

The concept "beneficial use" is at the centre of the following developments in the water law dispensation:

- 1.2.1 According to the *White Paper on a National Water Policy*¹³ the beneficial use of water previously meant the use of water for a productive purpose. When water was less scarce it was a sufficient limitation on water use. Since competition for the use of water has increased, there are a large number of additional users who could all claim to be using the water productively in some sense. The criterion in these circumstances is use which is "beneficial in the public interest".¹⁴
- 1.2.2 The responsibility of Government in terms of the *National Water Act*¹⁵ involves achieving the equitable allocation of water for beneficial use and the redistribution of water.
- 1.2.3 The *Water Allocation Reform Strategy*¹⁶ of 2006 states that water allocation must promote the *beneficial use of water in the public interest*.
- 1.2.4 When there had been permission to use water during a period of two years immediately before the commencement of the *National Water Act*,¹⁷ but the water use was not exercised,¹⁸ it is not protected as an existing lawful water use in terms of section 32 of the Act.¹⁹ In effect the exercise of a water use was set as a condition for the recognition of a water use right.

10 S 3(1) *National Water Act* 36 of 1998.

11 S 3(2) *National Water Act* 36 of 1998. See para 4.4.2.3.

12 S 2 *National Water Act* 36 of 1998.

13 DWA *White Paper on a National Water Policy* in para 4.2.1.

14 See para 3.8 and para 4.4.2.4.

15 Preamble *National Water Act* 36 of 1998.

16 DWA 2006 *Strategy for water allocation reform* 20. See para 3.8.

17 Act 36 of 1998.

18 See Thompson *Water Law* 497.

19 See para 4.5 for a discussion of s 32 of the *National Water Act* 36 of 1998.

1.2.5 Section 25 of the *Constitution*²⁰ prohibits the arbitrary deprivation of property²¹ and states that property may only be expropriated²² for a public purpose or in the public interest, subject to compensation.²³ Section 25(4) states that the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources. Moreover, property is not limited to land. It is clear from this that reforms to bring about access to water are allowed by the property clause. This thesis aims to explain that a link exists between the concept "beneficial use" and the public interest in water allocation reform. A link also exists between the concept "beneficial use" and the concept "water use right" as a property right.

1.2.6 The government has recognised that tradeable water use entitlements may promote the shift from low to high value use of water and may remove the need for administratively set prices in water-stressed areas where the water demand is increasing.²⁴ The promotion of the shift from low to high value uses of water is an indication that the public interest in the case of water scarcity influences which uses are regarded to be beneficial.

It is necessary to determine what is meant by the concept "beneficial use" in water policy, legislation and regulations. The main objective of the study is to determine whether and how the concept "beneficial use" is used to determine the content of a water use right, whether it influences the availability of water for reform and whether it may be used to reflect the public interest in the extent of a water use right. A critical analysis of the concept "beneficial use" is thus necessary.

1.3 Point of departure, assumptions, and hypotheses

1.3.1 Point of departure

The right of access to sufficient water is guaranteed by the *Constitution*²⁵ of 1996. The *National Water Act*²⁶ contains the legislative measures that the state, within its available resources, had to adopt in terms of the *Constitution*²⁷ to achieve the progressive

20 *Constitution* of 1996.

21 S 25(1) *Constitution* of 1996.

22 S 25(2) *Constitution* of 1996.

23 See para 4.3.6.

24 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3. See para 7.6.

25 S 27(1)(b) *Constitution* of 1996.

26 Act 36 of 1998.

27 S 27(2) *Constitution* of 1996.

realisation of this right. The courts, when interpreting the *National Water Act*²⁸ must promote the spirit, purport and objects of the *Bill of Rights* in the *Constitution*.²⁹ This *inter alia* includes the protection of the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and non-racialism and non-sexism.³⁰

1.3.2 Assumptions

The following assumptions underlie this thesis:

- 1.3.2.1 Society has a greater interest in a natural resource like water, which is necessary to sustain life, than in a natural resource that has a mere economic value.
- 1.3.2.2 Rights to use water become more valuable when water becomes scarcer.
- 1.3.2.3 Certain uses of water are more valuable to society than others.
- 1.3.2.4 There is a difference between the legal rules applicable to water as a social good and water as an economic good.

1.3.3 Hypotheses

The aim with this study is to test the hypothesis that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right. The following hypotheses will be used to test the main hypothesis:

- 1.3.3.1 A right of access to sufficient water as entrenched in the *Bill of Rights* is a manifestation of the Roman law principle of *res omnium communes*.
- 1.3.3.2 Because of the need for water to sustain life and livelihoods in conditions of water scarcity, the public interest plays a larger role in the allocation of water use rights in South Africa than in the allocation of rights to other forms of property.
- 1.3.3.3 When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.
- 1.3.3.4 The extent of the right of access to sufficient water as a constitutional right should be limited by the concept "beneficial use".

²⁸ Act 36 of 1998.

²⁹ S 39(2) *Constitution* of 1996.

³⁰ S 1(a) and s 1(b) *Constitution* of 1996. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23, as well as para 3.2.

- 1.3.3.5 The concept "beneficial use" should be used to determine the existence of the right to use water.
- 1.3.3.6 When some private rights in a water resource are in conflict with other private rights to use the water resource, beneficial use is the tool that is used to determine which rights are to be preferred to others.
- 1.3.3.7 When it is necessary to encourage water users to discard uses with a low value for uses with a higher value, water trading will be an effective way to encourage the discarding of uses with a low value.

1.4 Methodology

1.4.1 Historical research

According to Zimmermann and Visser³¹ both Roman-Dutch and English law “fulfil the role of ‘common law’ in South Africa”. South African legislation and precedent are prime authority, with the underlying Roman-Dutch and English sources both equally authoritative.

In this thesis pre-classical, classical and post-classical water law in Rome will be traced to see how many of the principles developed in Rome were received into Roman-Dutch and South African water law. The historical development of South African water law will be divided into the period under the Dutch administration, the period under British administration and the period when the riparian system was accepted. During the discussion of water law in Rome, Holland, and the Cape under the Dutch and then the British administration, *firstly*, the principles that govern the concept *res omnium communes* will be discussed. *Secondly*, private rights in water will be discussed in the light of the effect of the concept "use" or "beneficial use".

1.4.2 Comparative water law research

During the research it became apparent that water scarcity in the Cape caused the Roman-Dutch law to be inadequate to regulate the dilemma of too many water users and too little water in a just manner. The early Cape courts under the British administration had used American case law to develop South African water law. The reason was that the American courts had relied on Roman and civil law principles to develop American water law. Courts in America and the Cape thus made use of comparative legal research early on in their history. Venter³² defines comparative legal research as that unique, systematic

³¹ Zimmermann and Visser *Southern Cross* 10.

³² Venter *Regsnavorsing* 213.

legal scientific method of research that is used to obtain new knowledge on the similarities and differences between the various legal systems to which it is applied. At a distance from his own legal system the researcher gains more perspective. Distance allows him to relativise and to come to objective conclusions on the strong and weak points of his legal system.³³ This leads to meaningful attempts at legal reform later.³⁴

In particular, Choudhry³⁵ explains that the dialogical mode of comparative constitutional interpretation holds that the legal doctrine found within a legal system may be understood as expressing the underlying values of that system. This method entails three steps: *Firstly*, comparative jurisprudence is used as a means to identify important assumptions in one's own constitutional order. *Secondly*, the court compares assumptions underlying domestic and comparative jurisprudence and engages in a process of justification. *Thirdly*, a court may be able to justify similarity with or a difference between the assumptions in its own jurisdiction and the assumptions in comparative jurisprudence. The identification and attempted justification of constitutional assumptions through comparison may lead to a court challenging and rejecting its assumptions and may facilitate the search for new assumptions.³⁶ Choudhry³⁷ is also of the opinion that a process of dialogical interpretation can even lead to a court using comparative jurisprudence as a means to initiate radical legal change.

Currently the *Constitution*³⁸ allows a court when interpreting the *Bill of Rights* to consider foreign law. According to Malan,³⁹ the courts are involved in functional legal comparison where the object is to obtain more knowledge on the content of the South African *Bill of Rights*. Malan⁴⁰ explains that certain factors need to be taken into account for legal comparison to be successful. He divides them into textual and contextual factors.⁴¹ Textual factors relate to the content of the foreign *Bill of Rights* and foreign case law.⁴² In this thesis the property clauses of the American and Australian Constitutions were analysed in accordance with the functional method of legal comparison.

Contextual factors relate to dogma that is not expressly mentioned in foreign case law.⁴³ In the case of the American and Australian Constitutions the questions whether the right of access to sufficient water is a human right and whether there is a concept of "public

33 *Regsnavoring* 214.

34 *Venter Regsnavoring* 215.

35 Choudhry 1999 *Indiana LJ* 836.

36 Choudhry 1999 *Indiana LJ* 858.

37 Choudhry 1999 *Indiana LJ* 858.

38 S 39(1)(c) of the *Constitution* of 1996. See Malan 1997 *THRHR* 217 and Choudhry 1999 *Indiana LJ* 844.

39 Malan 1997 *THRHR* 217.

40 Malan 1997 *THRHR* 217.

41 See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 22.

42 Malan 1997 *THRHR* 217.

43 Malan 1997 *THRHR* 224.

trusteeship" in their water law, form part of the contextual or background factors in terms of which their water law has to be interpreted. Besides the guarantee of access to sufficient water in section 27(1)(b) of the South African *Constitution*, prohibition of arbitrary deprivation of property in terms of the property clause plays a central role when water use rights are reformed. Malan⁴⁴ points out that the question should be whether foreign rules will be useful when one tries to solve local problems. In the context of this thesis the appropriate question is what should be the interpretation of the property clause in the *Constitution* of 1996 in the light of interpretations of the American and Australian property clauses when their courts were confronted with the reduction of water entitlements because of water scarcity. The role played by the concept "beneficial use" to determine the existence of the water use right in America will be compared to the situation in South Africa. The objective with the comparison is to determine whether there are any principles similar to those in American law that are applicable in South African law. In *Magajane v Chairperson, North West Gambling Board*⁴⁵ the court held that it was entitled under section 39(1)(c) of the *Constitution* of 1996 to review relevant foreign jurisprudence when considering the standard for regulatory inspections of commercial premises. The court held that the notion that an inspection constitutes an intrusion, albeit a less invasive one, invoking the right to privacy, is consistent with our constitutional notion of concentric circles of the privacy right.⁴⁶ Similarly, it is argued that the court is entitled under section 39(1)(c) of the *Constitution* of 1996 to review relevant foreign jurisprudence on the interpretation of a property clause. Where the understanding of a concept in American law is consistent with our constitutional notion of the same concept, like the concept "water use right," it may be of assistance to the court to consider the understanding of the foreign concept when making its decision.⁴⁷ The focus of the thesis falls on section 25 that deals with the property clause, but the property clause may also be limited by section 36(1) of the *Constitution* of 1996. It states that the rights in the *Bill of Rights* may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The effect of water law reform on the concept "water use right" as a property right in other modern and democratic societies that have constitutional property clauses, like America and Australia, may or may not show that the limitation of property rights by the *National Water Act*⁴⁸ is reasonable and justifiable.

44 Malan 1997 *THRHR* 225.

45 *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC) para 51.

46 *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC) para 59.

47 See *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC) para 59.

48 *National Water Act* 36 of 1998.

Where civil and common law institutions share the same structural roots, the possibility of borrowing is greater.⁴⁹ The reasons why American and Australian water law reform are studied in this thesis are: *Firstly*, American water law is founded on Roman law.⁵⁰ Australian water law is founded on the English common law where, thanks to Bracton, the approach was similar to Justinian's approach that running water is *res omnium communes*.⁵¹ The English common law on water was also influenced by Scots legal precedents.⁵² Scots law is founded on civil law. *Secondly*, both countries as a result of civil law historically regarded the water use right to be usufructuary in nature.⁵³ *Thirdly* both countries grapple with water scarcity. *Fourthly*, both countries have property clauses containing certain elements that are also found in the South African property clause.⁵⁴ *Fifthly*, both countries have case law in terms of which the stipulations of the property clause are applied to the reform of the law regulating the natural resources water or fisheries.⁵⁵ In the *sixth* instance the courts in both countries have identified certain principles that might be useful when South Africa regulates the water use right as a constitutional property right. In the *seventh* instance Australia has a federal agreement in terms of which water law reform must take place.⁵⁶ This provides very useful insight into the value of water trading when a country attempts to encourage people to use water for purposes with a higher rather than a lower value.⁵⁷

It should be stressed that it is not implied that all foreign solutions would be suitable for local problems. It is, however, suggested that a discussion of American and Australian solutions to problems related to water scarcity will be useful in identifying the different aspects of the problem and the different alternatives to addressing the problem. Australian policy, which forms a framework for water reform and which encourages water trading to motivate water users to discard uses with a low value in favour of uses with a higher value, will also be compared to clauses in the *National Water Act*⁵⁸ and policy documents to determine the possibilities and dangers inherent in water trading in South Africa.

49 See Du Plessis 1998 *Stell LR* 345 and 348.

50 See para 2.6.1.

51 See para 2.5.

52 See para 2.6. and para 6.2.

53 See para 5.5 and para 6.6.2.

54 See para 5.8 and para 6.5.

55 See para 5.9 and para 6.6.

56 See para 6.7.

57 See para 7.1 to para 7.5. Unfortunately water policy in America is scattered over many agencies and there is not a uniform policy in terms of which water reform should take place. Water trading in America was not studied.

58 Act 36 of 1998.

1.4.3 Literature study

This study entails an analytical literature study of relevant case law, text books, legislation and scientific contributions published in national and international law and other journals on the subjects studied in this thesis.

1.5 Overview of the chapters

Water law is one of the areas of the law where a study of the principles of the law as found in Rome, Holland and other countries where Roman water law was received, leads to insight into the legal challenges of one's time. The principle of the *res omnium communes* and the concept "servitude" can be found in various guises in all legal systems studied in this thesis, depending on the content of the public interest at a given time. When the boundaries provided by these concepts are investigated in Chapter 2, the principles on which modern water law is based, become apparent.

The right of access to sufficient water is a constitutional right protected in Chapter 2 or the *Bill of Rights* in the *South African Constitution*.⁵⁹ However, it will be argued in Chapter 3 of the thesis that when the right of access to sufficient water is protected as a constitutional right, the *res omnium communes*' principle has just taken on a modern day guise. It will also be argued that the right of access to sufficient water for basic human needs⁶⁰ and the aquatic ecology and the principles governing the allocation of water as a resource are all subject to the limitation of beneficial use.⁶¹ The Minister is ultimately responsible to ensure that water is allocated equitably and *used beneficially* in the public interest, while promoting environmental values.⁶² It needs to be investigated whether the concept "beneficial use" in the public interest⁶³ has a different meaning to the concept "beneficial use".

Similarly, the extent of the water use right in the case of the use of water for economic purposes and as a right in property, as discussed in Chapter 4, is also affected by the limitation of beneficial use. The limitation of beneficial use goes hand in hand with the concept of "public trusteeship."⁶⁴ Moreover, it will be argued that the limitation of beneficial use is at the root of the phrase "existing lawful water use" in terms of which unexercised water use rights were made available for reform purposes by sections 32 and 33 of the

59 S 27(1)(b) *Constitution* of 1996.

60 See para 3.7.

61 See para 3.8; para 3.1.4 and para 3.7.6.

62 S 3(2) *National Water Act* 36 of 1998.

63 See para 3.8.

64 See para 4.4.2.3 and para 4.4.2.4.

National Water Act.⁶⁵ The questions whether and when these sections lead to the arbitrary deprivation or even the expropriation of property will be discussed in some detail.

American water law is of importance for modern day South African water law because the so-called public trust doctrine, a modern version of the *res omnium communes*' principle, developed in America. The public trust doctrine reminds one of the concept of "public trusteeship" found in section 3 of the *National Water Act*.⁶⁶ In Chapter 5 it is explained that the concept "beneficial use" is a tool used hand in hand with the public trust doctrine in American water law to limit private property rights in water.⁶⁷ Sax⁶⁸ succinctly explains the place of beneficial use in American water law:

...the fundamental rule remains that beneficial use is the basis, measure, and limit of property rights in water.

It does not matter how old a use, if it is not seen as beneficial any more, it is repudiated in favour of modern conceptions of beneficial use. Pollution laws provide a relevant example.⁶⁹

The reason why American water law may supply guidelines for water reform is that Americans, because of water scarcity, grapple with a similar problem that South Africa does: How does one make more water available for reform without becoming liable to pay compensation because of an intrusion into property rights in water? There are two major methods of reform in American water law. The one deals with the forfeiture of unused riparian rights,⁷⁰ a method which is similar to the one used in sections 32 and 33 of the *National Water Act*.⁷¹ The second one deals with a reduction in deliveries to water users.⁷² The proposed discussion of the question which uses are protected by American courts when water rights are reformed might be a tool to help South Africans to understand underlying principles and assumptions in the South African water law system.

In the case of Australia the concept "beneficial use" is not used *verbatim* in the protection of a natural resource like a fishery. However, the general public in Australia is deprived of the right of unfettered exploitation or unconstrained use of *inter alia* fisheries, as is explained in chapter 6.⁷³ There also exists conflict in Australian case law between property being seen as inviolable and property being seen as subject to redistribution in the public

65 S 32 and 33 *National Water Act* 36 of 1998.

66 Act 36 of 1998.

67 See para 5.4 and para 5.7.

68 Sax 1988-1989 *Envtl L* 478.

69 Sax 1988-1989 *Envtl L* 478.

70 See para 5.9.3.

71 S 32 and 33 of the *National Water Act* 36 of 1998. See para 4.5.

72 See para 5.9.2.

73 *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 2. See para 6.4 and para 6.6.

interest.⁷⁴ The principles distilled from case law in Australia on whether compensation should be paid for regulatory deprivations of rights in natural resources might help South African lawyers to identify the principles at stake when there are regulatory deprivations of water rights.

There moreover exists an agreement, the *National Water Initiative*, between the Australian federal government and the states in terms whereof water law should be reformed.⁷⁵ The discussion of the framework for water law reform in Australia might be a tool to help South Africans to understand principles and assumptions useful to South African water law reform, as well as point out the advantages and disadvantages of certain methods to promote reform of the way in which water is used. Because of water scarcity in Australia, its governments, commonwealth as well as state, are concerned with finding ways to discourage people from using water for existing uses with a low value and to encourage them to use water for uses that were not developed at the time the water was first allocated. The commodification of water entitlements and allocations is happening because policy makers want to encourage a shift in water use from purposes with a low economic value to purposes with high economic value. In effect society's priorities, when determining which water uses are more beneficial than others, have changed. The *National Water Initiative*⁷⁶ is supposed to achieve the progressive removal of barriers to trade in water entitlements and allocations and to facilitate the broadening and deepening of the water entitlement and allocations market, as is discussed in chapter 7. Similarly, the South African *White Paper on a National Water Policy*⁷⁷ recognised that a way to set an appropriate price for water use⁷⁸ or even waste discharge would be by pooling available allocations and by selling them by tender or through an auction. The implication is that an appropriate price for water use would involve that uses with a low value are discarded for uses with a higher value. The discussion of water entitlement and water allocation trading in Australia discusses its advantages and disadvantages and might prevent South African policy makers from making certain mistakes. In the final chapter, chapter 8, the results of the research are measured against the objectives of the study in para 1.2 and the hypotheses set out in para 1.3.3. An *addendum* containing relevant clauses is at the back of the thesis.

74 Evans 2000 *PLR* 32. See para 6.5.4.6.

75 See para 6.7 and para 7.1.

76 National Water Commission 2004 *NWI* para 28.

77 DWA 1997 *White Paper on a National Water Policy* para 6.5.3.

78 S 21 of the *National Water Act* 36 of 1998.

In the next chapter the history of water law will be researched. The discussion will start with Roman law, but will include Roman-Dutch and South African law, as well as some English law and American water law.

CHAPTER 2

HISTORY

2.1 Introduction

*Gaius Noster*⁷⁹ taught that it is improper to deal with legal subjects by starting with the subject matter without tracing its origins, to give not even one's hands an initial wash. In the same breath he reminds us of both the importance of the study of history for the jurist and the importance of water for everyday activities. Gaius did not complete the image of one preparing oneself for the day by stating that one should look in the mirror before venturing out the door. If one were to look in the mirror after washing one's hands in the history of South African law, one would see features of legal systems that formed South African water law. It is no wonder, as the issues that were relevant at the time of Gaius are still relevant today.⁸⁰ Principles which applied then still apply today. Generally accepted water law principles will be discussed in this chapter. *Firstly*, the principles that govern the concept *res omnium communes* will be discussed. *Secondly*, private rights to use water will be discussed in combination with a discussion of the limiting effect of the concept "use" or "beneficial use". The question is to what extent water in the resource is a public or private good and where the limits to water use rights are to be found. It is in those societies where water in the resource is scarcer than others, that one finds well developed rules dividing and allotting water in the water resource. Many of the principles governing the division of water resources and the allotment of water use rights, which were applied in Rome,⁸¹ are still being applied today in arid countries like South Africa, the United States of America and Australia.⁸² The public interest⁸³ is still central to the question of the management of water resources.⁸⁴

In this chapter those legal systems that influenced the development of water law in South Africa are discussed. The influence of Roman law is discussed in the light of the *Twelve Tables*,⁸⁵ Cicero's thoughts on a community of law, the exposition of rights by Gaius⁸⁶ and

79 Translated into English as *Our Gaius*. Harris and Greenwell <http://www.harris-greenwell.com/HGS/GaiusTheJackOfRomanLaw>. See Van Zyl *Geskiedenis en Beginnels* 39-40 and para 2.2.2 below.

80 See Chapter 4; Chapter 5; Chapter 6 and Chapter 7.

81 See para 2.2.

82 See Chapter 4; Chapter 5; Chapter 6 and Chapter 7.

83 The question is whether early roots of the public trust concept are to be found in the history of our water law. For the reception of the concept in our law, see s 3(1) of the *National Water Act* 36 of 1998 and s 2(4)(o) of the *National Environmental Management Act* 107 of 1998. See the discussion in para 5.4.

84 Traces of the concept "stewardship" are found throughout the history of Western law. Grotius's thoughts on natural law had been influenced by Thomas of Aquino's thoughts on the stewardship of earthly things. See para 2.3.

85 See para 2.2.1.

86 See para 2.2.2.

the other jurists, as well as the exposition in Justinian's⁸⁷ *Institutes* and *Digest*. The classification of water as a resource and the classification of water use rights, as well as interdicts⁸⁸ protecting water users and servitudes giving water users certain rights, are of vital importance as they still form the basis of the common law of water law in South Africa. The rules developed around the concept "water use" in classical and post classical Roman law are still relevant today. Some of these rules were not important to the Dutch, as water scarcity was not an issue. Roman-Dutch⁸⁹ law pertaining to water, including the classification of the water resource and specific servitudes, form part of South Africa's Roman-Dutch legal heritage.⁹⁰ Because the Netherlands does not experience water scarcity, legal rules detailing the division of water in the resource or its allocation were not emphasised. Roman-Dutch law having had such a strong influence on South African property law, the thoughts of Grotius on property and the stewardship⁹¹ of nature are unconsciously echoed in the South African management of water resources.

The history of the management of water resources at the Cape⁹² in the time of the Dutch East Indian Company is discussed in the context of the flawed system of administration⁹³ and governance of the Dutch settlement. The influence of Roman law on the English⁹⁴ law of the commons is discussed briefly. It is because of the lack of legal rules dividing and allocating water in the resources in Roman-Dutch law and the deficiencies in early South African law that the judges working under the English administration⁹⁵ at the Cape had to research civil and Roman law and had to borrow from American⁹⁶ water law with its Roman law roots,⁹⁷ to develop a South African water law dividing water amongst riparian owners. Although the system of riparian⁹⁸ water use rights was flawed, the concept "reasonable use" and its relevance to the concept "beneficial use" will be discussed.

The main hypothesis tested in this thesis is that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right. In this chapter the truth of the hypothesis will be tested, *firstly*, by an investigation into the truth of the hypothesis that the concept "beneficial use" should be used to determine the existence of the right to use water. *Secondly*, the truth of the hypothesis

87 See para 2.2.3.

88 See para 2.2.3.1.

89 See para 2.3.

90 "Gemenereg". The Roman-Dutch law is regarded as the common law of South Africa, especially in private law matters. See para 1.4.1.

91 See para 2.3.3.

92 See para 2.4.

93 See para 2.4.4.

94 See para 2.5.

95 See para 2.6.

96 See para 2.6.1.1.

97 See para 2.6.1.3.

98 See para 2.6.3.

that the public interest plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property is investigated. *Thirdly* the hypothesis is tested that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

2.2 The influence of Roman law

In Roman times water was relatively scarce and was used mainly for agriculture, navigation and fishing.⁹⁹ The rivers of Italy were often tumultuous in winter and flowed in thin, slow streams in the hottest part of summer.¹⁰⁰ Because water at times was scarce, the allocation of water in the resource was regulated by the Romans. Roman law still forms the basis of the common law with regard to water resources in South Africa.¹⁰¹ From early on Roman law also made use of servitudes, which consist of the concept of one person having a right in something that belonged to another.¹⁰² These rights could even be sold.

2.2.1 Early and pre-classical Roman law

The first codification of Roman law around 451-450 BC in the *Law of the Twelve Tables* resulted in an almost complete separation of religion and the law.¹⁰³ State regulation of penalties to be paid by a wrongdoer superseded self-help. Rights in Rome no longer originated from ritual acts or from the decisions of magistrates or judges, but from statute.¹⁰⁴ Unfortunately there was a limited means to defend rights and to enforce obligations.¹⁰⁵ In recognition of the power of water to do damage, remedies were provided for two instances where water caused damage.

99 Thompson *Water Law* 17.

100 Hall *Origin and development of water rights* 5.

101 *Butgereit v Transvaal Canoe Union* 1988 1 SA 759 (A) 769-770. See *Transvaal Canoe Union v Garbett* 1993 4 SA 829 (A). See Burger *Roman Water Law* 11.

102 The Roman (see para 2.2.2. and 2.2.3) Roman-Dutch (see para 2.3.5) and American concepts "easement" and *profit à prendre* (see para 2.6.1.3 and para 5.5) developed from this. The Australians also make use of the same concept (see para 6.6.2).

103 Sinnigen and Boak *History of Rome to AD 565* 91. For more on the history of the *Twelve Tables*, see Harries "Roman Law Codes and the Roman Legal Tradition" 85 in Cairns and Du Plessis (eds) *Beyond Dogmatics: Law and Society in the Roman World*; Sinnigen and Boak *History of Rome to AD 565* on 76-77 and Van Zyl *Geskiedenis en Beginsels* 4; 24-26.

104 Thomas 2008 *TSAR* 53.

105 Sinnigen and Boak *History of Rome to AD 565* 91.

The first remedy provided by the *Twelve Tables* is known as “if rain water does damage” or *si aqua pluvia nocet*.¹⁰⁶ Watson¹⁰⁷ expresses amazement that governments were so little interested in private law that the Roman state never again intervened to provide a further remedy, except for the interdicts. He makes the point that jurists were so blinkered by their legal culture that they never tried to interpret the clause in the *Twelve Tables* to include damage caused by the deprivation of water. The second remedy the *Twelve Tables* provided was a private action for the injury to an owner to be made good when a stream of water flowing through a public place caused injury to a private person.¹⁰⁸

The *Twelve Tables* contains early instances of the law of servitudes. An example is the servitude of right of way contained in *Tab XII VII 6*¹⁰⁹ where it was stated that the width of the right of way covers eight feet in a straight line, but sixteen feet on a turn.¹¹⁰ Things like land and buildings in Italy, beast of burden like oxen and donkeys and old rural servitudes like *via* and *aquae ductus* were *res Mancipi*.¹¹¹ *Res Mancipi* possibly consisted of those things that were very important to the early agrarian Roman society and, therefore, formalities needed to be complied with before ownership could be transferred.¹¹² Van Zyl¹¹³ describes *mancipatio* as an old and formal way of transferring ownership involving the presence of witnesses, holding the object of the right and the touching of scales that probably had its origin in the *Twelve Tables*. Watson¹¹⁴ explains that servitudes might have come into existence in practice by consent. Because the need for legal protection was felt and *traditio* could not take place as there was nothing physical to transfer, there was no alternative to *mancipatio*. The creation of legally recognised rustic praedial servitudes allowed land to be used much more efficiently.¹¹⁵ The important point is that

106 *Tab VII.8a* in Watson 1990 *Ga L Rev* 164-165. By the first century BC the praetor had issued a model formula for the action. The formulation of the issues remained the basis of the law in the reign of Justinian. The cause of action was available only when the injury was the result of “work done” (*opus factum*). It was restricted to injury in the country. The thrust of the action was for restitution of the *status quo ante*. Even in the first century BC, jurists interpreted “if rain water does damage” to mean “if it can cause damage.” Pecuniary damages were awarded only for loss occurring after the beginning of the action. See Watson “Law and Society” 12 and Coleman-Norton 1950 *CJ* 56. Harries “Roman Law Codes and the Roman Legal Tradition” 85 thinks that the fact that the terms of the debate had been tenacious in juristic legal analysis demonstrates the power of legal tradition and the ability of jurists to “sustain a technical discourse in its own terms over many centuries”. See Drummond, Sherman and McCarthy 2005 *Tex Tech L Rev* 16-18 for the influence of Greek law on Roman law.

107 1990 *Ga L Rev* 171.

108 Conant and Reingruber 1927-1928 *St. Louis L Rev* 238 translated the text of *Tab VII.8b Paulus ad Sab. D 43.8.5*:

Si per publicum locum rivus aquae ductus privato nocebit, erit actio privato ex lege XII tab, ut noxa domino sarciatur.

109 Conant and Reingruber 1927-1928 *St Louis L Rev* 237-238 translated the text of *Gaius ad ed Provinc* (D 8.3.8):

Viae latitudo ex lege XII tab in porrectum octo pedes habet, in anfractum, id est ubi flexum est, sedecim.

110 Coleman-Norton 1950 *CJ* 5.

111 Van Zyl *Geskiedenis en Beginsels* 123.

112 Van Zyl *Geskiedenis en Beginsels* 124.

113 *Geskiedenis en Beginsels* 136 fn 59.

114 2004 *J Legal Hist* 140-142.

115 Watson 2004 *J Legal Hist* 146.

servitudes like *aquae ductus* could in principle be sold and transferred as they were *res Mancipi*.¹¹⁶

By the time the period of the Republic was passing by 44-27 BC, the *ius gentium* or law of nations was defined as that part of the law that the Romans applied both to themselves and foreigners.¹¹⁷ Roman law in this manner accepted principles and customs used by the Greeks and other foreigners when they became assimilated and Romanised. The Romans derived the idea of the law of nations as law common to all mankind from Greek philosophy, as well as the idea of an *ius naturale* or natural law.¹¹⁸ Natural law consists of the idea that a universal divine law emanates from right reason.¹¹⁹ Natural law provided the Romans with a philosophic justification of the law and it encouraged them to systematise Roman law according to fundamental legal principles. Although the Romans did not write systematic works on philosophy, the marriage between Greek speculative and Roman institutional genius brought forth part of the political inheritance of at least the Western world.¹²⁰

Cicero (106-43BC) believed in moderation, concord and constitutionalism. He defined the state as a community of law.¹²¹ The rule of law was important to him and he believed that the legal rights of those who are citizens of the same commonwealth ought to be equal. He believed that all those who had reason in common had to have common conceptions of law and justice.¹²² The foundation of law was the natural inclination to love one's fellow person. Cicero stressed that popular consent was the foundation of legitimate government. Liberty only had a place in a state where the people's power was the greatest.¹²³ The next paragraph will show that classical Roman law showed traces of the influence of natural law and was more systematised than early and pre-classical Roman law.

116 Water rights, which in Roman times could exist separately from land rights (see para 2.2.3.1), paved the way for modern trading in water entitlements. See Chapter 7.

117 Sinnigen and Boak *History of Rome to AD 565* 248.

118 See Cicero "De Republica De Legibus" 136-138 in Ebenstein *Great Political Thinkers*. It is not the purpose of this thesis to analyse the advantages and disadvantages of natural law, but traces of natural law are found throughout the history of property law (see para 2.2.2; para 2.2.3 and para 2.3.3) and water law and even in American constitutional law.

119 Sinnigen and Boak *History of Rome to AD 565* 248.

120 Ebenstein *Great Political Thinkers* 124-125.

121 The original Latin is *iuris societas*. Ebenstein *Great Political Thinkers* 126. Cicero's view of the state as a community of law was attractive to the framers of the American Constitution, who linked national selfhood and unity with justice and based their nation on the rule of law. Ebenstein *Great Political Thinkers* 128.

122 Ebenstein *Great Political Thinkers* 127.

123 Ebenstein *Great Political Thinkers* 128.

2.2.2 The classical period of Roman legal development (27 BC-250 AD)

*Gaius Noster*¹²⁴ (ca 110-180 AD)¹²⁵ lived at the height of the classical period and divided the law into natural or fundamental law, based upon nature and reason, and civil or positive law based upon the will of the legislator.¹²⁶ This became a tool with which to support and criticise the positive law of the state.¹²⁷

By the time of the classical development of Roman law the nature of rivers had already been a matter of discussion and classification. The fact that a river was perennial caused it to be characterised as *flumen publicum*. Navigability did not play a part. Gaius stated that *aqua flumina* was *res publicae*.¹²⁸ Ulpianus¹²⁹ later on stated that things that were public were held to belong to the *universitas* (the corporate body) itself.¹³⁰ Aelius Marcianus, however,¹³¹ stated that *aqua flumina* was *res omnium communes*.¹³² The phrase “things common to mankind” reflects the influence of poets and philosophers on Marcianus, the Roman poet and jurist.¹³³ In antiquity it was believed that until greed gave birth to private property, all things were held in common and the earth naturally produced its fruits for the benefit of all. The moral duty not to deprive others of things needful to them, especially the elemental things of nature, was rooted in Stoicism.¹³⁴ Deveney¹³⁵ explains that Marcianus believed that:

...communal ownership imposed a duty not to deprive others of essential things, especially elemental or common things.

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- 124 Van Zyl *Geskiedenis en Beginsels* 39. Van Zyl *Geskiedenis en Beginsels* 5 classifies the second century AD and the first half of the third century AD as the classical period of legal development.
- 125 Gaius was probably born in the time of Hadrian and wrote under the Antonines. He is known for his *Institutiones*, on which the *Institutiones* of Justinian was based. Sandars *Institutes of Justinian* xxviii. Sinnigen and Boak *History of Rome to AD 565* 318 write that Antoninus Pius (138-192AD) insisted on the impartial administration of justice. The law was liberalized through the introduction of the principles of equity and began to receive its characteristically systematic form.
- 126 Harris and Greenwell 2006 <http://www.harris-greenwell.com/HGS/GaiusTheJackOfRomanLaw> explain that Gaius' *Institutes* was a text from about 160 AD that was used to teach Roman law students. The *Institutes* of Justinian relied heavily on the *Institutes* of Gaius and adopted the format and often the words of Gaius. As much as two-thirds of Justinian's *Institutes* were taken from the *Institutes* of Gaius. Justinian calls Gaius, *Gaius Noster* or “our Gaius”. Gaius developed the first system in the history of law by dividing the law into persons, things, and actions. See Van Zyl *Geskiedenis en Beginsels* 40.
- 127 Harris and Greenwell 2006 <http://www.harris-greenwell.com/HGS/GaiusTheJackOfRomanLaw>. Gaius also mirrored Aristotle's views on the subject of law and justice. Aristotle (Benn and Peters *Social principles and the democratic state* 112) held that justice consists of an equality of proportion between persons and the things assigned to them. Differences in treatment should be proportionate to the degrees to which the individuals differ in relevant respects.
- 128 Gauntlett (ed) *Opuscula Miscellanea – JC de Wet 7* states that water in a public river was a *res publica* and not a *res communes* as stated by D 1.8.2.1. Compare Uys *Structural analysis of water allocation* 119.
- 129 Muirhead *The institutes of Gaius and Rules of Ulpian* II.11.77 the former from Studemund's apograph of the Verona codex.
- 130 About two fifths of Justinian's *Digest* consists of fragments of Domitus Ulpianus' writings. Ulpianus died in 228 AD. Van Zyl *Geskiedenis en Beginsels* 41.
- 131 Aelius Marcianus *inter alia* wrote under writing under Antoninus Caracalla 188–217 AD.
- 132 D 1.8.2.1.
- 133 Deveney 1976 *Sea Grant LJ* 26. Butler 1981-1982 *WM & Mary L Rev* 850.
- 134 Deveney 1976 *Sea Grant LJ* 27. The Stoic concept of “nature” was that nature includes the processes of growth and the goal and or principle towards which this process is moving. Ebenstein *Great Political Thinkers* 142.
- 135 Deveney 1976 *Sea Grant LJ* 27.

The air, flowing water, the sea and seashore reflected the elements as described in the Stoic elements of the world. They were listed by Marcianus as common to all. The element earth was probably excluded because it had long been divided. The air, flowing water and the sea were also less susceptible to private acquisition. Uys¹³⁶ interprets Marcianus' opinion that certain things belonged to everyone in terms of natural law as meaning that natural resources were intended for common use by all. No-one who was in need of natural resources could be prevented from using them, because that would have been contrary to universal principles of justice.

The classical jurists did more than just classify natural resources. Gaius and his contemporaries already classified rights into corporeal and incorporeal rights. The concept *usus fructus*,¹³⁷ which means benefitting from the fruits of the things of another, was categorised by Gaius and regarded to be incorporeal.¹³⁸ It did not affect its definition that the fruits gathered from the soil were corporeal. It was the right under *usus fructus* that was incorporeal. Even incorporeals like *usus fructus* could be ceded by way of cession in court.¹³⁹ The possessor was regarded as possessing via those to whom he has granted [a right of use].¹⁴⁰

The distinction between substantive law and procedure, the division between contract and delict, and the distinction between actions *in rem* and actions *in personam* are all due to the work of Gaius.¹⁴¹ He divided actions into actions *in rem* and actions *in personam*. It was an action *in rem* when somebody contended that a corporeal was his or that he was entitled to some right, such as one of *usus fructus*, of drawing water or having a prospect.¹⁴² Actions *in rem* were called vindications. Muirhead¹⁴³ explains that vindication was the generic name for an *actio in rem*. Specific forms were *inter alia* the *rei vindicatio* and the *vindicatio servitutes*. According to Gaius,¹⁴⁴ *aqua ductus* was a vested right on rural land. According to the *Libro Singulari Regularum* of Ulpianus,¹⁴⁵ it was an incorporeal

136 Uys *Structural analysis of water allocation* 121-123.

137 *Usus fructus* was later received in American law as a *profit à prendre* (see para 2.6.1.3 and para 5.5). The Australians also make use of the concept *profit à prendre* (see para 6.6.2).

138 Gaius "Commentarii Quattor" II.14 in Muirhead *Institutes of Gaius and Rules of Ulpian* 78-79 the former from Studemund's apograph of the Verona codex. See para 2.2.2; para 2.2.3, para 4.4; para 5.5 and para 6.7.

139 Ulpianus "Libro Singulari Regularum" XIX.11 in Muirhead *Institutes of Gaius and Rules of Ulpian* 395 the former from Studemund's apograph of the Verona codex. The concept "session of rights" is important for trading in those rights.

140 Gaius "Commentarii Quattor" IV 153 in Muirhead *Institutes of Gaius and Rules of Ulpian* 339 the former from Studemund's apograph of the Verona codex. Gordon and Robinson *Institutes of Gaius* 511, with the Latin text of Seckel and Kuebler, do not use the expression usufruct or right of use.

141 Harris and Greenwell 2006 <http://www.harris-greenwell.com/HGS/GaiusTheJackOfRomanLaw>.

142 Gaius "Commentarii Quattor" IV 1-45 Muirhead 268 the former from Studemund's apograph of the Verona codex. See *Institutes of Gaius* translated by Gordon and Robinson; with the Latin text of Seckel and Kuebler 404.

143 Muirhead *The institutes of Gaius and the rules of Ulpian* 627 the former from Studemund's apograph of the Verona codex.

144 Gaius "Commentarii Quattor" II.14 in Muirhead *Institutes of Gaius and Rules of Ulpian* 78-79 fn 14a, the former from Studemund's apograph of the Verona codex.

145 See Ulpianus "Libro Singulari Regularum" XIX.1 in Muirhead *Institutes of Gaius and Rules of Ulpian* 395 the former from Studemund's apograph of the Verona codex.

right and called a praedial servitude. It was also a *res Mancipi*.¹⁴⁶ It was an inherent limitation of the servitude of *aqua ductus* that use had to take place. According to Paulus,¹⁴⁷ the praedial servitudes of drawing water from a well and *aquae ducendae* lapsed when they had not been used for two years.¹⁴⁸ They were revived¹⁴⁹ by use for two years. It appears that by classical Roman law an early manifestation of the concept "beneficial use" was utilised to determine the existence of the right to use water.

Whereas the right of sewerage¹⁵⁰ was a vested right on urban land, *aqua ductus* was a vested right on rural land. In litigation on the servitude of *aqua ductus*, the litigant was supposed to give surety that he would not prevent the other party from leading water.¹⁵¹ If water had been led from a common feeder between neighbours, the use of violence against somebody who uses water with the same frequency on his land as another was prohibited.¹⁵²

2.2.3 Post classical Roman law (250 AD – 1100 AD)

In the 533 AD *Institutiones* of Justinian (482-565 AD) things were divided into those *in nostro patrimonio* or capable of private ownership and *extra nostrum patrimonium* or incapable of private ownership.¹⁵³ *Res extra nostrum patrimonium* either belong to all men (*res communes*), to the state (*res publicae*), to nobody (*res nullius*) or to bodies of people (*universitatis*). According to Justinian:¹⁵⁴

By the law of nature these things are common¹⁵⁵ to mankind – the air, running water, the sea and consequently the shores of the sea. One was allowed to take as much as one pleased from things common to all.

146 See para 2.2.1 and *Preston and Dixon v Trustee of Biden* (1882) 1 HCG 248 on 310 where *res Mancipi* in Roman law and formalities for the transfer of property in civil law are discussed.

147 "Uitspraken van Paulus" 1.16.1; XVII.2 and XVII.3 in Spruit and Bongenaar's translation of *Gaius en Paulus* 97. Paulus was *praefectus praetorio* in the time of the emperor Alexander Severus (222-235 AD).

148 More detailed rules are found in the *Digest*. See para 2.2.3. Compare s 32 and s 33 of the *National Water Act* 36 of 1998.

149 *Herkregen*.

150 "Gaius" II.1 pr2. in Spruit and Bongenaar's translation of *Gaius en Paulus* 57.

151 "Uitspraken van Paulus" V.8c in Spruit and Bongenaar's translation of *Gaius en Paulus* 181.

152 "Uitspraken van Paulus" V.6.9 in Spruit and Bongenaar's translation of *Gaius en Paulus* 181. My loose translation of the Dutch.

153 *Just* 2.1 Sandars *Institutes of Justinian* 90. See Moyle *Institutes of Justinian Translated* D 2.

154 *Just* 2.1.1.

Et quidem naturali iuria communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris.

According to Lazarus 1986 *Iowa L Rev* 334 this declaration was likely to have been Justinian's own idealisation of a legal regime and might not have reflected the true nature of public rights during the Roman Empire. It was in all events mimicked practically verbatim in the Spanish thirteenth-century code, *Las Siete Partidas*, and eventually was reflected in the customs of most European nations in the Middle Ages. This compilation of pre-existing Spanish law was enforceable in all of Spain's overseas territories, including territories now included in the United States (*inter alia* Arizona, California, Nevada). See para 5.9 for a modern application of water law in the West of America.

155 Deveney 1976 *Sea Grant LJ* 29-30 argues that the sea and the seashore were common to all only to the extent that they were not yet appropriated for use by anyone or allocated by the state. Each person could use the things common to all to the limit of his own need. The appropriation gave the holder real ownership. See Huffman 2007 *Duke Envtl L & Pol'y F* 1 para III.

Of things that are common to all anyone may take such a portion as he pleases. Thus a man may inhale the air, or float his ship on any part of the sea. As long as he occupies any portion, his occupation is respected, but directly when his occupation ceases, the thing occupied again becomes common to all.¹⁵⁶

Sandars¹⁵⁷ explains that the *Institutes* state that all rivers and ports are public. For this reason the rights of fishing in a port or in rivers is common to all men.¹⁵⁸ Sandars¹⁵⁹ believes that the word *publicus* probably means “what belongs to the people”. Things public might belong to a particular people, but may be used and enjoyed by all. The people or nation in whose territory public things lie was allowed to permit the whole world to make use of them. They exercised a special jurisdiction to prevent any one injuring them. According to Sandars,¹⁶⁰ public things are subject to the guardianship of the Roman people. Butler¹⁶¹ states that grants of exclusive rights in coastal lands and resources¹⁶² were prevalent, but the Romans were reluctant to convey ownership of public things. A grant adverse to public rights was construed strictly. Grants often were limited to possessory rights. The general right of common use was subject to the control of the state, for the emperor or the senate might forbid any diversion from a public stream. It does not appear from any passage in the *Digest*, the *Institutes* or the *Codex* that the idea that the state was absolute owner of the rivers ever existed. The rivers were *res publicae* in the sense that the state controlled the rivers for the benefit of all inhabitants, who had a common right to use them. The state and emperor had purely legislative functions. Neither the state nor the emperor had rights of ownership in the rivers.¹⁶³

Burger¹⁶⁴ explains that although any member of the public could divert or use flowing water, no one could have a right to possess or own flowing water whilst it was flowing. The shape of flowing water is ever changing and moving and is, therefore, incapable of being possessed or owned. If one impounds flowing water and succeeds, then it is no longer flowing. Because possession or ownership of water was not possible, the Romans considered flowing water to be *res omnium communes* and “incapable of being owned”. He argues that one can possess or own stagnant water. Large bodies of stagnant water

156 Sandars *Institutes of Justinian* 91.

157 Sandars *Institutes of Justinian* 2.1.2 on 91.

158 *Flumina autem omnia et portus publica sunt: ideoque jus piscandi omnibus commune est in portibus fluminibusque.*

159 *Institutes of Justinian* 91.

160 Sandars *Institutes of Justinian* 91. We get the first inkling of the concept of the “public trust” that appears in s 3(1) of the *National Water Act* 36 of 1998.

161 1981-1982 *WM & Mary L Rev* 852-853. See para 4.4; para 5.4 and para 6.4.

162 See para 2.2.3.1 and D 43.14.7.

163 Hall *Origin and development of water rights* 6. This contrasts with the Dutch East India Company claiming an absolute right to control the use of streams in its own interests. See para 2.4.6.

164 *Roman Water Law* 12-13.

acquire the same characteristic of the land on which it was situated. Thompson¹⁶⁵ agrees that the ownership of running water was forbidden, but parts and contents of it could be appropriated. He mentions as example “a bucketful of water or a catch of fish”. The appropriated water and fish became *res singulorum*, in other words belonged to private individuals.¹⁶⁶

Deveney¹⁶⁷ explains that the rule that *res publica* or *res omnium communes* were *extra commercium* was true only in the sense that they fell outside the private law and were not capable of being subjected to ordinary legal transactions between private persons. They were not immune from all legal transactions. Things *extra commercium* only in their totality were outside of commerce. A specific quantity of water was a *res in commercium* and *dominium* was acquired by means of appropriation as in the case of all *res nullius*.

The right of use of water was described as a personal right in the *Digest*.¹⁶⁸ It relied on Gaius when stating that a bare right of *usus* is use without entitlement to the fruits. It is generally created in the same way as *usus fructus*.¹⁶⁹ Paulus¹⁷⁰ stated that *usus fructus* was the right to use and enjoy the things of another without destroying their substance. The real difference seems to be that in the case of *usus* one was not entitled to the fruits of the things of another. If a man was granted the right to draw water, a right of access was presumed.¹⁷¹ In the case of a public river a grant of the right to draw water without the right of *iter* (the right to access on foot) achieved nothing. One of the servitudes that Justinian mentions is that of *aquae ductus*, the right of conducting water through the land of another.¹⁷² Another servitude related to water is the urban servitude of receiving or not receiving the water that drops from another man’s house.¹⁷³ Rural servitudes he mentions are those of drawing water and watering cattle.¹⁷⁴ Justinian replaced the *vindicatio servitutes* and the *vindicatio usus fructus* by the *actio confessoria* that was available for

165 Thompson *Water Law* 20.

166 Van der Merwe *Sakereg* 27 and Van der Merwe and De Waal *Law of Things and Servitudes* para 19.

167 1976 *Sea Grant* LJ 30.

168 D 7.8.21. Translation edited by Alan Watson. According to Modestinus it cannot be transmitted to the heir of the usuary. It was discussed under the heading 8 *The right of use and the right of habitation*.

169 D 7.8.1. Translation edited by Alan Watson.

170 D 7.1.1 Translation edited by Alan Watson.

171 D 8.3.3. *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

172 Justinian 2.3 in Sandars *Institutes of Justinian* 118. Van Zyl *Geskiedenis en Beginsels* 178 classifies *aquae ductus* as a rural praedial servitude.

173 Sandars *Institutes of Justinian* 120. See *Hall on water rights in South Africa* 271-275 on the interpretation of servitudes. See *Thormahlen v Gouws* 1956 4 SA 430 (A) 435-436 on the *actio aquae pluviae arcendae* and the *interdictum quod vi aut clam*. In *Redelinghuis v Bazzoni* 1976 1 SA 110 (T) 112-114 the court held that the *actio pluviae arcendae* still applies to a rural tenement. See *Van Schalkwyk v Van der Wath* 1963 3 SA 636 (A) 641 for the *onus* of proof. See also *Benoni Town Council v Meyer* 1959 3 SA 97 (W) on 100-101 where the court held that the fact that the work done is a reasonable exercise of the owner's enjoyment of a property will not avail the owner if the effect is to remove a vlei or part of a vlei from his own property to the property of his neighbour. See also *Benoni Town Council v Meyer* 1961 3 SA 316 (W). See De Waal *Vestiging van Grondservitude* 34-36 on urban land servitudes. See para 4.4.2.2 on the water entitlement in terms of the *National Water Act* 36 of 1998.

174 Sandars *Institutes of Justinian*; De Waal *Vestiging van Grondservitude* 31-34 on rural land servitudes. See also Butler 1981-1982 *WM & Mary L Rev* 852-853.

the protection of the rights of all servitude holders.¹⁷⁵ Owners on whose property water originated had preferential rights to the use thereof, because it could have been “unreasonable to allow others to use it at the expense of the upstream owner’s requirements”.¹⁷⁶

In post classical Roman law a servitude of using water was still liable to be lost if it were not used. Paulus¹⁷⁷ was quoted in the book *Plautius* as stating that if a man has a right to take water during alternate years or alternate months, the right is lost by the lapse of twice the prescribed period. When the right may be exercised on alternate days or only during the day or only at night, it will be lost by the lapse of the period established by law, because the exercise of the servitude is considered continuous. Paulus¹⁷⁸ quoted Servius, who wrote that if a man has a servitude that may be exercised every other hour or for one hour during the day, he will lose the servitude by not using it. Paulus¹⁷⁹ explained that if a man who has a right to draw water at night only did so during the day for the period prescribed for the loss of a servitude by non-use, he lost his servitude of drawing water at night because he failed to exercise it. The same rule applied when a man had a right to use a watercourse during certain hours, but only made use of it at other times. When a man failed to channel water on his appointed day throughout the prescribed period where a number of men were accustomed, as of right, to channel water which had its source on a neighbour’s estate, the right to channel water or the servitude was lost, according to Proculus.¹⁸⁰ The right could not be exercised through another. The landowner would enjoy freedom from this much of the servitude. When a man did not draw water from a spring, the right of *iter* similarly was lost, according to Pomponius.¹⁸¹ It is not only non-use that could cause the servitude to be lost. When one exceeded one’s quota, one also contravened a condition of the servitude that would lead to the servitude being lost. Paulus¹⁸² wrote that when a man uses more water than he is entitled to use in terms of the servitude, the servitude is also lost. If the previous owner of an estate did not make use of a servitude attached to it, it will be held against his successor in title.

Pomponius¹⁸³ explained that if you sold a part of your land, but made it a term of the contract that you reserved a right to channel water across the sold land to the rest of the estate there were two possibilities. *Firstly*, if you had made a watercourse and did not use it, you would have lost your right. *Secondly*, if you did not construct a watercourse during

175 Van Zyl *Geskiedenis en Beginsels* 187.

176 Thompson *Water Law* 20.

177 D 8.6.7 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

178 D 8.6.7 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

179 D 8.6.10 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

180 D 8.6.16 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

181 D 8.6.17 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

182 D 8.6.18 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

183 D 8.6.19 *Mommsen and Krueger’s translation of the Digest* English translation edited by Watson.

the prescribed period, you would not have lost the right as there is no channel for the water to flow through. When a spring dried up and later started flowing again, the emperor granted relief when two men petitioned the emperor that their rights should be restored to them on the grounds that they lost it through no neglect or fault of their own, but because it had been impossible to obtain water.¹⁸⁴ The emperor held that the right, which they held on the first day that it became impossible to obtain water, should be restored to them.

One's subjective belief is also important. Paulus¹⁸⁵ wrote that a person could only be considered to have been using a servitude when he believed that he exercised a right which belonged to him. If he believed that he was using a servitude belonging to another, he was not entitled to an interdict or an action. It appears that by post classical Roman law the concept "beneficial use" was still used to determine the existence of the right to use water. The concept "beneficial use" is of importance because of the status of water as *res omnium communes*. The right to use water appears to have been conditional on the following factors: One should have used the water; one should not have exceeded one's quota; and one should have had the intention to use one's servitude. One would not have lost one's servitude when non-use was not as a result of one's neglect or fault.

Ulpianus¹⁸⁶ wrote that if a man has obtained a right to channel water by long use and long possession, he does not need to lead evidence to establish the legal title of his right to use water. He was entitled to an *actio utilis* to establish that he had the use of the water and that it was not obtained by force, stealth or precarium. The action could also be brought against third parties. Praetorial interdicts to enforce rights to perennial flowing water will be discussed next.

2.2.3.1 The interdicts

One could not own perennial flowing water in the resource, but the user needed the assurance of a continued supply. From about 150 BC the mechanism to achieve this assurance was the series of interdicts which were issued by the praetors to enforce rights to perennial flowing water.¹⁸⁷ An extensive irrigation practice in the Roman Empire led to a fully developed system of law covering aqueducts and the associated servitudes.¹⁸⁸ Interdicts issued by the praetor were in a stereotyped form that is set out for each sort of case in the edict. Interdicts had a "policing" character and many were concerned with public ways and rivers. Interdicts were a remedy when two parties claimed a right to divert

184 D 8.3.35 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

185 D 8.6.25 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

186 D 8.5.10 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

187 Burger *Roman Water Law* i. In D 43.12.3-D 43.12.4 (*Mommsen and Krueger's translation of the Digest* English translation edited by Watson). Cassius, supported by Celsus, states that a public river is perennial. A private river was no different from any other private place. See *Van Heerden v Weise* 1 Buch A.C. 5 (1880) and para 2.6.2.

188 Burger *Roman Water Law* 14.

flowing water, which being a *res communes*, could not be owned or possessed by either. The interdict helped to maintain public order.¹⁸⁹ Uys¹⁹⁰ argues that the *usus publicus*, being the right of every member of the public to use any water, was limited by legislative measures to control competitive use, as well as by the obligation to use water reasonably by considering the rights of other water users. The latter was a manifestation of the concept "reasonable use".

a) Proportionate allocation of water

The fact that the allocation of water was important in Rome is borne out by D 8.3.17:

PAPIRIUS JUSTUS, Imperial Rulings, Book 1: The Emperors Antoninus Augustus and Verus Augustus laid down in a rescript that for the purposes of irrigating fields, water from a public river ought to be allocated in proportion to the size of those fields, unless anyone could establish that he should be allowed more than his proportionate share because of some special right of his. They further laid down that a man is only permitted to channel water if this can be done without wrong to another.¹⁹¹

D 8.3.17 refers to a public river where the water is used for irrigating fields. When the water is allocated, the allocation ought to be in proportion to the size of the fields. Should anyone have a special right, he should prove it in order to be allowed more than his proportionate share. Water may in any event only be channelled if this can be done without wrong to another. According to Burger,¹⁹² there is only a need for a division of water amongst the users when there is a shortage of water. In that case, it would be illogical to bring other additional lands into production through irrigation. He mentions that a special right could exist where water had been granted by the emperor and argues that the words *proprio iuris* suggest that there was a general right in terms of which water was used generally.¹⁹³ Burger¹⁹⁴ is of the opinion that D 8.3.17 offered an equitable solution when an area became fully developed and there was a shortage of water. This it did by

189 Burger *Roman Water Law* 19.

190 *Structural analysis of water allocation* 153.

191 D 8.3.17 PAPIRIUS IUSTUS libro primo de constitutionibus.

Imperatores Antoninus et Urus Augustin rescripserunt aquam de flumine publico pro modo possessionum ad irrigandos agros diuidi oportere, nisi proprio iure quis plus sibi datum ostenderit. item rescripserunt aquam ita demum permitti duci, si sine injuria alterius id fiat.

Mommsen and Krueger's translation of the Digest English translation edited by Watson. See suggested translation by Burger *Roman Law* 31. See para 2.6.2; *Hough v Van der Merwe* 1874 Buch 148 and *Van Heerden v Weise* 1 Buch A.C. 5 (1880). See para 3.8 where the right of access to sufficient water is a human right.

192 *Roman Law* 31.

193 Burger *Roman Water Law* 32. In our day a "special right" might be similar to a constitutional right in terms of the SA *Constitution* of 1996. Unfortunately, more is not known about the balancing of the special rights *vis a vis* one another.

194 *Roman Water Law* 32.

spreading the hardship over all the users. The result was that no user would ever be totally deprived of water and ruined.

This text appears under the heading *Rustic praedial servitudes*. They are *iter*, *actus*, *via* and *aquae ductus*.¹⁹⁵ They included the right to draw water and to drive cattle to water. The right to channel water or to draw water to be conducted by a watercourse across the same ground can be granted to several individuals to exercise during the same hours.¹⁹⁶ D 8.3.25 links land and the right to channel water.¹⁹⁷ Pomponius is quoted that if one were to sell a part of his estate to another, a right to channel water that attaches to the estate will accompany the land even if the right is most often exercised for the benefit of another part of the land. The division of the water is to be in proportion to the extent of the retained and conveyed fields. On the other hand, it was lawful for a man to reserve the use of water in a contract for the sale of the land on which the source was situated.¹⁹⁸ Paulus¹⁹⁹ is the authority stating in D 8.3.30 that the seller only had a right of access to the water.

b) Prohibition on interference with the manner and direction of the flow

Some rivers were public, and the praetor issued an interdict:

D 43.12.1

Ulpianus *Edict*, book 68: The praetor says: You are not to do anything in a public river or on its bank by which the landing or passage of a boat is or shall be made worse.²⁰⁰

For Cassius, Celsus and Ulpianus a public river was a river that flowed all year round.²⁰¹ The effects were restricted to navigable rivers²⁰² or their significant tributaries. In this case the right of landowners to use the water was restricted in the public interest. Their neighbours also benefited, as the landowner could not divert the public river or reduce its flow considerably. Watson concludes that for such rivers the neighbour would in practice have equal right to a reasonable use. Uys²⁰³ writes that all running water was *communia*,

195 D 8.3.1 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

196 D 8.3.2 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson. See para 7.2 on the unbundling of water rights.

197 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

198 See para 2.3.1 and para 6.8. Keeping the water while selling the land allows the seller to trade in the water later on.

199 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

200 D 43.12.1

Ulpianus libro sexagesimo octavo ad edictum. Ait praetor: ne quid in flumine publico ripae eius facias neque quid in flumine publico neque in ripa eius immitas, quo statio iterue navigio deterior sit fiat.

Mommsen and Krueger's translation of the Digest English translation edited by Watson. See Watson's translation in 1990 *Ga L Rev* 174.

201 D 43.12.1.3 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

202 D 43.12.1.12 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

203 *Structural analysis of water allocation* 134.

although some of the interdicts only applied to certain forms and strengths of streams. The exclusion of certain small streams did not move them from *communia* to *res privatae*. Uys²⁰⁴ explains that the division of water sources into classes such as *flumina publica*, *flumina privata* and *rivi*, was merely for the sake of administrative control, and not for the sake of rewriting the *ius rerum*. *Flumina publica*, together with *flumina privata* and *rivi*, were *res publicae* or *communia*.

D 43.13.1

Ulpianus *Edict book 68*: The praetor says: “I forbid anything to be done in a private river or on its bank, or anything to be introduced into a public river or on its bank which might cause the water to flow otherwise than it did last summer”.²⁰⁵

Watson²⁰⁶ states that Ulpianus explains that it did not apply where a neighbour only changed the volume of the water's flow, but applied where a neighbour changed the manner and direction of the current. There was no attempt to strike a balance in the amount of use of water by (or injury to) neighbouring proprietors. The words “flow otherwise” refer to the manner and direction of the current of the water, not the volume.²⁰⁷ Ulpianus explains a text that the praetor thus provided that rivers do not dry up (*exarescant*) by channels that are not allowed or that a changed river bed does not cause injury to neighbours. Watson²⁰⁸ considers the manuscript reading to be insecure. Watson²⁰⁹ explains that “*exarescant*” is the reading of the inferior manuscripts, and it is the preferred reading. The Florentine, the prime manuscript, reads the questionable word as *exrescent*, “that rivers do not increase in volume.” If that were accepted as the proper reading, this provision would be similar to the law for the *actio aquae pluviae arcendae*. The interdict seemingly had a limited scope. This interdict contained only a prohibition, but it was closely associated with another interdict ordering restitution where something had already been done that changed the water's flow.²¹⁰

204 Structural analysis of water allocation 140.

205 D 43.13.1

Ulpianus libro sexagensimo octavo ad edictum. Ait praetor: “In flumine publico inue ripa eius facere aut in id flumen ripamue eius immittere, quo aliter aqua fluat, quam priore aestate fluxit, ueto.

Mommsen and Krueger's translation of the Digest English translation edited by Watson.

Watson 1990 Ga L Rev 174-175 states that Ulpianus explained that it did not apply where a neighbour just changed the volume of the water's flow, but applied where a neighbour changed the manner and direction of the current. There was no attempt to strike a balance in the amount of use of water by (or injury to) neighbouring proprietors.

206 1990 Ga L Rev 174-175.

207 D 43.13.3 Mommsen and Krueger's translation of the Digest English translation edited by Watson. The interdict in D 43.13.11 provides for restitution.

208 1990 Ga L Rev 175.

209 See Watson “Law and Society” 17.

210 D 43.13.1.12-D 43.13.1.13 (Ulpian, Edict 68) Mommsen and Krueger's translation of the Digest English translation edited by Watson.

c) Interdict to protect navigation and fishing

D 43.14.7 read that if a contractor who had taken a lease of a lake is prevented from fishing, the interdict in D 43.14.1, prohibiting the use of force against one travelling in a boat on a public river or public lake, applies. Sabinus and Labeo are cited as authority.²¹¹

Uys²¹² explains that reference was only made to public streams, since only these were perennial and fit for navigation and were prone to competition for sailing space. The competition on seasonal rivers was probably less severe, which means it was not necessary to regulate them in that way.

d) Interdict to protect daily water

The *Digest* protects access to sufficient water.²¹³ D 43.20.1 *R*:

Ulpianus, *Edict*, book 70: The praetor says: "In so far as you have this year drawn off water in question not by force or stealth or *precarium* from such a one, I forbid force to be used to prevent you from drawing it off in this manner."²¹⁴

This was an interim interdict for prohibition and restitution that applies to daily water.²¹⁵ Daily water was water that someone could use every day if he wished, it was not water that was used every day.²¹⁶ Daily water was water that was normally drawn off in summer and winter. There might have been times that it was not drawn off. In the case where a servitude granted the water at intervals it was also known as daily water. Summer water was water that was suitable for use in summer.²¹⁷ The interdict referred to perennial water.²¹⁸ Uys²¹⁹ explains that the interdict was aimed at regulating the diversion of large streams which offered divertible water for many people. They were probably subject to severe competition by members of the public in need of daily water.

211 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

212 *Structural analysis of water allocation* 135.

213 See the discussion of s 27(1) of the *Constitution* of 1996 in para 3.7.

214 D 43.20.1

R: Ulpianus libro septuagensimo ad edictum. Ait praetor: Uti hoc anno aquam, qua de agitur, non ui non clam non precario ab illo duxisti, quo minus ita ducas, uim fieri ueto'

Mommsen and Krueger's translation of the Digest English translation edited by Watson.

215 D 43.20.1.1 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

216 D 43.20.1.2 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

217 D 43.20.1.3 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

218 D 43.20.1.5 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

219 *Structural analysis of water allocation* 136.

e) Town properties

It is made clear that water for use by town properties was also protected.

D 43.20.1.11:

It is asked whether only such water is included under the interdict as belongs to the irrigation of fields or also what is for our use and convenience. The law we follow is that these too are included. On account of this, even if someone wishes to draw off water for town properties, this interdict may apply.²²⁰

This interdict also applies to town properties, and not only to water for irrigation or daily use. Labeo states that this interdict may also be used to prohibit someone from sowing and digging on such a farm when by doing so he may pollute the water.²²¹

f) The drawing of water from a water tank

The emperor was entitled to grant the right to draw off water from a water tank. This right was also protected. D 43.20.1.38:

The praetor says: where such a one who had a right to it, was permitted to draw off water from that water tank (*castellum*), I forbid the use of force to prevent him from drawing it off as he is permitted to.²²²

This interdict applies to both those who have an imposed servitude and those who believe that they are in possession of a servitude, as well as to those who draw off water from a water tank (in the sense of a receptacle for the collection of public water).²²³ It is a concession of the emperor that the water in the water tank may be drawn out of a watercourse or out of any other public place. No one else is entitled to grant the right to draw off water.²²⁴ This interdict constitutes a final determination of the issues in the case.²²⁵ Burger²²⁶ does not agree with De Wet²²⁷ that the text in D 43.20.1.38 constitutes proof that every user of water had to have a permit or authorisation from the emperor.

220 D 43.20.1.11:

Illud quaeritur, utrum ea tantum aqua his interdictis contineatur, quae ad agrum irrigandum pertinet, an uero omnis, etiam ea, quae ad usum quoque et commodum nostrum. et hoc iure utimur, ut haec quoque contineatur. propter quod etiam si in urbana praedia quis aquam ducere uelit, hoc interdictum locum habere potest.

Mommsen and Krueger's translation of the Digest English translation edited by Watson. See D 43.20.1.12.

221 D 43.20.1.27 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

222 D 43.20.1.38:

Ait praetor: Quo ex castello illi aquam ducere ab eo, cui eius rei ius fuit, permissum est, quo minus ita uti permissum est ducat, uim fieri ueto.

Mommsen and Krueger's translation of the Digest English translation edited by Watson.

223 D 43.20.1.39 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

224 D 43.20.1.41- D 43.20.1.42 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

225 D 43.20.1.44 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson. See Hall *Origin and development of water rights* 6.

226 *Roman Water Law* 24.

227 De Wet 1959 *Acta Jur* 31.

Burger argues that there would be no occasion for any other user to obtain permission if not drawing from such a joint or common work.

g) Reconciling D 8.3.17 and D 43.20.1

According to Burger,²²⁸ there is no conflict between D 8.3.17 and D 43.20.1 as D 43.20.1 when applied where water for new development was still available. A newcomer could not intrude on the prior use. The apparent difference is that D 8.3.17 refers to water for irrigation and D 43.20.1 applies to the undisturbed use of water inside and outside cities for daily requirements, and to water from a *castellum*.

h) Criticism of the interdicts

Deveney²²⁹ notes that the interdicts were granted *ex parte* and without an investigation into the circumstances. The conditional nature prevented the interdicts from becoming oppressive. If the interdictee believed it did not apply to him or believed he had an excuse, there was no penalty for disregarding it. There did, however, exist an action for damages.

2.2.4 Conclusion on the role of Roman law

Roman law is the foundation of South African water law. For this reason South African water law subscribes to the *res omnium communes*' principle, or the principle that water is common to all. Roman law underpins the eventual development of the public trust concept in America.²³⁰ A right to use water was classified as *usus* in Roman law. The result is that flowing water was not the property of the riparian owner or the water rights holder. There existed only a right to use water that was flowing, unless it had been separated from the stream to become *res singulorum*.²³¹

The allocation of water from a public river was regulated by the state. The Roman interdicts that provided a remedy where one's water use right was infringed, meant that there was public protection of one's water rights. One was allowed to channel water only if there was no harm to another. One was not allowed to change a river to flow otherwise than it did "last summer". One's daily water was protected, as was water from a *castellum*. Many of our existing servitudes have their origin in Roman law. In the classical period of the development of Roman law the jurist Paulus²³² wrote that the praedial servitudes of drawing water from a well and *aquae ducendae* lapsed when they had not been used for

228 Roman Water Law 33.

229 1976 *Sea Grant Law Journal* 24-25.

230 See para 5.4.

231 See para 2.2.3.

232 See para 2.2.2.

two years.²³³ They were revived by use for two years. In post classical Roman law the servitude of leading water was still liable to be lost if it had not been not used. Paulus²³⁴ was quoted in the *Digest* stating that if a man has a right to take water during alternate years or alternate months, the right is lost by the lapse of twice the prescribed period. If a man did not draw water at the appointed time, the servitude was lost. When one exceeded one's quota, one also contravened a condition of the servitude that would lead to the servitude being lost. One's intention was important. When a spring dried up and later started flowing again, the emperor granted restoration of water rights because they had been lost through no neglect or fault of the right holders, but because it was impossible to obtain water. One's subjective belief also was important. One could only have been considered to have been making use of a servitude when one believed that one was exercising a right which belonged to one. These rules indicate how conditional water use servitudes were. The conditions attaching to the water use servitudes were the forerunners of the concept "beneficial use".

2.3 Roman-Dutch law

The Dutch interpreted the works of the ancient Roman writers on the law and adapted Roman law to Dutch circumstances.²³⁵ The fact that the Netherlands had such an abundance of water meant that scant attention was paid to the aspects of Roman water law applicable to arid countries and climates. Burger²³⁶ states that Voet does not mention several important texts of Roman water law. There is no mention of D 8.3.17,²³⁷ which deals with the solution when a river is fully used and no more is available from the perennial flow. The water is then proportionately divided amongst the existing users. The leading of water for irrigation was unnecessary and the old writers are almost silent on the question of the diversion of water from public streams, except when they are quoting from the *Digest*.²³⁸

233 Compare s 32 and 33 of the *National Water Act* 36 of 1998 and the discussion in para 4.5.

234 See para 2.2.3.

235 Gauntlett (ed) *Opuscula Miscellanea – JC de Wet* 9 states that Roman water law was applied in the Netherlands.

236 Burger *Roman Water Law* 10.

237 See para 2.2.3.1.

238 Hall *Origin and development of water rights* 8-9.

In South Africa the Dutch encountered different circumstances and in time, as is explained below, these circumstances led to the development of a distinct South African water law.²³⁹ Gane states:²⁴⁰

In the Netherlands the main consideration of the landowner was to prevent the diversion onto his ground of the surplus water of his neighbours. In South Africa, with its serious lack of seasonal rainfall, the landlord's jealousy is directed on the contrary to the prevention of any possible deprivation of water by the acts of his neighbours.

Because of this crucial difference in context, the substantive law of water rights and the procedural law as to the settlement of disputes in South Africa were expanded by statute.²⁴¹

2.3.1 *Running water as common property*

Simon Van Leeuwen's *Censura Forensis*²⁴² also divided things into those in our patrimony or ownership and those that are outside our patrimony and "form part of no man's goods". Running water that keeps a continuous²⁴³ flow, whether it is rain water or groundwater, is common property: These things are "by their nature" equally allotted to everyone and may be occupied, in so far as that user does no harm; for without the use of air and water no one can live or breathe..." Van Leeuwen is of the opinion that things like water and air are:

in perpetuity exempted from being owned by anyone, for the sake of the use which, belonging to all, can by no means be by one person snatched away from all. Therefore if any of these things can by nature be occupied it rests in the occupant only in so far as common use is not hindered by his occupation.²⁴⁴

239 See para 2.6.1 and the discussion of *Retief v Louw* 4 Buch 165 (1874) 173.

240 Gane mentioned the difference in the hydrology of the Netherlands and South Africa in a note to his translation of Voet's chapter on *Water and the Action on the Diversion of Rain Water*. *The selective Voet, being the Commentary on the Pandects* VI 34. South Africa is regarded as one of the twenty most arid countries in the world, according to Pienaar & Van der Schyff 2007 *LEAD J* 181. See Allan 2003 *Nat Resources J* 453.

241 See para 2.4.5 and para 2.4.6.

242 Van Leeuwen *Censura Forensis* II.I.8 translated by Schreiner 9. See *Jurisprudence of Holland by Hugo Grotius* II text translated with brief notes and a commentary by Lee 63.

243 See D 43.12.3.

244 Van Leeuwen *Censura Forensis* II.I.7 translated by Schreiner 9.

2.3.2 Rivers are public in ownership

According to Voet,²⁴⁵ earlier on, public things used to “belong by right of ownership to the whole people”. Common things still had to be “taken” and belonged to nobody. He classified perennial rivers under public things. The use of public things, like river banks, was common to all and thus it used to be free to sail and fish in.²⁴⁶ By the time of Voet²⁴⁷ the use of public things was not common to all anymore. Everyone was not allowed to fish with nets in a river. Much less was one allowed to lead water from a river, or to put up mills without “an express grant” from an emperor or his nominee. It was necessary to first obtain permission before one could do any of those things. Riparian owners were allowed to build on river banks provided they did no harm to upper or lower neighbours or those with estates along the line. They had to give security for damages and were not allowed to obstruct public use to make navigation worse or to change the flow of the river. These conditions were indications that the use of river banks had to be beneficial. The use of public things was limited to prevent harm to others.

Where a public stream was not in public use, the leading of water from it could be allowed, unless the emperor had forbidden it.²⁴⁸ One was also allowed to lead from the private stream of another if the owner and the holders of servitudes of leading water have agreed.²⁴⁹ If statutes were not in conflict, water could also be led from lords' waters and cantonal waters. Uys²⁵⁰ suggests that Voet in *Ad Pandectas* 43 12 complicated the distinction between forms of water further by sorting seasonal rivers under private things. Nowhere in Roman law were private rivers ever said to be *res privatae*. Due to their negligible common value they could be used by private persons exclusively, but they were still seen as common to all for purposes of the classification of things. Uys²⁵¹ blames Voet for the origin and existence of this distinction in Roman-Dutch law.

In Dutch customary law,²⁵² the rivers were among the regalia or domains of the emperors.²⁵³ Uys²⁵⁴ states that “regalia” imply stricter state control. Van Leeuwen,²⁵⁵ like

245 Voet *Commentarius ad Pandectas* I.8.8 translated by Gane 158-159. According to Hall *Origin and development of water rights* 10 Voet incorporated the rules of the *Digest* and so influenced the development of water law in SA. He doubts that Voet could have imagined that the distinction of perennality would be useful as an exposition of the civil law to be applied to the waterlogged Netherlands.

246 Voet *Commentarius ad Pandectas* I.8.8 translated by Gane 158-159.

247 Voet *Commentarius ad Pandectas* I.8.9 translated by Gane 161.

248 Voet *Commentarius ad Pandectas* XXXIX.3.1 translated by Gane 35.

249 Voet *Commentarius ad Pandectas* XXXIX.3.1 translated by Gane 35.

250 *Structural analysis of water allocation* 168.

251 *Structural analysis of water allocation* 169-170. See para 2.2.3.1 and para 2.6.2.

252 Voet's time.

253 Voet *Commentarius ad Pandectas* I.8.9, translated by Gane 161. This would be “modern” times when Voet lived. This section was cited in *Van Niekerk and Union Govt (Minister of Lands) v Carter* 1917 AD 359, 373, 387. See discussion of Justice Innes' judgment in *Van Niekerk* in para 2.6.2. See also *Butgereit v Transvaal Canoe Union* 1988 1 SA 759 (A) 768E and *Jurisprudence of Holland by Hugo Grotius* II text translated with brief notes and a commentary by Lee 65.

254 *Structural analysis of water allocation* 169.

255 Van Leeuwen's *Commentaries on Roman Dutch Law* II.13 Decker's revision of Kotzé's translation 152.

Voet, states that in Roman-Dutch law rivers and harbours are public in ownership and use, but are ranked with royal properties.²⁵⁶ The right of fishing is the prerogative of the sovereign only and of those to whom the rights have been granted. The exception is that fishing with an angling rod is open to everyone. Van Groenewegen²⁵⁷ states that the streams of the Rhine, the Maas and the Yssel belong to the whole civil community of Holland and West Friesland.²⁵⁸ This includes lakes and other navigable water, also the land and the banks in as far as they are covered by the water of the lakes. Holland and West Friesland had the right to ask toll money from foreigners to conserve these streams.²⁵⁹ De Vos and Visagie²⁶⁰ refer to a *placcaat* of the *Heere Staaten* of 1593 and decisions of courts and provincial councils in Holland that have the effect that navigable water, where the cities have dug the canals at their own cost, do not belong to all of Holland and West Friesland. They are not *res publicae*²⁶¹ but rather *res universitatis* belonging to those cities. Uys²⁶² suggests that in Roman-Dutch law the meaning of belong depended on the context. When water was said to belong to the citizens, reference was probably made to rights of use. When it was said that water belonged to the government, reference was made to the power of control.

2.3.3 Water separated from the stream

According to Grotius,²⁶³ a river is the property of the people through whose land it flows or of him under whose jurisdiction the people are. They may appropriate the products of the river. If the river is running water, it is so common that anybody may drink or draw from it. “What man would refuse to let another light a candle by him?” Grotius²⁶⁴ quoted the Roman Poet Ovid (43 BC - 18 AD) who said that the use of water was common.²⁶⁵ Van Leeuwen²⁶⁶ wrote that a lake, which has a perpetual body of water, and a pool, which holds a temporary supply of standing water, generally collected in winter (e.g. artificial

256 According to *Transvaal Canoe Union v Garbett* 1993 4 SA 829 (A) 835 the ownership was part of the regalia and the use remained public, subject to local limitations.

257 Groenewegen *Inleydinge tot de Hollantsche Regts-geleertheyt beschreven by Hugo de Groot* II.2 on 49. See discussion of De Vos and Visagie *Scheltinga se dictata* II.1 on 92. See also Van Leeuwen's *Commentaries on Roman Dutch Law* II.13 translated by Kotzé 152.

258 “...gantsche burgelyke gemeenschap van Holland ende West-Vrieslant...”.

259 Hall on water rights in South Africa 1 states that the principle that the state was *dominus fluminis* in respect to running water adhered to by the Dutch at the Cape had its origins in Van Groenewegen's *De Legibus Abrogatis ad Just.* 2.1.23 which had stated that all public streams were state property.

260 De Vos and Visagie *Scheltinga se dictata* II.1 on 91-92.

261 See Uys *Structural analysis of water allocation* 160.

262 *Structural analysis of water allocation* 173.

263 *De Jure Belli ac Pacis* II.2.12 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 438-439.

264 *De Jure Belli ac Pacis* II.2.12 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac Book II 438-439.

265 The Roman poet Virgil (70 BC – 19 AD), also quoted by Grotius, wrote of a right of temporary sojourn of the Trojans in a foreign port. *De Jure Belli ac Pacis* II.2.15.1 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac Book II 438-439.

266 Van Leeuwen *Censura Forensis* II.1.8 translated by Schreiner 9. See para 5.5.

receptacles for water) may or may not be public. Grotius²⁶⁷ explains that there is a reason why it is forbidden that the sea should be anybody's property – the taking of possession obtains only in things that are limited. Liquids, having no bounds of their own, cannot be possessed, unless they are enclosed by something else. Lakes and ponds and also rivers are subject to property, because they are confined within their banks.

Grotius²⁶⁸ posed the question whether men may not have a right to enjoy in common those things that are already the properties of other persons. He notes that the establishment of property seems to have extinguished all the rights that arose from the state of community. He argues, however, that those who first introduced the property of goods intended to deviate as little as possible from the rules of natural equity.

Van der Walt²⁶⁹ explains that the Spanish Moral Philosophers influenced Grotius' view of property and other real rights. According to Thomas of Aquino, God was the sole proprietor of creation. In terms of natural law creation is available for everybody's use and individuals should not claim parts thereof for themselves.²⁷⁰ Because the image of God is present in the reason of humankind, and because of Providence, the human being may use its will on creation to use for its benefit and advantage. God remains primary proprietor, but a human being forms a secondary proprietorship for own maintenance. There was a strong element of stewardship in Aquino's use of the term *procurandi* (agency) – a person disposes of earthly things for and on behalf of God, the true owner.²⁷¹

2.3.4 Restriction of private property in the case of necessity

Grotius²⁷² explains that it is with the restriction of the rules of natural equity that the rights of proprietors have been established. It follows that in the case of absolute necessity, the ancient right of using things, as if they were to remain in common, must revive, and be in full force. When there is a scarcity of provisions at sea, what each man has reserved in store, ought to be produced for the common use.²⁷³ This is explained by the rules of

267 *De Jure Belli ac Pacis* II.2.3.1 and II.2.3.2 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 431. Grotius quotes Aristotle.

268 *De Jure Belli ac Pacis* II.6.1 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 433-434. Otto "De andere wereld van recht en bestuur" 71 explains that Grotius in 1604 wrote his first study of the law after having been instructed by the Dutch East Indian Company. The work *De iure praedae* had to justify juridically the seizure of Portuguese ships! Grotius allegedly tried to do for international law what Galileo did for physics. According to Benn and Peters *Social principles and the democratic state* 36 he tried to provide an axiomatic basis from which subordinate principles could be derived. The law of nature was a set of moral axioms which any rational being must accept, like the proposition that contracts ought to be kept.

269 *Ontwikkeling van Houerskap* 258-259. The Moral Philosophy synthesised theology and the philosophy of human ethics and Roman law. Legal science in the Middle Ages largely consisted of using the scholastic method on the sources of Roman and canon law.

270 Van der Walt *Ontwikkeling van Houerskap* 260-265.

271 We lately find the concept of "stewardship" in the US public trust concept (see para 5.4).

272 Grotius *De Jure Belli ac Pacis* II.2.6 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 433-434. See Gildenhuys *Ontieningsreg* 3-4.

273 See para 2.4.1 for an example of necessity.

natural equity. Grotius²⁷⁴ quoted Seneca the father, who stated that necessity, the great resource of human frailty, breaks through the ties of all human laws. Some “precautions” were, however, necessary. All other possible means should be used to avoid the necessity (for example, asking a magistrate for relief or getting the owner’s permission). Plato did not permit a person to draw from the well of another until he had dug so far in his own land that there was no hope of obtaining water.²⁷⁵ If the owner were to face the same pressures, the possessor has the advantage.²⁷⁶ When one is compelled by necessity to take a thing from another person, one should make restitution to that man as soon as one is able to do so.²⁷⁷

2.3.5 Specific servitudes

Voet stated that the basis of the *actio aquae pluviae arcendae* was that no one can direct water onto another’s land without a servitude.²⁷⁸ This is a civil action under the *Twelve Tables* and is an action *in rem*, although it is mainly personal. The above example is a good example of an old Roman law rule from the Twelve Tables, which was received into Roman-Dutch law.

The South African Appellate Division followed the law on the *actio aquae pluviae arcendae*.²⁷⁹ Other *servitutes*²⁸⁰ *praediorum* relating to water that have been received into South African law include the *servitus aquae ductus* (servitude of leading water over the servient tenement to the dominant tenement); the *servitus aquae haustus* (servitude or right of drawing water from another’s well or spring); the *servitus pecoris ad aquam appellendi* (right of drawing one’s cattle over a neighbour’s land to water); the *servitus aquae exonerandae* (the right to send water in an artificial way to the neighbouring land).²⁸¹ The above servitudes are important in governing the relations between servient and dominant tenements. The law governing the relations among the people and the

274 Grotius *De Jure Belli ac Pacis* II.2.7 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 435.

275 Grotius *De Jure Belli ac Pacis* II.2.7 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 436.

276 Grotius *De Jure Belli ac Pacis* II.2.8 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 436.

277 Grotius *De Jure Belli ac Pacis* II.2.9 edited and with an introduction by Richard Tuck from the edition by Jean Barbeyrac 436.

278 Voet *Commentarius ad Pandectas* xxxix.3.2 translated by Gane 36.

279 This action was cited and approved in *De Villiers v Galloway* 1943 AD 439, 444, although absolution was granted. In *Ackerman v Fry* 1951 1 SA 390 (T) at 393 E the court stated the principle that the *actio* applies whether it concerns public water or private water or even sewage or garbage, if the applicant could show that the respondent’s conduct has resulted in matter being brought on to his property which would not have come there by natural means and which has caused him damage of more than negligible extent. See para 2.2.1.

280 De Waal *Vestiging van Grondservitude* 4. He defines a servitude (on 7) as a real right on the thing of another that gives the right holder certain enjoyment and use competencies with regard to that thing.

281 Van der Merwe *Sakereg* 350-351 and Van der Merwe and De Waal *Law of Things and Servitudes* para 231. According to Voet *Commentarius ad Pandectas* Book VII Tit I.18 a usufruct may be established over all kinds of things that are “not outside the ordinary transactions of men and are not consumed by use”. Nothing prevents a usufruct from being established over feudal property”. Water is sometimes consumed by use, but not always, as in the case of the generation of power.

government regarding water in the abstract is altogether more complex, because of the relative water scarcity in South Africa.

2.3.6 Conclusion on the influence of Roman-Dutch law

In general the transition from the law of the province of Holland to South African water law has not been as clear and relatively uncomplicated as the reception of the *servitudes praediorum*. There is an overabundance of water in Holland and too little in South Africa. It means that no rules to allocate water needed to develop in Holland. The distinction between private and public water that Voet made, served to muddy the water. When it comes to the allocation of water, which is South Africa's biggest problem, Roman law, as it developed in Rome and in other jurisdictions where water is scarce,²⁸² provides more guidance. A very relevant development for natural resource management took place when Grotius was influenced by Thomas of Aquino, who taught that man holds property for God as a steward. This philosophy nicely complements the public trust concept which has now been received into South African law. The latter states that a government holds water in the public trust for the people. Property rights are not seen as absolute in either of the cases. Property rights are in fact limited by the greater good. When riparian owners were allowed to build on river banks provided they did no harm to upper or lower neighbours and had to give security for damages, their use of river banks was indeed limited to beneficial use.

2.4 Dutch settlement at the Cape

2.4.1 Introduction

The impact of a lack of water and food on the people on board a ship on its way to the east from the Netherlands is illustrated by the demise of Harmen Jacobsz. The lack of fresh food could *inter alia* cause scurvy and madness among the sailors.²⁸³ The results of a lack of water could be as devastating. On the 9th of May 1629 Jacobsz, quartermaster of the yacht *Goes*, attached a note to a door of the yacht in which he threatened to cause the death of the people on board ("gij allen") if they were not given more water. Water rations had been halved because it had taken a long time to cross the equator and too much water had been consumed. On the 11th of May Jacobsz admitted that he had written that

282 See Chapters 4, 5 and 6.

283 Roeper and Van Gelder *In dienst van de Compagnie* 72-73. The company was very involved in the spice trade with the East. See Gaastra *De geschiedenis van de VOC* 124. See Haarhoff 2007 *Historia* 139.

letter, even though it might cause his death. He preferred being killed to slowly dying of thirst. On May 16th irons were tied to Jacobsz and he was thrown overboard, still alive.²⁸⁴

Until 1652 Portugal, the English and the Dutch all made use of the Cape of Good Hope as a *rendezvous* where they could obtain fresh water and meat.²⁸⁵ The formal history of water resource management and water law, in what in 1910 became the Union of South Africa, follows the history of the country from when the Dutch East India Company created a refreshment post under the command of Jan Van Riebeeck at the Cape of Good Hope in 1652. The main function of the refreshment post at Cape Town was to provide food and water for the ships docking at the Cape. The Dutch settlement at the Cape was at the cost of the indigenous population, who lost access to their land and water. The commercial nature of the Dutch East Indian Company led to nepotism and sometimes doubtful governance practices at the Cape. A public water law with characteristics peculiar to the Cape soon developed as a result of the settlement's function as a refreshment station and problems with water scarcity.

2.4.2 *The Dutch and the Khoikhoi*

In the early years of the settlement at the Cape there already existed a tug of war over access to water, land and cattle between the Dutch and the Khoikhoi people. One of the main methods to squeeze independent-minded Khoikhoi out was to deprive them of access to rivers and springs. The Khoikhoi wanted to know from Van Riebeeck: If there were not enough land for the Dutch and the Khoikhoi, who in justice had to give way, the rightful owner or the foreign intruder?²⁸⁶ According to Guelke,²⁸⁷ the encounter of the Dutch settlers with Khoikhoi pastoralists was essentially a clash between resource management systems based upon different institutions and value systems.

Each group had evolved institutions to meet the particular needs of two very different climatic, land use and economic situations. The Dutch practised an intensive form of mixed farming in the humid Netherlands where land was a highly valued, privately controlled commodity. The Khoikhoi made a living on wild and uncultivated common lands. They were nomadic pastoralists and hunters in a sub-humid and arid Southern Africa. The Dutch brought their ideas and farming traditions with them. The Dutch settlement replaced the Khoikhoi land management system with one based on Dutch

284 Roeper and Van Gelder *In dienst van de Compagnie* 73-74. One should keep in mind that those were different times and not apply the standards of our time. The incident does illustrate the importance of water.

285 Wennekes *Gouden Handel* 257.

286 Giliomee *The Afrikaners* 8. The Khoikhoi were under stress on more than one front. Some of the Khoikhoi people were also vulnerable to Western diseases like smallpox and scarlet fever (see Boucher "Die Kaap onder die Verenigde Oos-Indiese Kompanjie" 71). Barely one out of every ten Khoikhoi survived the smallpox epidemic of 1713 (Giliomee & Mbenga *Nuwe Geskiedenis van SA* 53).

287 2003 *S Afr Geogr J* 90.

principles. A set of values dedicated to private ownership and control of land that had evolved in Europe was in effect applied to entirely new circumstances. This transformed the settlers, the land and its original inhabitants in the process.²⁸⁸

The Khoikhoi peoples were holistic managers with a communal approach to resource use.²⁸⁹ Each Khoikhoi clan used its territory as a common resource. The Khoikhoi system of nomadic rotational grazing had ecological benefits. *Firstly*, it made for a harmonious coexistence of Khoikhoi livestock and the wild animals. The various animals consumed different types of vegetation and sustained a healthy diversity of plants. Furthermore, intensive rotational grazing by livestock and wild animals regenerated vegetation. Lastly the system was flexible and capable of adapting itself to changes in the condition of the pasturage. The Khoikhoi system of resource use left little impression on the land itself. The Europeans who observed the lands occupied by the Khoikhoi would have had the impression of virtually empty lands. The controversy over access to land and water still exists in Africa in general and South Africa in particular today and needs to be managed to prevent conflict.²⁹⁰

2.4.3 *The Dutch East Indian Company and the mercantile age*

Because of the way the Dutch East Indian Company had been created, it was allowed to fulfil the role of the state.²⁹¹ The Cape never was a Dutch colony. The company was a product of the mercantile age when there were close links between the state and trading companies. This caused confusion between the function and interests of public and private enterprises, as well as confusion between the income of the state and its officials. Cape officials often supplemented their incomes by being in irreconcilable offices at the same time. Some awarded loans, contracts and monopolies to themselves. Officials, traders and property owners were often related by blood or marriage. The Burgher Senate consisted of four people and managed Cape Town's affairs. It collected taxes, but determined it in the favour of its members and their friends. It also awarded licences for *inter alia* bakers and butchers.²⁹² It is possible that the allocation of water privileges was also affected by nepotism.²⁹³

288 See Guelke and Shell 1992 JSAS 819-820 on the competition between the *trekboers* and the Khoikhoi for valuable water and land.

289 Guelke 2003 *S Afr Geogr J* 91.

290 For more on Africans holding rights as groups in so-called "settler societies" and non-Africans holding land as private property, as well as the rights of pastoralists, see Derman, Odgaard & Sjaastad *Conflicts over land and water* 21.

291 Not to be confused with the English East Indian slave trading company (the *Company of Merchants of London Trading with the East Indies*). See Boucher "Die eeu van ontdekkingsreise" 59. See also Otto. "De andere wêreld van recht en bestuur" 77.

292 Giliomee & Mbenga *Nuwe Geskiedenis van SA* 87.

293 See para 2.4.8.

The protection of its property, sufficient stock and commercial profit were the main objects of the company.²⁹⁴ De Mist²⁹⁵ wrote in 1802, at the time of the Batavian Republic, that the object of the Dutch East Indian Company was to obtain as much produce from the colony as possible in order to meet the needs of the company. The increase in territorial authority and the forming of a state in Java,²⁹⁶ at least, and arguably the Cape, happened involuntarily. The fact that there was neither a state-general or local citizens controlling the power of the executive, nor an independent judiciary, meant that there was no *trias politica*, but an *unitas politica*²⁹⁷ - in other words, no checks and balances. Smugness and a lack of critical and independent oversight played a role in the demise of the East Indian Company. One of the reasons was that the competition was silenced with the help of the authorities.²⁹⁸ This unhealthy state of affairs was not conducive to the development of a healthy legal administration.

2.4.4 Deficiencies in the administration of justice

De Mist²⁹⁹ listed a number of defects in the administration of justice. *Firstly*, there was no statute book for the Cape colony; *secondly*, the Council of Justice had no instructions, except as regards the number, rank and salaries of its members; *thirdly*, the Fiscal was independent of the Council to which he was supposed to be subordinate and he was, *fourthly*, subordinate only to the directors in the motherland. *Fifthly*, there were no instructions for the Landdrost and Heemraden (and frequent complaints by the inhabitants). *Finally*, matters were complicated by the fact that the sentences of the Council could be appealed against in India. The fiscal had collected an unpromulgated new tax on imported goods and pocketed the profits. One of the problems with the Fiscal was that by issuing a summons he could cast a slur on the good name of an individual.³⁰⁰

294 See Boucher "Die Kaap onder die Verenigde Oos-Indiese Kompanjie" 62.

295 Memorandum 174. De Mist was sent to the Cape by the Batavian Republic as Commissioner General to bring about a more orderly administration in the colony. (See Boucher "Die Kaap onder die Verenigde Oos-Indiese Kompanjie" 78.) De Mist and Janssens (the governor) came to the Cape with the ideals of the French Revolution – liberty, equality and fraternity. (Eybers *Bepalingen en Instructiën* 68). South Africa did not keep up with the cultural trends of 18th century Europe. De Mist was a Dutchman of the time of the French revolution. One finds evidence of 18th century rationalism in his work, he was a philanthropist, but also believed that government had to be strong in reaction to the French reign of terror. (Gie in the preface to the De Mist *Memorandum* on page iv-v.) Van der Walt *Ontwikkeling van Houerskap* 380 mentions that the spirit of the French Revolution was one of political liberalism and not economic liberalism. The purpose of the liberalism of this revolution was to destroy the link between land property rights and political rights.

296 Otto "De andere wêreld van recht en bestuur" 79 blames the profits that were made by pres. Suharto (1921-2008) of Indonesia and his entourage out of Indonesian natural resources in the twentieth century on the culture of profit-making created by the Dutch East Indian Company. The management heritage left by the company consisted of the attitudes of striving for profits and being indifferent towards the local population. Locals were exploited by their chiefs under the eye of the colonial powers. The locals did not have a legal system that respected them and gave them fundamental rights. Otto "De andere wêreld van recht en bestuur" 81-82. Derman, Odgaard & Sjaastad *Conflicts over land and water* 22 state that colonialism tended to strengthen the control of chiefs over land.

297 Otto "De andere wêreld van recht en bestuur" 79.

298 See Bruijn *et al Roemrucht verleden* 81-83. See also Otto "De andere wêreld van recht en bestuur" 77.

299 De Mist *Memorandum* 234.

300 De Mist *Memorandum* 237. For more on the Fiscal in the early days, see Boëseken *Uit die Raad van Justisie*, 1652-1672 x-xii.

If he was not inclined to carry out the decrees of the High Council, the Court of Justice had no authority to force him to discharge his duties. De Mist also complained about the effect the commercial character of the previous Cape government had on the administration.³⁰¹ He attributed the lack of instructions to the Landdrost and Heemraden and the absence of a book of *placcaaten* and laws to this.

2.4.5 *The law prevailing at the Cape*

One is tempted to believe that pure Roman-Dutch law prevailed at the Cape. The picture, which emerges from the sources, is a lot murkier. De Wet³⁰² states that there clarity does not quite exist on the water law at the time of the Dutch occupation. There appears to have been recognition of the fact that the state was *dominus fluminis*, that the state granted water use "rights" and that those "rights" were reviewed when new land was made available. On the morning of 12 February 1715 the Political Council of the Cape of Good Hope, under the leadership of Governor M de Chavonne, adopted a resolution that in future the law and case law of the statutes of India would be followed, in as far as those *placcaaten* and ordinances and respective resolutions of council that this government gave and took from time to time were not contradicted. The resolution was made after a request for a fixed instruction by the Council of Justice on the status of the statutes of India in relation to Roman and the then current law.³⁰³ Nonetheless, Visagie³⁰⁴ states that there was a vibrant Roman-Dutch legal system at the Cape by the end of the reign of the East Indian Company. Modern lawyers do not know what all the authoritative books were that had been used at that time, but the Council on Justice possessed a legal library containing all the major authoritative works on Roman-Dutch law. The common law of the province of Holland, with Roman law as supplementary system, was the leading authority. Visagie³⁰⁵ also states: "There is little doubt that the whole legal system of the Cape depended on nothing more than custom." The fact that the Council of Justice of the Cape in the time of the East Indian Company never gave reasons for its decisions makes it difficult to know which authorities the court followed.³⁰⁶ Statutory law had been enforced, although strictly speaking statutes had no legal force, according to Visagie.³⁰⁷ The sources

301 De Mist *Memorandum* 236. See also Mentzel *Geographical and Topographical Description* 141 who describes the fiscal as having had the most lucrative position at the Cape, next to the governor.

302 Gauntlett (ed) *Opuscula Miscellanea* – JC de Wet 11.

303 Boëseken *Resolusies van die Politieke Raad* Deel IV 433-434. See Boëseken *Uit die Raad van Justisie, 1652-1672* viii-x for more on the legal basis of the Cape of Good Hope. Walker *Lord De Villiers* 75 confirms that local proclamations have taken precedence in South African courts since 1715.

304 *Regspleging* 78.

305 *Regspleging* 76–78.

306 Watson 1983 *U Penn L Rev* 1126 notes that Western systems for long stretches of time made do with sources of law that were inadequate for the development of satisfactory or unambiguous law. Awareness of the deficiencies in the sources of law by the powers that be frequently does not lead to reform.

307 *Regspleging* 76–78.

of statutory law were local laws,³⁰⁸ the statutes of Batavia,³⁰⁹ and some of the statutes of the State of Holland.³¹⁰ The Acts of the State General that were made expressly for the foreign areas of the East Indian Company were also in force at the Cape.

2.4.6 Examples of company control of water resources

When one compares the early Dutch settlement with Roman-Dutch law and modern legislation, one should keep in mind that the drier climate and the lack of freely available water necessitated stricter government control over water than in the Netherlands.³¹¹ The first *placcaaten* made by the Dutch were made to protect the water resources against pollution and thus formed part of what one would classify as public law. On Friday 21 February 1653 Johan (sic) Van Riebeeck noted that the people or “volck” were mostly weak and ill from the water in the stream and other unhealthy factors.³¹² Hall³¹³ noted that the illness of the sailors led to the *placcaat* of Jan van Riebeeck published on 10 April 1655 prohibiting *aancomende opperhoofden* (arriving commanders) and their subordinates from washing themselves and their clothing in the streams. There were well-grounded fears for the spread of contagious diseases such as smallpox. On Saturday 26 August 1656 a *placcaat* was made as a result of people from arriving ships washing their dirty linen in the rivers upstream of the settlement’s source of drinking water. Everybody was prohibited from doing laundry or bathing or washing or rinsing anything in any place upstream of the place where water was being fetched in the stream or rivers. This was to prevent pollution and also to protect the health of travellers by sea between Batavia and Europe from disease. There was sufficient opportunity to do laundry downstream of the place where drinking water was fetched. Contravention of this prohibition would result in a fine. This prohibition was displayed at the rivers.³¹⁴ In April 1686 the Political Council was upset that some of the Free Burghers had crossed the very important aqueduct (*waterleiding*) with cattle and wagons and in so doing ruined it. It was resolved that employees of the company who were guilty of such conduct should be fined one year’s wages. Free Burghers were fined 25 Rijksdaalders for the first offence.³¹⁵ The dumping of

308 According to Du Plessis *Compensation for Expropriation* 18 the little legislation adopted in the Cape until 1806 does not survive in South African law today.

309 See Wessels *Roman Dutch Law* 358.

310 See Wessels *Roman Dutch Law* 357.

311 Thompson *Water Law* 33.

312 “...swack op de been ende siekelijck van ’t water den loop ende ander ongesontheden”. Ironically, certain people like Pieter Martensz van Tonningen and Jan Blanx van Mechelen, who had committed crimes like stock theft (stealing and eating the company’s sheep) were the best workers, “*cloeckste in den arbeit sijn*”, without whose labour work on the fort would be in arrears as a result of the poor condition of the other people. Boëseken *Resolusies van die Politieke Raad* Deel I 14.

313 *Origin and Development of Water Rights* 11.

314 Boëseken *Resolusies van die Politieke Raad* Deel I 80.

315 Boëseken *Resolusies van die Politieke Raad* III 127. See also Hall *Origin and Development of Water Rights* 12. He refers to a *placcaat* of 2 January 1687.

waste in the canals was also prohibited.³¹⁶ The company's prohibition of the pollution of the water resources on which the settlers were dependent provide the first examples of the importance of the concept "beneficial use" at the Cape.

2.4.7 *The division and allocation of water*

The company was also in complete control of the division and allocation of water. In December 1661 it prohibited its servants and the Free Burghers to lead the water from the streams in such a way that the mills and other matters were interfered with.³¹⁷ Hall³¹⁸ could find no evidence that landowners received any privileges in respect of the use of water for irrigation. It is no surprise that the company prohibited servants and Free Burghers to divert water from the Table Valley streams for the irrigation of the land to the detriment of the company's requirements. It was clear that the Company "claimed an absolute right to control the use of these streams in its own interests."³¹⁹ Hall³²⁰ concluded that the Free Burghers, alongside or through whose land a stream ran, even as late as 1773 had no water rights. The company gave them permission to use the water for a short period each day when it could spare the water. This permission was a special favour and not a right. The company remained *dominus fluminis*.³²¹ The fact that the company always looked after its own interests first, is borne out by the fact that when it regulated turns to lead water, the turns were subject to the need of the company's mills to receive water. The company also exacted preferential rights for its downstream gardens.³²²

The following examples illustrate the above: One Joel Ackerman's land lay under that of Michiel van Breda and between that of Joseph Coel and Michiel Smuts. They had been given turns in a distribution of 1763. Ackerman's predecessor in title, Jan Gintsenberg, had a private arrangement with Ryk Tulbagh, in terms of which he was permitted to take water from the company's trough that ran through his land. When Gintsenberg died, his special privileges to take water were not transferred to his successor in title, Ackerman. When Ackerman started taking water from the river his neighbours complained. He petitioned the Council to be allowed to take water. The Council then gave permission to Ackerman to take a turn to lead water. Jan Roode, whose land adjoined Ackerman's,

316 On 27 March 1738 Daniel van den Hengel and on 11 December 1742 Hendrik Swellengrebel prohibited the dumping of waste from tubs into the canals by slaves. Jeffreys *Kaapse Plakkaatboek (1707-1753)* 163 and 205.

317 Hall *Origin and Development of Water Rights* 12. See Uys *Structural analysis of water allocation* 190.

318 *Origin and Development of Water Rights* 12.

319 See Hall *Origin and Development of Water Rights* 11; Hall *Maasdorp's Institutes* 82 and Hall 1938 *THRHR* 245. On Saturday 26 July 1664, the Free Burgher Hendrick Boom had a dispute regarding the use of running water against Jan Reijniersz. (Boëseken *Uit die Raad van Justisie (1652-1672)* 157).

320 *Origin and Development of Water Rights* 13-14.

321 Uys *Structural analysis of water allocation* 194-195 disagrees and is of the opinion that water remained *res omnium communes*.

322 Hall *Origin and Development of Water Rights* 16.

subsequently also received a turn to lead water from the Council.³²³ In 1787 Johannes Hermanus Redelinghuys was forbidden to use water ever again from the watercourse running adjacent to his property because he had taken a furrow out of a watercourse for irrigating his garden.³²⁴ There was no right of access to sufficient water in Dutch times as there is today.

2.4.8 *Landdrost and heemraden*

By 1682 *landdrost* and *heemraden* had been established at Stellenbosch and Drakenstein. One of the functions of the *heemraden* when they were appointed in 1682 was the settling of disputes over farmlands.³²⁵ Hall³²⁶ states that the *Burgherraden* were charged with fixing turns of water leading for the landowners. Venter³²⁷ accepts that the resolution of water disputes formed part of their work. Moreover, in 1685 the *landdrost* was instructed to execute the governor's orders regarding the digging of trenches and water conduits. Rivers and water works also had to be inspected. In the case of the negligence of the inspectors, they would be fined. Venter³²⁸ mentions a case where the parties were disputing whether the perpetrator had been leading water from a stream since time immemorial or whether the stream was a diversion from the river. According to Venter,³²⁹ the real question was not whether each was legally entitled to something, but whether it was in the real interest of the inhabitants generally. The *landdrost* and *heemraden* seldom lost sight of the interests of the residents in general. (Modern scholars query whether the residents in general included those who were not white.) Because the people *in casu* could not do without water and the map of one of the complainants showed that he was entitled thereto, an agreement had to be made. The *landdrost* suggested that the people divided the water amongst them so that each would have use of the water on some days.³³⁰ Records of the decisions of *landdrost* and *heemraaden* and their confirmation exist.³³¹ Both the Council of Policy and the *landdrost* and *heemraden* made equitable distributions demanded by the exigencies of each case. No concept of "riparian ownership" had as yet arisen.³³² Venter³³³ writes that the later courts had respect for the way in which the colleges gave their judgements when resolving water disputes. Chief

323 Hall *Origin and Development of Water Rights* 14-15. Uys *Structural analysis of water allocation* 192-193 believes the harm was caused to the other water users and not the state.

324 Uys *Structural analysis of water allocation* 193.

325 Venter 1940 AYB 63. Wessels *Roman Dutch Law* 353 writes that s 35 of the charter of the East Indian Company, which had been formed by the Dutch States-General, provided for the establishment of courts of justice.

326 *Origin and Development of Water Rights* 13.

327 1940 AYB 67.

328 1940 AYB 67.

329 1940 AYB 67.

330 Venter 1940 AYB 68-69.

331 See also Thompson *Water Law* 35.

332 Hall *Maasdorp's Institutes* 83.

333 Venter 1940 AYB 68-69.

Justice De Villiers stated that the *landdrost* and *heemraaden* knew the local circumstances and “were in a far better position to do justice between the parties than a judge trying the case hurriedly on Circuit...”³³⁴ This old type of water court was one of the most effective and cheapest means of getting the parties to settle. Giliomee and Mbenga,³³⁵ however, are of the opinion that the networks of favouritism that existed in Cape Town were repeated on smaller scale in the country districts.³³⁶ The *landdrosten*, district secretaries and *heemraden* selectively applied administrative powers relating to finance, tax, and the awarding of land and labour. Although the state was *dominus fluminis*, and water vested in it, in our terms, water use privileges existed. Today we still grapple with the extent of the water use rights or water use entitlements as we call them.³³⁷

2.4.9 Conclusion on the role of the Dutch East India Company

The relatively dry climate at the Cape and the resultant lack of water necessitated stricter government control over water than in the Netherlands. The *placcaaten* made at the Cape were influenced by local circumstances and constitute the beginnings of a South African legal system, particularly with regard to public law. The *placcaaten* were aimed both at protecting the interests of the company and the public and prohibiting pollution. The first inklings of the beneficial use concept are thus found. The state was *dominus fluminis*, and water vested in it, but the people themselves only had weak water use privileges. The resolution of water disputes appears to have been centred on what was in the real interest of the inhabitants generally. This could point to a shadow of a public trust concept. The reality was that the system was designed to protect the company’s interests in the first place and then that of the white population. One could barely speak of a public trust if one were to exclude a part of the public and then put the interests of the remainder second to that of the company when it came to the allocation of water.

Although the creation of a refreshment post at the Cape of Good Hope might inadvertently have caused the later creation of the South African state, one has to take into account the negative effect the culture of the Dutch East Indian Company had on good governance in South Africa and the perpetuation of monopolistic business practices. The profit motive of the Dutch East Indian Company meant that it made laws in the interest of its own pocket and not in the interest of the people it governed. This meant that society developed around laws that were not primarily in their interest or in the interests of justice. One had

334 Venter 1940 AYB 70.

335 *Nuwe Geskiedenis van SA* 87.

336 See para 2.4.3.

337 See chapter 4.

to be a part of the system if one wanted to survive. One could not survive economically if one were independent – trading with anyone but the Dutch East Indian Company was illegal. Some people might allege that striving for profits and being indifferent to the local population are characteristic of corruption in Africa, but it appears that corruption in some instances were imported directly from Europe.³³⁸ The Khoikhoi were among the first to pay a price for the first European settlement at the Cape, as they not only lost access to some of their water resources, but also were decimated by smallpox.

2.5 Background to English law

The development of English law will be discussed briefly because of the influence of the riparian principle in South African water law, as well as the development of the principle of the public trust³³⁹ from the English commons concept. English legal historians have frequently underestimated the impact of Roman law on English law.³⁴⁰ Watson,³⁴¹ however, explains that the legal elements that went into the formation of modern Western legal systems are everywhere alike. The difference between civil law systems and common law systems is the fact that civil law systems adopted, in whole or in part, *Justinian's Corpus Iuris Civilis* of the sixth century AD as law of the land or at minimum as direct and decidedly persuasive authority. Modern common law systems also borrowed much of their substantive law from Roman law. Modern civil law also adopted the *Corpus Iuris Civilis* as the organising instrument. Eighteenth century rationalism generated a conviction in civil law countries that law ought to be the embodiment of reason. Because it was written down, the law could be improved. The Enlightenment had a much greater impact on law in civil law systems because civil law systems were more open to philosophy.³⁴² According to Watson,³⁴³ English common law is the product of judges working within the medieval and later English court system. Roman private law is the product of jurists operating within the Roman court system. English common law, without the input of statutes, is more than the sum of the decisions of judges and Roman private law is more than the sum of the opinions of the jurists.³⁴⁴

338 Later governments in South Africa were not necessarily less prone to nepotism and greed, but they did not have such a big impact on the foundations of the legal system and will not be discussed here.

339 See 5.4 on the public trust doctrine.

340 Watson 1983 *U Penn L Rev* 1122.

341 Watson 1983 *U Penn L Rev* 1126.

342 Watson 1983 *U Penn L Rev* 1132.

343 1990-1991 *Loy L Rev* 249. See also Gordley and Von Mehren's discussion of the role of the royal judges in *Comparative Study of Private Law* 3-10.

344 Watson 1990-1991 *Loy L Rev* 252 states that in Rome there was an unitary system of private law that was enforced by one system of courts. In England there were a variety of courts, some with competing jurisdiction, often applying conflicting law. The chancery enforced rules of equity, and not law. Watson 1990-1991 *Loy L Rev* 257. The Roman court system forces jurists not to be oriented to the particular court, but to gear their discussions to legal institutions, rules or principles. English procedure inhibits and obstructs the development of concepts of substantive law. The latter is unimportant when compared to the primacy of procedure. Legal rights became incomprehensible to the layman.

As early as 688 AD the English used an open field system of agriculture in terms of which they rotated the use of common fields, meadows and pastures. After the fall of the Roman Empire, however, the Roman common or public rights concept fell into disuse.³⁴⁵ William the Conqueror, who assumed control of England in 1066, declared himself to be the “fee owner”³⁴⁶ of all lands in England. He held the lands in his capacity as sovereign and had the power to grant exclusive rights in them, as well as in the sea, the foreshore and other navigable waters.³⁴⁷ Gauntlett³⁴⁸ explains that English law did not make a distinction between private and public water, but made a distinction between water in a known and defined channel and water that is spread over the surface or running underground. The owner of the land could do what he wanted with water not in a known and defined channel. In essence his rights were the same as the owner of private water in Roman and Roman-Dutch law. Riparian owners were entitled to water in a known and defined channel. These rights flowed from the ownership of the riparian land.

Van der Walt³⁴⁹ explains that in the Anglo-American legal family a person does not own land, but only interests in land. The enjoyment and the use of things are also separated from the concept “title”. The law of things forms a part of the law of torts. It should be kept in mind when comparing Anglo-American and civil law systems.

2.5.1 *Bracton’s influence*

Bracton in his *De Legibus et Consuetudinibus Angliae*³⁵⁰ stated that by natural law running water and air are common to all. He classified all rivers and ports as public. The right to fish therein is common to all people. The use of river banks and of the river itself is also public by the *jus gentium*, but the ownership of the banks belongs to those of whose lands they are part. Bracton made a distinction between mankind and all living things. Those things are regarded as public that belong to all people - they are for the use of mankind alone. Those things that belong to all living things may sometimes be called common.

Bracton in *De Legibus et Consuetudinibus Angliae* relied on the Roman concept of “common property” when he declared that the sea and seashore was common to all, as explained by Justinian in the *Institutes*.³⁵¹ Bracton used Roman law as support for recognising various rights, like the right of fishing in the rivers and ports and the right to

345 Butler 1981-1982 *WM & Mary L Rev* 853.

346 Van Wyk *Restrictive Conditions* 312-315 discusses the development of English land law.

347 Butler 1981-1982 *WM & Mary L Rev* 854.

348 *Opuscula Miscellanea* – *JC de Wet* 10-11.

349 *Ontwikkeling van Houerskap* 522-523.

350 *Bracton on the Laws and Customs of England* attributed to Henry of Bratton 2.39 English translation’s copyright 1968-1977 by the President and Fellows of Harvard College.

<http://hisl5.law.harvard.edu/bracton/Unframed/English/v2/39.htm>.

351 Deveney 1976 *Sea Grant LJ* 13.

use river banks for banking and towing. Butler³⁵² mentions that Bracton sometimes restated Roman law inaccurately, but that his “explanation of common rights eventually became authoritative”. Holdsworth³⁵³ is of the opinion that if the judges who had succeeded Bracton had his knowledge of Roman law, more attention would have been paid to the Roman parts of Bracton’s *Treatise*, and they would have had more influence on the history of English law. According to Holdsworth,³⁵⁴ Bracton was also influenced by:

the speculations, the theories, the arrangement, the technical language of
the canonist and the civilian.

To presume that Bracton should have obtained from the study of existing sources of English law alone the “legal instinct to construct from them a philosophical treatise upon English law would be to suppose a miracle”. The sources he had available to him were the rolls of the King’s courts, the incipient register of writs, a few legislative enactments and Glanvil’s *Treatise*.³⁵⁵ Bracton was inspired by the legal instinct of the Roman jurists as interpreted by the glossators. As Lee³⁵⁶ reminds one: “Bracton caught the Civilians bathing and stole their clothes”. Watson³⁵⁷ explains that English law was long bereft of scholars. Bracton’s books and those attributed to Glanvil lacked impact on the form and substance of the law, on legal education and even on subsequent books. Holdsworth³⁵⁸ also argues that English society was influenced by the Roman Catholic Church. Where it took root, it introduced ideas of “political organisation, of law and of morality...” These political and legal institutions came from the Roman Empire. They were passed to the modern world by the writings of the Roman lawyers and the Christian Fathers.

2.5.2 Conclusion on the English law

English law seems rather haphazard and chaotic to the Roman-Dutch jurist, but has in fact been able to keep up with the demands of modern life. It is possible that the lack of the strict categorisation found in Roman law in a sense freed the Anglo American jurist to consider factors like an equitable outcome.

352 1981-1982 *WM & Mary L Rev* 858. According to Lazarus 1986 *Iowa L Rev* 635 Bracton was borrowing from the Roman notion of *res communes*. He also declared the shores of the sea ‘common to all’ and inalienable. Practice appears to have departed from pronouncement. More formal confirmation of the public’s rights to valuable coastal resources occurred only when the Crown wanted a means to increase the treasury. The bottom line is that although English common law recognised public rights in the shore in some sense, they were rights controlled by the sovereign.

353 Holdsworth *A history of English Law* 244.

354 Holdsworth *A history of English Law* 268.

355 Holdsworth *A history of English Law* 269.

356 1915 *Mich L Rev* 90.

357 1990-1991 *Loy L Rev* 259. Coke’s *Institutes of the Law of England* might have been an exception, but he made no attempt to develop the law and the work is famous for its lack of a theoretical structure.

358 Holdsworth *A history of English Law* 4-6.

2.6 South African water law under the British administration

The early Cape courts in the time of the Dutch administration did not give their reasons for decisions. It was probably almost as difficult for the British administration after the British occupation of the Cape in 1806 to find the law as it is for those living today. The Roman-Dutch writers wrote in Latin, a practice that in today's terms would be viewed as elitist and exclusionary.

The Cape judges interpreted Voet 8.3.6 and as a result used the principle that "every landowner is owner of the water arising on his own land, *erumpens in suo*". The Privy Council expressed doubt as to the correctness of this principle,³⁵⁹ and the Cape judges searched for a better principle.³⁶⁰ It was after all not fair that one person could waste the water of a fountain, while others suffered from a lack of water. This search led to the adoption of the riparian principle. Justice Bell did not research the law because he wanted to preserve private property rights in water, but because he wanted to make water more accessible to other users. Merely stating that the riparian principle derived from British law would be doing the old Cape judges and their interpretative skills a disservice, as can be seen from the cases discussed in this section.

2.6.1 *Retief v Louw and the adoption of the "riparian principle"*

The case of *Retief v Louw*³⁶¹ is one of the *loci classici* in the development of the law of water rights in South Africa. Strangely enough it was not reported immediately and Hall³⁶² states that it was ignored for some twenty years. Justice Bell, who came from Scotland where civil law was followed, in 1856 determined the rights of proprietors of land as to the use of the water of the stream. These proprietors were situated relatively higher and lower on the course of a running perennial stream.³⁶³ He distinguished the facts of the case in front of him regarding the rights of land owners to a stream, which was rising on the ground of neither, from a passage in Voet 8.3.6 that was interpreted to apply to the case of water arising on a proprietor's own land. Justice Bell called the authority on the law of Holland "very meagre" because water in Holland was "rather a nuisance than an

359 Burger *Roman Water Law* 1. See *Dirk Gysbert van Breda v Johan Conrad Silberbauer* 1869 PC 587, 601 discussed in para 2.6.2.

360 Compare Uys *Structural analysis of water allocation* 168 and para 2.3.2.

361 *Retief v Louw* 4 Buch 165 (1874). See Gauntlett (ed) *Opuscula Miscellanea – JC de Wet* 11.

362 *Maasdorp's Institutes* 86.

363 *Retief v Louw* 4 Buch 165 (1874) 171. Note that this decision was made before the one in *Dirk Gysbert van Breda v Johan Conrad Silberbauer* 1869 PC 587 (see para 2.6.2.). Cloete also gave a judgement, which had the same effect as that of Bell, but he used a more traditional route by stating that this was a private stream where ownership was acquired by him who was possessed of land on both its banks. See *Retief v Louw* 4 Buch 165 (1874) 187-188. The problem is that this approach might wipe out farms and households downstream and is not good public policy in an arid country. *In casu* there was a right derived from agreement to receive daily water and water from the upstream property on some days.

advantage.”³⁶⁴ He argued that it was a misapplication of terms to use the passage in Voet, which treats the right of the proprietor of the upper ground to lead away the water arising from that land, to support the argument of the defendant that he is entitled to use the stream as he wishes. He proceeded to find law elsewhere rather than under the title of servitude.³⁶⁵

Justice Bell classified the water as a perennial stream and as flowing water. In the language of Justinian’s *Institute* it is said to be common to the different persons entitled to use it, in respect of the land through which it runs.³⁶⁶ The court quoted from the *Censura Forensis*³⁶⁷ where it was said that flowing water, collected either from the rain or the earth, makes a perpetual current which by nature itself is attributed to and may be occupied by anyone provided the common and promiscuous use is not injured, “for without the use of air and water no one could live or breathe”. The court concluded that the flowing perennial stream *in casu* was the common property of the proprietors of the two parcels of land and of all the other proprietors of land lying on the stream.³⁶⁸ The importance of the use of the *Institutes* and the *Censura Forensis* is that it supported Justice Bell in moving away from the idea of solely looking at the right to use water as a private property right in the case of water rising on one’s own land, and moving towards a view of the water resource being “common” property.³⁶⁹ When determining the nature and extent of the rights of these owners in the enjoyment of this common property, Justice Bell looked *inter alia* to the law of Scotland, England and America.³⁷⁰ Scottish law, based on Roman law, was found to be “destructive of the absolute right in the water asserted by the defendant for the proprietors of higher lands”.³⁷¹ Justice Bell *inter alia* quoted Littledale who stated that the law of England was that all the King’s subjects have a right to the use of flowing water, on condition that in using it they do not injure the rights already vested in another by the

364 *Retief v Louw* 4 Buch 165 (1874) 173.

365 *Retief v Louw* 4 Buch 165 (1874) 175. See the discussion in Hall *Origin and development of water rights* 33-36.

366 *Retief v Louw* 4 Buch 165 (1874) 176. According to Burger both Bell and Cloete overlooked the fact that D 43.20.1 pr had the answer to their problem and that D 8.3.17 was probably applicable. (Burger *Roman Water Law* 42). Had they considered the text, South Africa could have been spared 150 years of riparian doctrine. Burger *Roman Water Law* 43. In terms of D 8.3.17 the principle that the water from a public river ought to be allocated in proportion to the size of the irrigated lands, is applicable unless anyone can establish a special right that he should be allocated more than his share. There are a number of special rights protected by the Constitution. The problem lies in determining the weight that should be given to each. D 8.3.17 does not take the matter much further. Other interests beside the size of the irrigated lands are the foreign capital earned by an exporting industry and the importance of the environment for the ecology or our health.

367 *Censura Forensis* 2.1.6. See para 2.3.1.

368 De Wet 1959 *Acta Jur* 32 calls Bell’s judgment an *obiter dictum*. He states that Bell considered himself free to look for guidance outside the Dutch and Roman-Dutch legal systems by finding guidance in Angell’s *Treatise on the Law of Watercourses*, which deals with Anglo-American law. The fact is that Angell and the American cases relied heavily on Roman law. See para 2.6.1.3.

369 Watson 1983 *U Penn L Rev* 1125 notes that borrowing from another system is the most common form of legal change. Because law survives through the centuries, a great deal of law operates in a place for which it was not designed initially, or in a society which is poles apart from that which created the law.

370 Hulsebosch 2002 *Cardozo L Rev* 1084 explains that American law developed because lawyers sometimes misunderstood English sources, as happened in the case of navigability. Americans had access to English legal writings, but they were far away from the oral tradition of instruction central to English legal culture.

371 *Retief v Louw* 4 Buch 165 (1874) 177.

appropriation of the water.³⁷² The condition was in fact one of beneficial use. Justice Bell noted that in America “water seems to be of much greater value than in the European states”.³⁷³

2.6.1.1 The influence of *Tyler v Wilkinson*

Justice Bell³⁷⁴ quoted from the well-known American case *Tyler v Wilkinson*³⁷⁵ where the court held that a riparian owner had “no property in the water itself; but a simple use of it, while it passes along”.³⁷⁶ In the *Tyler* case Circuit Justice Story³⁷⁷ distilled general principles from cases on the subject from *inter alia* Angell's³⁷⁸ work on watercourses. The general principles were that every proprietor on each bank of a river is entitled to the land covered with water in front of his river bank to the middle of the stream (*usque ad filum aquae*).³⁷⁹ Because of this land ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction.

He has no property in the water itself; only a simple use, while it flows along.³⁸⁰ The consequence of this principle is that “no proprietor has a right to use the water to the prejudice of another”. The natural stream is annexed, by operation of law, to the land itself. Justice Story³⁸¹ did not mean that there may be no diminution or no obstruction or impediment in the use of the water as it flows - as that would be to deny any valuable use.

372 *Retief v Louw* 4 Buch 165 (1874) 178.

373 *Retief v Louw* 4 Buch 165 (1874) 179.

374 According to Walker the first Cape Supreme Court Bench was staffed entirely by men from overseas. Many of the magistrates were British. English law books were more accessible than the works of the writers of Roman-Dutch law that were either in High Dutch or in Latin. Where books on English law could not assist, the works of the American judge, Justice Story, were consulted. Walker *Lord De Villiers* 78.

375 *Tyler v Wilkinson* 4 Mason 397 (1827) on 401. See para 5.4.

376 Burger *Roman Water Law* 2 explains that this principle, as formulated in *Tyler v Wilkinson* 4 Mason 397 (1827), became the basis for Chancellor Kent's statement of the common law in regard to flowing water. It “influenced courts and lawyers throughout the nineteenth century”.

377 Hulsebosch 2002 *Cardozo L Rev* 1061 writes that in areas of private law that affected interstate dealings - primarily commercial law - America's jurisdictional diversity generated pressure for uniform doctrine. (See para 5.4.1). Many lawyers believed that they needed to simplify American law and make it systematic, rational, and portable. Justice Story made clear that legal education and professional literature were central to the project of creating national doctrine. Hulsebosch 2002 *Cardozo L Rev* 1055-1056 states that within the generation after the American Revolution American lawyers and jurists wanted a law of riparian rights. They constructed it beginning with the keyword navigability.

378 Angell *Treatise on the Law of Watercourses with an Appendix containing Statutes of Flowing and Forms of Declarations*.

379 *Tyler v Wilkinson* 4 Mason 397 (1827) on 474. Uys *Structural analysis of water allocation* 208-209 writes that the *usque ad medium filum fluminis* principle did not apply in Roman law.

380 *Tyler v Wilkinson* 4 Mason 397 (1827) on 474. See Huang 2007 *U Denv Water L Rev* 55.

381 Purists need not balk at the origins of the rules in *Tyler v Wilkinson* 4 Mason 397 (1827). Justice Story was no stranger to Roman law. *Bevier's Law Dictionary* 1856 Datasegment.com
<http://onlinedictionary.datasegment.com/word/equity> quotes his description of ‘equity’ as follows:

This equity is justly said to be a supplement to the laws; but it must be directed by science. The Roman law will furnish him with sure guides, and safe rules. In that code will be found, fully developed, the first principles and the most important consequences of natural right. “From the moment when principles of decision came to be acted upon in chancery,” says Justice Story, “the Roman law furnished abundant materials to erect a superstructure, at once solid, convenient and lofty, adapted to human wants, and enriched by the aid of human wisdom, experience and learning.” *Com. on Eq. Jur. Sec. 23 Digest*, 54.

There may be, and there must be allowed a reasonable use³⁸² of that which is common. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors. The diminution, retardation, or acceleration, which does not injure by diminishing the value of the common right, is an implied element in the right of using the stream. The law acts with a reasonable reference to public convenience and general good.³⁸³ There is not a narrow strictness, subversive of common sense, nor an extravagant looseness, which would destroy private rights. The maxim *sic utere tuo, ut non alienum laedas* applies.³⁸⁴

A thing, common by nature, may be appropriated by general consent or grant. Mere priority of appropriation of running water, without such grant, confers no exclusive right extinguishing a common right. The basic principles that appear from *Tyler* and were accepted by Justice Bell in *Retief* is that there must be allowed of that which is common to all, a reasonable use. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not.³⁸⁵ This is another way of stating that use³⁸⁶ has to be beneficial.³⁸⁷

2.6.1.2 *Evans v Merriwether*

Justice Bell in *Retief* also referred to *Evans v Merriwether*,³⁸⁸ where the court held that each riparian proprietor is bound to make such a use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The court took into account that some streams may be small and the water limited. It held that where the stream is small, and does not furnish water more than sufficient to supply the natural³⁸⁹ wants of the different proprietors living on it, none of the proprietors may use the water for either irrigation or manufacture. Nobody may use all the water where the water in the stream is not needed for “natural wants”, but there is not sufficient³⁹⁰ water for manufacturing. If there is no contract or grant, no proprietor has a right to use all the water. All have a right to participate in its benefit, and an action will be instituted against a

382 Scott and Coustalin 1995 *Nat Resources J* 872 explains that *Tyler v Wilkinson* 4 Mason 397 (1827) introduced the concept of “reasonable use” in water rights before it was accepted in England. In *Embrey v Owen* (see para 6.2.2) English law twenty-five years later cited *Tyler* as part of its reasoning. See also Gordley and Von Mehren *Comparative Study of Private Law* 158 and Len 2004 *U Denv Water L Rev* 60.

383 Fisher 1990 *Emory LJ* 120 writes that the principle that courts can and should select common-law doctrines that simultaneously promote the common good and do justice in particular cases is also found in *Tyler*.

384 *Tyler v Wilkinson* 4 Mason 397 (1827) on 474. *Retief v Louw* 4 Buch 165 (1874) 182.

385 Uys *Structural analysis of water allocation* 210-211 notes that excluding other users did not respect the Roman natural law principles of justice and equity.

386 Watson 1990 *Ga L Rev* 221 explains that in the ongoing struggle between the need for certainty (in the form of broad but precise rules) and the need for rationality (in the form of a flexible test of reasonableness designed to reflect and accommodate the specific realities at hand) America still cannot say that rationality has prevailed in the context of the property rights of riparian landowners.

387 See para 2.6.3; para 3.8.1; para 4.4.1 and para 4.4.2.4.

388 *Evans v Merriwether* 3 Scam (III) R 496.

389 See Smith 2008 *Ariz L Rev* 473.

390 See Smith 2004 *NYU L Rev* 1758.

party who diverts or consumes the whole of the stream.³⁹¹ Where no one has an exclusive right in a common benefit, a just portion must be determined by a jury.

2.6.1.3 The influence of civil law

Justice Bell also quoted French law. According to *Domat's Public Law* 1.8.2.11 a riparian proprietor may divert the water for the irrigation of his meadows. A person had a duty to use this liberty to not do injustice to his neighbours "who have a like want and an equal right."³⁹² In each case the old maxim of the law of neighbours applies: *sic tuo utere ut alienum non laedas*.³⁹³ It represents the requirement of beneficial use. Would Justice Bell have come to the same conclusion if he had not compared the law of other countries, but his study had been limited to the *Institutiones*? Perhaps. The value of the comparative study of the law lay in the broadening of his mind and in introducing known concepts, such as "common property," "reasonableness" and the principles of the law of neighbours, into a situation where old concepts like "servitudes" were no longer sufficient.

Hall³⁹⁴ is of the opinion that the authorities and the "frame of the judgement were taken from chapter IV of Angell's *Watercourses*,³⁹⁵ however, this source was not acknowledged. Moreover, the 1956 *Water Act*³⁹⁶ owed its origin to the discovery by Justice Bell of the American decisions as arranged and set out in *Angell on Watercourses*. It also owes its shape to Justice Bell's "ingenuity" in applying the American decisions to "the conditions of the winter rainfall area of South Africa". It appears from Angell's book³⁹⁷ that Roman and civil law played a large part in shaping the American law on watercourses.³⁹⁸ In the case of irrigation, Angell used Domat's *Public Law* 1.8.2.11³⁹⁹ as authority for the fact that in the case where a riparian proprietor diverted the water for his meadows, the King's Bench judgement coincided with the law of France: "...every one must use his liberty so as to do no injustice to his neighbours, who have a like want and an equal right..."

391 Watson 1990 *Ga L Rev* 213 states that the balancing of interests to determine what use of water by neighbouring proprietors was reasonable, was similar to article 645 of the French *Civil Code*.

392 *Retief v Louw* 4 Buch 165 (1874) 180.

393 *Retief v Louw* 4 Buch 165 (1874) 182. Compare *Regal v African Superslate* 1963 1 SA 102 (A) and Van der Walt *Ontwikkeling van Houerskap* 769-776.

394 Hall *Maasdorp's Institutes* 85. Another case in which Angell is quoted is in the judgement of Dwyer in *Van Heerden v Weise* 1 Buch AC 5, 11 (the latter could be Waise or Wiese, depending on whether it is Buchanan, his noter-up or Hall).

395 Angell *Treatise on the Law of Watercourses*.

396 Act 54 of 1956.

397 See Hulsebosch 2002 *Cardozo L Rev* 1066 for Story's advice to Angell on the appendix.

398 For more on the influence of the Roman law of servitudes on the jurisprudence of Louisiana see Herman 1992 *Stell L Rev* 165-167. With regard to wells, Angell referred to D 39.3. He calls Roman law "that law, the fruit of the researchers of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe." (Angell *Treatise on the Law of Watercourses* 123). Regarding prescription, Angell refers to Bracton and the fact that the writers of the Common Law of England, as well as the civilians, have recognised the principle that a right may be acquired by lapse of time. (Angell *Treatise on the Law of Watercourses* 239.)

399 Van der Walt *Ontwikkeling van Houerskap* 368 explains that there were strong elements of natural law present in Domat's most important work *Les lois civiles dans leur ordres naturel* (1689). Parts of the work can be compared to the work of the German *Usus Modernus Pandectarum*.

Watson⁴⁰⁰ states that in general Domat⁴⁰¹ incorporated the law found in the Roman interdicts. All his references were to the relevant *Digest* texts. Two innovations occurred at the end of the passage. There was no Roman remedy available against a proprietor who reduced the volume of water to a neighbour, causing him injury. Domat cited no authority for the other important innovation: when there was not enough water for the use of all, officers would be charged with deciding the relative needs and uses.⁴⁰² Watson⁴⁰³ states that with regard to a neighbour's right to continue to receive a supply of water necessary for the continued, similar use of his land, English law (in the time of Bracton and Blackstone) and American law in the 18th century had reached a point never reached by Roman law nor fully reached by the French *Code Civil*.

The Roman (and French) law began from the *actio aquae pluviae arcendae* which gave the neighbour only the right to ward off damaging water. English (and American) law began from the concept of "nuisance" which led to an action whether the flow of water was increased or diminished. He explains that another theory of property rights on which courts drew in the eighteenth century, amounted to the rule "first in time is the first in right."⁴⁰⁴ Angell quotes *Liggins v Inge*,⁴⁰⁵ where Lord Chief Justice Tindal stated that water flowing is *publici juris*.⁴⁰⁶ Running water was considered to be *res communes*. The property belongs to no person, but the use to all. The law of England was that the first person who appropriates any part of the water flowing through his land to his own use, has the right to use that which he has appropriated.⁴⁰⁷ Angell⁴⁰⁸ comments that running water is not a *bonum vacans*, in which any one might acquire a property: it is public and common in the sense only that all might use it to support life. Supporting life is of course the highest form of beneficial use. No one had any property in the water itself, except in that portion which he might have abstracted from the stream, and which he possessed, during the time of such possession only.⁴⁰⁹

A miller who purchases a water privilege without any part of the bed of the river would gain an incorporeal hereditament (something that could be inherited or part of an estate) or an easement.⁴¹⁰ Easement is from the French word *aise*, and is a "privilege or

400 1990 24 *Ga L Rev* 178-179.

401 See Gordley and Von Mehren *Comparative Study of Private Law* 166.

402 Watson "Law and Society" 20 explains that in France lawyers were using the *Corpus Iuris Civiles* and Domat, whilst relying on Roman public law, modified the law.

403 1990 *Ga L Rev* 190.

404 Watson 1990 *Ga L Rev* 192.

405 *Liggins v Inge* 7 Bing R 692.

406 See Anderson 2007 *McGeorge L Rev* 478. Compare Scott and Coustalin 1995 *Nat Resources J* 856 who argue that in common law England, non-tidal rivers were not *res publicae* in the Roman law sense. Where "private rights" to water flow were concerned, one could not support prior-use principles by reference to the notion of *res publicae*.

407 Angell *Treatise on the Law of Watercourses* 146-147.

408 Angell *Treatise on the Law of Watercourses* 146-147.

409 Angell *Treatise on the Law of Watercourses* 149.

410 Angell *Treatise on the Law of Watercourses* 161. See para 5.5 and para 6.6.2.

convenience which one neighbour has of another *without profit*". An example is a right to bring water through another's land. It is clear that the American easement has the same origin as the South African servitude.⁴¹¹ According to Angell a "right to take something out of the soil, as turf or coal, is not an easement, but a *profit à prendre*." The "service" of *aquae haustus*, of taking out water from another's well or pond, is distinguished from the service of *aquae ductus*. *Aquae haustus* is a right of profit.⁴¹²

2.6.1.4 The development of the concept "use" in American water law

Dellapenna⁴¹³ states that the "natural flow" theory of water law was a clear and certain system of property law. When in the mid- to late-nineteenth century the natural flow theory was replaced throughout the Eastern United States with the "reasonable use" theory, it was replaced by a common property system. Transitions from a private property system to a common property system are rare. This transition suggests that private property systems do not work well for ambient resources like water. Konefsky⁴¹⁴ explains that *Tyler* pitted the (old) doctrine of absolute ownership against the demands of dynamic businessmen. The natural use theory was generated at a time of minimal economic development. It had antidevelopment, anticompetitive implications that were placed under stress by the increased pace of economic life. Increased competition amongst users led to the adoption of the principle of reasonable use. Justice Story set out to recast water law by attempting to systematise the current learning on water law. He tended to limit the reach of "reasonableness" to the absence of injury. The result was that the first developer was extended a preference that could translate into a "static" property use.

Justice Story in the *Tyler* case held that the riparian owner has no property in the water itself; only a simple use, while it flows along.⁴¹⁵ The consequence of this principle is that "no proprietor has a right to use the water to the prejudice of another". Scott and Coustalin⁴¹⁶ state that Story's explanation is consistent with a utilitarian "greatest good" axiom. Water must be used so that each person gains much while little injury is imposed. Beneficial use and the greatest good axiom are related.

411 Angell *Treatise on the Law of Watercourses* 162-163. Watson 1990 *Ga L Rev* 216 concludes that the distinguished John Bouvier of *Dictionary fame* could in 1851 give the basic rules of the French *Code Civil* as a statement of American law. E.g. the owner of a spring that arose on his land was entitled to use it without having regard to the convenience or advantage of his neighbours. This right, Bouvier wrote, was very different from the much more restricted right of use by the owner of an estate through which a watercourse flowed. He added that a neighbour could acquire an easement to the use of his neighbour's spring. Watson is adamant that whether the economy is agricultural or industrial, the same issues will affect riparian owners, including some at a distance from where the work was done, as well as the wider public.

412 Angell *Treatise on the Law of Watercourses* 165. See para 2.2.3 and para 2.3.5.

413 2000 *Wm & Mary Env'tl L & Pol'y Rev* 345-346.

414 1988 *Stan L Rev* 1139-1140.

415 *Tyler v Wilkinson* 4 Mason 397 (1827) on 474. See Huang 2007 *U Denv Water L Rev* 55.

416 1995 *Nat Resources J* 894.

2.6.2 Other old Cape cases

In *Hough v Van der Merwe*⁴¹⁷ De Villiers CJ determined the question whether the upstream owner of land through which a stream flows was entitled to divert a reasonable quantity of water for irrigation. If so, did the defendants make unreasonable use of their rights?⁴¹⁸ Justinian's *Institutes* 2.1.1 provided authority for the proposition that the right to the use of flowing water is common to all.⁴¹⁹ Lord Kames stated in the *Magistrates of Linlithgow vs Elphinstone*⁴²⁰ that appropriation is authorised with respect to every subject that is best enjoyed separately; but prohibited with respect to every subject that is best enjoyed in common. Water drawn from a river into vessels, or into ponds, becomes private property. To award private property in the river would be inconsistent with the public interest "by putting it in the power of one man to lay waste a whole country".

Lord De Villiers introduced the term "riparian owners": According to Burger,⁴²¹ not even an inference of the term appears in D 8.3.17. Lord De Villiers⁴²² quotes Lord Kames where he says that no individual can appropriate a river, but every individual, especially those who have land adjoining, is entitled to use the water for private purposes. *Hough v Van der Merwe*⁴²³ is authority for the principle that ordinary use is what is required for the support of animal life, and in the case of riparian proprietors, for domestic purposes. Extraordinary use is that which is required for any other purpose. The right to ordinary use is derived from "necessity" and the right to extraordinary use from "convenience". The distinction between necessity and convenience made by Lord De Villiers represents a clear preference for one use above another. Ordinary use has a higher value than extraordinary use.

De Villiers mentions the principle of the Emperors Antoninus and Verus that water of a public river ought to be divided for purposes of irrigation according to the measure of possession of riparian proprietors, but that no diversion should be allowed if any injury is thereby done to the remaining riparian proprietors.⁴²⁴ It is another instance of the requirement of beneficial use. He repeats the quotation from *Domat's Public Law* earlier used by Justice Bell regarding neighbours having a like want and an equal right. After also referring to law from Lower Canada, where the old French law prevailed, Lord De Villiers

⁴¹⁷ *Hough v Van der Merwe* 1874 Buch 148.

⁴¹⁸ *Hough v Van der Merwe* 1874 Buch 152.

⁴¹⁹ *Hough v Van der Merwe* 1874 Buch 153.

⁴²⁰ *Magistrates of Linlithgow vs Elphinstone* (1768) 3 Kames' Decisions 331. See also para 6.2.

⁴²¹ Burger *Roman Water Law* 33. See para 2.2.3.1(a).

⁴²² *Hough v Van der Merwe* 1874 Buch 153.

⁴²³ *Hough v Van der Merwe* 1874 Buch 154.

⁴²⁴ See discussion of D 8.3.17 in para 2.2.3.1.

concluded that the owner of land through which a public⁴²⁵ stream flows, is entitled to divert a portion of the water for irrigation purposes, provided that he does not deprive the proprietors lower down of sufficient water for their cattle and their domestic needs. The upper proprietor must not use more than a just and reasonable proportion of the water consistent with the similar rights of the lower proprietors to irrigate. The water must be returned to the public stream with no other loss than that which has been caused by irrigation.⁴²⁶ Hall⁴²⁷ notes that Lord De Villiers does not refer to *Retief v Louw*, but the basis was the same as adopted by Justice Bell in *Retief* on the ideas and authorities of *Angell on Watercourses*. The decisions of Justice Bell and Lord De Villiers of the Cape Court became incorporated in the *Cape Act* No 32 of 1906 and confirmed the riparian principle.⁴²⁸ The importance of the use made of the ideas and authorities in Angell's work is that both Justice Bell and De Villiers looked towards jurisdictions where water law had roots in Roman law. Not only that, but water scarcity was a problem in parts of the United States as is the case in South Africa. This was a much-needed development, as Roman-Dutch law never needed to consider problems regarding the allocation of water.

In *Breda v Silberbauer*⁴²⁹ the Privy Council in 1869 held that at least from 1861 the governor and council regulated the use of the streams in Table Valley by ordinance.⁴³⁰ *In casu* their lordships did not consider the texts in Voet stating that the Appellant is entitled to do what he pleases with the waters if the streams rise on his land.⁴³¹ The Privy Council did not have the text in front of it. It was also not satisfied that the proposition was true without qualification; or that by the Roman-Dutch Law the rights of the lower proprietors would not attach upon water which had flown beyond the Appellant's land in a known and definite channel.⁴³²

In 1885 the Privy Council in *Commissioners of French Hoek v Hugo*⁴³³ reiterated the doubt. In effect the tyranny of private land ownership was being curtailed. Justice De

425 Gauntlett (Ed) *Opuscula Miscellanea* –JC de Wet 12 states that although De Villiers mentioned a public river, almost nothing reminded of Roman and Roman Dutch law, as the water in De Villiers' public river is not *res publica* anymore, but the water is the entitlement of the riparian owners. It is not clear if De Wet has ever read *Tyler v Wilkinson* (see para 2.6.1.1) but if he had, he might have recognised its Roman law roots.

426 *Hough v Van der Merwe* 155. See De Bruyn *Opinions of Grotius* 138-139.

427 *Maasdorp's Institutes* 86.

428 Burger *Roman Water Law* 3. Gauntlett (Ed) *Opuscula Miscellanea* – JC de Wet 4 states that it is no exaggeration that the 19th century Cape water law as developed by the courts was mostly borrowed from Angell's *Treatise*. See *Hall on water rights in South Africa* 5.

429 *Dirk Gysbert van Breda v Johan Conrad Silberbauer* 1869 PC 587, 601. See Uys *Structural analysis of water allocation* 201.

430 The court relied on its construction of the regulations of 1787 to find the Appellant's obligations.

431 *Dirk Gysbert van Breda v Johan Conrad Silberbauer* 1869 PC 587, 609.

432 Gauntlett (Ed) *Opuscula Miscellanea* –JC de Wet 12 is of the opinion that the Privy Council probably expressed doubt because English law does not make a distinction between public and private rivers. See Hall's discussion of water rising on freehold land in *Origin and Development of Water Rights* 17-20 as well as his discussion of *Van Breda v Silberbauer* and the appeal in *Origin and development of water rights* 42-43.

433 *Commissioners of French Hoek v Hugo* 1885 PC 90, 100.

Villiers held in *Van Heerden v Weise*⁴³⁴ that the general rule that a person may do what he likes with water rising on his own land, is subject to the limitation that the water is not the source of a public stream. Once it is established that the stream is public water, the rights of each proprietor, at its source or along its course, are limited by the rights of the public and by the common rights of other riparian owners.⁴³⁵

Innes J in *Van Niekerk and Union Government (Minister of Lands) v Carter*⁴³⁶ found that

The elasticity of the civil and the Roman-Dutch systems has enabled South African courts to develop the law of water rights along lines specially suited to the requirements of the country. The result has been a body of judicial decisions, which, though eminently favourable to our local circumstances, could hardly be reconciled in its entirety with the law either of Holland or of Rome.⁴³⁷

2.6.3 *The ownership of water and the riparian principle*

Sir Henry Juta KC⁴³⁸ in 1907 wrote that the rights of a riparian owner in terms of the common law could not be rights of ownership in the water. The prior rights of the public always limit the rights of the riparian owner. The temporary flow of water that flows only after rain and the flow of a perennial stream too weak to be capable of being applied to common use, were the absolute property of the person on whose land they were for as long as they were on his land.⁴³⁹ However, one of the main objects of the *Irrigation Act*⁴⁴⁰ was to provide for the more beneficial use of the water in watercourses in which there is only a flow in consequence of rain, particularly in the Karoo.⁴⁴¹ In the case of non-riparian land the right to use water preserved by section 8(c) of the *Irrigation Act*⁴⁴² is the right to continue such use as was exercised.⁴⁴³ It did not include the right to change the use to the prejudice of any other party entitled to use the water. It might appear as if the Act imported the principle of beneficial use followed by the prior appropriation⁴⁴⁴ system that had been followed in the American West. However, the Act did not breach the principle of riparian ownership of land as the land was not riparian land.

434 *Van Heerden v Weise* 1 Buch A.C. 5 (1880). See discussion of Weise and D 43.12.1-D 43.12.3, as well as D 8.3.1 in De Bruyn's translation and annotation of *Opinions of Grotius* 433-436.

435 See *Hall on water rights in South Africa* 21. See s 5 of the 1956 *Water Act*.

436 *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359, 376.

437 *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359, 377. For more on the development of the law in the Zuid-Afrikaansche Republiek see Josson *Schets van het Recht van de Zuid-Afrikaansche Republiek*.

438 *Juta Water rights under the Common Law and the Irrigation Act* 2.

439 *Juta Water rights under the Common Law and the Irrigation Act* 3.

440 Act 32 of 1906, also known as the *Cape Act*.

441 *Juta Water rights under the Common Law and the Irrigation Act* 3.

442 *Irrigation Act* 32 of 1906.

443 See *De Villiers v Barnard* 1958 3 SA 167 (A) 180.

444 See para 5.6.2.

A notable point Sir Henry Juta KC⁴⁴⁵ made was that a riparian owner had no right to sell the water flowing past his land as he had no dominion in it:

Whatever a riparian proprietor does not require for irrigation (or extraordinary use) is *a priori* in excess of his just and reasonable share.

This emphasises the fact that use was limited to that which was regarded to be a beneficial use in the circumstances of the time. In terms of the Act⁴⁴⁶ the water of perennial rivers had to be apportioned according to the riparian principle. A river that had no perennial flow was classified as an intermittent stream. A riparian owner on an intermittent stream could in effect take whatever water he needed. This classification “was not a success”, according to Hall.⁴⁴⁷

In 1912 the *Irrigation Act*⁴⁴⁸ was abandoned for the *Irrigation and Conservation of Waters Act*.⁴⁴⁹ The water in a river was divided into *surplus water* and *normal flow*.⁴⁵⁰ A reasonable share of the normal flow was allocated to all riparian owners. Any riparian owner of an original farm was entitled to store and use as much of the surplus flow as he could reasonably use. If there were more than one riparian owner of an original farm, each owner was then entitled to a reasonable share of that water to which the whole farm was entitled. In terms of the *Irrigation and Conservation of Waters Act*⁴⁵¹ a riparian owner was entitled to the reasonable use of the normal flow of a public stream, but with due consideration of existing rights.⁴⁵² The latter probably referred to rights arising from contracts, prescription, inheritance etc. Users were entitled to the secondary use of the normal flow, as long as it did not interfere with the primary use of downstream owners. They were also entitled to the tertiary use of the normal flow, as long as it did not interfere with the secondary rights of the downstream owners.⁴⁵³ Section 24(c) of the *Irrigation and Conservation of Waters Act*⁴⁵⁴ states that nothing in Chapter 2 of the Act shall be construed as preventing any person from continuing to use water who, prior to the commencement of the Act, has used and was entitled to use the water of any stream for irrigating non-riparian land. It in effect repeated the terms of section 8(c) of the *Irrigation Act*⁴⁵⁵ and what appears to be the principle of beneficial use followed by the system of

445 Juta *Water rights under the Common Law and the Irrigation Act* 90-91.

446 Cape Act 32 of 1906. Hall *on water rights in South Africa* 6 states that it was a complete codification of the existing law. It was derived from court decisions and previous legislation. It included the dry rivers of the Karoo in public streams. They were called intermittent streams.

447 Hall *on water rights in South Africa* 6.

448 *Irrigation Act* 32 of 1906, also known as the Cape Act.

449 *Irrigation and Conservation of Waters Act* 8 of 1912.

450 See Thompson *Water Law* 57.

451 *Irrigation and Conservation of Waters Act* 8 of 1912.

452 Thompson *Water Law* 57.

453 For an explanation of the terms, see the *Hough* case in para 2.6.2.

454 *Irrigation and Conservation of Waters Act* 8 of 1912.

455 *Irrigation Act* 32 of 1906.

prior appropriation.⁴⁵⁶ Section 2 of the *Irrigation and Conservation of Waters Act*⁴⁵⁷ was in 1934 amended to read that if non-riparian land which is capable of being irrigated with water from a public stream by means of a Government irrigation work, has during a period of ten years, not been beneficially irrigated with water from the public stream by means of the work, shall cease to be riparian land. The Irrigation Committee of 1923 reported in 1923 that at the time of the passing of the *Irrigation and Conservation of Waters Act*⁴⁵⁸ there was a strong public desire that better use should be made of flood waters in South Africa as the bulk of these waters ran into the sea.⁴⁵⁹ The committee recommended that the Water Court should reject all schemes that were inefficient or economically unsound or which involved an unreasonable or wasteful use of water.⁴⁶⁰ In effect uses that were not beneficial were rejected.

In *De Villiers v Barnard*⁴⁶¹ the Appellate Division held that in terms of the *Irrigation and Conservation of Waters Act*⁴⁶² a riparian owner is entitled to use the surplus water of a stream to which his land is adjacent, but he has no ownership in the water, only the use of it, and he must use it without waste. The then Appellate Division stated that it is the capacity to use water beneficially which is the measure of rights to use public water.⁴⁶³ The riparian principle was the basic principle behind the water law in South Africa from 1874 until 1998 – a period of 124 years.⁴⁶⁴ The riparian principle had three shortcomings: *Firstly*, all riparian owners could at any time claim a reasonable share of the water of the stream. A complete newcomer could commence irrigating and all prior irrigators would have to reduce their existing undertaking to give the newcomer his reasonable share. This led to insecurity of rights to use water.⁴⁶⁵ *Secondly*, inherent in the riparian principle is the limitation of use to riparian land. In modern times pumps make it easier to irrigate non-riparian land. An example is where the quality of the non-riparian soil is far superior to the riparian soil. The *third* defect was the practical impossibility of division and allocation of water according to the riparian principle on a long river.⁴⁶⁶ In terms of the *Water Act*⁴⁶⁷ of 1956 a riparian owner was entitled to the reasonable use of the share of the normal flow of a public stream to which his or her land was riparian as determined by the water

456 See para 5.6.2 and *De Villiers v Barnard* 1958 3 SA 167 (A) 180.

457 *Irrigation and Conservation of Waters Act* 8 of 1912 was amended by s 1 of Act 46 of 1934.

458 *Irrigation and Conservation of Waters Act* 8 of 1912.

459 *Lewis Water Law* 323.

460 *Lewis Water Law* 327.

461 *De Villiers v Barnard* 1958 3 SA 167 (A) 177.

462 *Irrigation and Conservation of Waters Act* 8 of 1912.

463 *De Villiers v Barnard* 1958 3 SA 167 (A) 217 A-B.

464 *Burger Roman Water Law* 3-4.

465 *Burger Roman Water Law* 4-5.

466 Huang 2007 *U Denv Water L Rev* 56-57 states that in America where the state is implementing a transition from riparianism to prior appropriation, the unpredictable existence of a future riparian right complicates the determination of water rights along a stream and hinders appropriation of the remaining water.

467 *Water Act* 54 of 1956.

court.⁴⁶⁸ The owner was also entitled to such a share of the normal flow as lawfully acquired by the owner from any person.

2.6.4 Conclusion regarding developments in South African case law

It is clear that South African case law on the subject of water law was influenced by Roman law and civil law, as well as American case law and especially Angell's *Treatise on the Law of Watercourses*. What had in fact happened was that the private property concept of "water rising on a man's land belonging to him" in terms of Roman-Dutch law was leading to injustice. In the search for a more just allocation of water, some of the principles of Roman and civil law, as received into American law, were received into South African law. The effect was that the idea of water as private property was substituted with the idea of water as common property. Even fountain water as the source of a public stream was regarded as public in *Van Heerden v Weise*. In cases like *Retief* and *Hough* the courts dealt with riparian owners, and thus only their rights were discussed. The old Roman law maxim of the law of neighbours *sic tuo utere ut alienum non laedas* also played a vital role. It drew attention to the rule that the use of water had to be beneficial and not cause harm. The rights of black people and other water users who were not riparian owners had not been dealt with, but they were not before the courts. Courts only deal with cases before them.

From the *Tyler* case it appears that the doctrine of natural use was generated at a time of minimal economic development. The "natural flow" theory was a secure system of property law as each riparian owner had an apparently unqualified right to have water flow down undiminished in quality and unchanged in quantity except insofar as upstream users exploited the water source for strictly domestic uses. This had antidevelopment and anticompetitive implications that were contrary to the public interest when there was increased competition for water. In South Africa the fact that water from fountains was regarded as private property, as well as the fact that the Dutch East Indian Company "owned" the water for the purpose of making profit, led to injustice. The "reasonable use" theory, which was adopted by the South African courts, made use of a common property system. The fact that both South Africa and the United States were undergoing such transitions for water resources implies that private property systems do not advance the interests of justice for ambient resources like water.

468 See Carter 1997 *Colo J Int'l Envtl L & Pol'y* 384.

2.7 Conclusion

The main hypothesis tested in this thesis is that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right. The hypothesis was tested by way of testing three supporting hypotheses. *Firstly*, the truth of the hypothesis that the concept "beneficial use" should be used to determine the existence of the right to use water was investigated. *Secondly*, the truth of the hypothesis that the public interest plays a larger role in the allocation of water use rights in South Africa than in the allocation of rights to other forms of property was tested. *Thirdly* the truth of the hypothesis that, when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest, was investigated.

During the discussion of the history of water law *firstly*, the principles that govern the concept *res omnium communes* were discussed. *Secondly*, private rights to use water were discussed in conjunction with the limiting effect of the concept "use" or "beneficial use". The *res omnium communes* and private rights in water will be discussed next and the hypotheses will be tested as the conclusion proceeds.

2.7.1 The concept *res omnium communes*

The status of water as a good that the public depended on was recognised early on. By the classical period of the development of Roman law Gaius stated that *aqua flumina* was *res publicae*.⁴⁶⁹ Aelius Marcianus, however, stated that *aqua flumina* was *res omnium communes*. The moral duty not to deprive others of things needful to them, especially the elemental things of nature, was rooted in Stoicism. The air, flowing water, the sea and seashore were listed by Marcianus as common to all. A link between morality and water law was thus established early on. The well-known text of post classical Roman law in the *Institutes* of Justinian⁴⁷⁰ sums up the attitude towards running water in many Western legal systems:

By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea. One was allowed to take as much as one pleased from things common to all...

469 See para 2.2.2.

470 See para 2.2.3.

This text will be encountered again when water law in South Africa;⁴⁷¹ America⁴⁷² and Australia⁴⁷³ is studied.

Roman-Dutch law also accepted that running water was common property.⁴⁷⁴ Simon van Leeuwen's⁴⁷⁵ *Censura Forensis* also divided things into those in our patrimony or ownership and those that are outside our patrimony and "form part of no man's goods". Running water which keeps a continuous flow, whether it is rain water or groundwater, is common property. The requirement of beneficial use and the importance of air and water to sustain life clearly appears in the text of Van Leeuwen that certain things which are common property are "by their nature" equally allotted to everyone and can be occupied, in so far as that user does no harm; for without the use of air and water no one can live or breathe...". The hypothesis that public interest plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property has been proven to be true.

The relatively dry climate at the Cape and the resultant lack of water necessitated stricter government control over water than in the Netherlands, indicating the role the changing public interest played in determining which uses of water were beneficial and what water law and water use rights should be.⁴⁷⁶ The first inklings of the beneficial use concept are thus found. The state was *dominus fluminis*, and water vested in it, but the people themselves only had weak water use privileges. The resolution of water disputes appears to have been centred on what was in the real interest of the inhabitants generally. The public interest thus played a part in the resolution of water disputes.

When the public interest or water scarcity necessitated water law reform because the concept "private water" produced unjust results, Cape judges under the British administration followed the principles of Roman water law as updated by American courts.⁴⁷⁷ American water law had been updated with reference to Roman water law as a change in the public interest demanded that the view of what uses were regarded as beneficial had to be adapted. When in the mid- to late-nineteenth century the natural flow theory was replaced throughout the Eastern United States with the "reasonable use" theory, it was replaced by a common property system.⁴⁷⁸ Transitions from a private property system to a common property system are rare. This transition suggests that

471 See para 4.4.2.3.

472 See para 5.4.

473 See para 6.2.1.

474 See para 2.3.

475 See para 2.3.1.

476 See para 2.4.

477 See para 2.6.

478 See para 2.6.1.4.

private property systems do not work well for ambient resources like water. The natural use theory was generated at a time of minimal economic development. It had antidevelopment, anticompetitive implications that were placed under stress by the increased pace of economic life. Increased competition amongst users, or a change in the public interest, led to the adoption of the principle of reasonable use. It represented a change in which uses were regarded as beneficial. Justice Story tended to limit the reach of "reasonableness" to the absence of injury." Justice Story's explanation is consistent with a utilitarian "greatest good" axiom. Water must be used so that each person gains much while little injury is imposed. Beneficial use and the greatest good axiom are directly related. The hypothesis is true that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

One of the reasons why a need for water necessitates water law reform, is that the principle of stewardship places a moral obligation on the powers that be to allocate water equitably. Grotius⁴⁷⁹ view of property and other real rights was influenced by the concept "stewardship." Creation in terms of natural law is available for everybody's use and individuals should not claim parts thereof for themselves. God remains primary proprietor, but a human being forms a secondary proprietorship for own maintenance. Although the principles on which the theory of stewardship is based might be too religious for some tastes and rather ancient for others, it is one of the mediating principles that may be used when different public interests in water resources are balanced against one another. It will later be shown⁴⁸⁰ that the principles of stewardship are echoed in section 24 of the *Constitution* of 1996 when it states that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. In this case the government is the steward or custodian on behalf of the nation. The principle of stewardship is also found in the concept "public trusteeship" in section 3(1) of the *National Water Act*.⁴⁸¹ It will later on be shown that the concept "beneficial use"⁴⁸² is found alongside the concept of "stewardship" or "public trusteeship".

Another rule recognised by Grotius, writer on Roman-Dutch law, is that equity demands that in times of scarcity people need to produce their provisions for common use.⁴⁸³ It is very relevant to water law reform in South Africa. When there is a scarcity of provisions at sea, what each man has reserved in store, ought to be produced for the common use. Grotius quoted Seneca the father, who stated that necessity, the great resource of human

479 See para 2.3.3.

480 See para 3.1.4.

481 See para 4.4.2.3

482 See para 4.4.2.4.

483 See para 2.3.4.

frailty, breaks through the ties of all human laws. Necessity plays a crucial role in water law reform in the case of water scarcity. Sometimes necessity breaks through the ties of existing human property laws when it causes systems of water use rights to be reformed and the water use rights to be adjusted.

2.7.2 *Private interests in water*

By pre-classical Roman law servitudes like *aquae ductus* could in principle be sold and transferred as they were *res Mancipi*.⁴⁸⁴ According to Gaius,⁴⁸⁵ *aqua ductus* was a vested right on rural land.⁴⁸⁶ It was an inherent limitation of the servitude of *aqua ductus* that use had to take place. According to Paulus,⁴⁸⁷ the praedial servitudes of drawing water from a well and *aquae ducendae* lapsed when they had not been used for two years. They were revived by use for two years. It appears that by classical Roman law⁴⁸⁸ the concept "beneficial use" was used to determine the existence of the right to use water. By the time of Justinian the right of use of water was described as a personal right in the *Digest*. It relied on Gaius when stating that a bare right of *usus* is use without entitlement to the fruits. It is generally created in the same way as *usus fructus*. It appears that by post classical Roman law the concept "beneficial use" was still used to determine the existence of the right to use water. The concept "beneficial use" is of importance because of the status of water as *res omnium communes*. The right to use water appears to have been conditional on use, on one not exceeding one's quota; and on one's intention to use one's servitude.⁴⁸⁹ One does not lose one's servitude when non-use was not as a result of one's neglect or fault. The hypothesis that the concept "beneficial use" should be used to determine the existence of the right to use water in Roman law has been proven to be true.

By the time of Voet⁴⁹⁰ riparian owners were allowed to build on river banks provided they did no harm to upper or lower neighbours or those with estates along the line. They had to give security for damages and were not allowed to obstruct public use to make navigation worse or to change the flow of the river. These conditions were indications that the use of river banks and thus rivers had to be beneficial.

The fact that certain uses in South Africa are more valued than others are illustrated by *Hough v Van der Merwe*.⁴⁹¹ The latter is authority for the principle that ordinary use is what

484 Para 2.3.1.

485 See para 2.2.2.

486 See para 2.2.2.

487 "See para 2.2.2.

488 See para 2.2.3.

489 See para 2.2.3.

490 See para 2.3.2.

491 See para 2.6.2.

is required for the support of animal life, and in the case of riparian proprietors, for domestic purposes. Extraordinary use is that which is required for any other purpose. The right to ordinary use is derived from “necessity” and the right to extraordinary use from “convenience”. The distinction between necessity and convenience made by Lord De Villiers represents a clear preference for one use above another. Ordinary use has a higher value than extraordinary use. Water scarcity was the reason why certain uses of water are valued above others. Water scarcity was also the reason that irrigation legislation was adopted. One of the main objects of the *Irrigation Act* 32 of 1906 was to provide for the more beneficial use of the water in watercourses in which there is only a flow in consequence of rain, particularly in the Karoo.⁴⁹² The Irrigation Committee of 1923 reported that at the time of the passing of the *Irrigation and Conservation of Waters Act* 8 of 1912 there was a strong public desire that better use should be made of flood waters in South Africa as the bulk of these waters ran into the sea. The committee recommended that the Water Court should reject all schemes that were inefficient or economically unsound or which involved an unreasonable or wasteful use of water. In effect uses that were not beneficial were rejected.

In *De Villiers v Barnard*⁴⁹³ the Appellate Division held that in terms of the *Irrigation and Conservation of Waters Act* of 1912 a riparian owner is entitled to use the surplus water of a stream to which his land is adjacent, but he has no ownership in the water, only the use of it, and he must use it without waste. The Appellate Division thus reaffirmed the principle of the beneficial use of water. The hypothesis that when a water law dispensation is reformed, the concept “beneficial use” sets the limits of the water use right as a property right has been proven to be true.

It is because the needs of the public determined that water had to be allocated more equitably that the right of access to sufficient water is now protected by section 27 of the *Constitution* of 1996. Relevant hypotheses that will be tested in the next chapter are, *firstly*, whether a right of access to sufficient water as entrenched in the *Bill of Rights* in the *Constitution* of 1996 is a manifestation of the Roman law of *res omnium communes*. The hypothesis that will be tested *secondly* is whether the extent of the right of access to sufficient water as a human right should be limited by the concept “beneficial use”. *Thirdly*, it will be enquired whether, when some private rights in a water resource are in conflict with other private rights, beneficial use is the tool that is used to determine which uses are to be preferred to others. *Fourthly*, it will be enquired whether, when water scarcity

492 See para 2.6.3.

493 See para 2.6.3.

necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

CHAPTER 3

IMPROVING ACCESS TO SUFFICIENT WATER

3.1 Introduction

The focus of water law has moved from preventing water from running into the sea in terms of the *Water Act*⁴⁹⁴ of 1956 to assisting the previously disadvantaged to have access to sufficient water⁴⁹⁵ with the acceptance of the final *Constitution* in 1996. The focus used to be on state regulation of the control, conservation and use of water for domestic, agricultural, urban and industrial purposes.⁴⁹⁶ The focus now is on the duty of the state in terms of section 27(2) of the *Constitution* of 1996 to take reasonable measures to achieve the progressive realisation of the right of access to sufficient water in section 27(1)(b) of the *Constitution* of 1996.⁴⁹⁷ The focus has thus moved from regulation to reform.

In the previous chapter it was explained that running water historically was classified as *res omnium communes*. The word *communes* could *inter alia* mean for common use.⁴⁹⁸ Water is thus available for common use. However, one needs to establish who the members of the community are for whose common use the water resource is available. Suffice to say that the members of the community who need access to water vary from subsistence farmers to large irrigators. The fish in the rivers and the small animals in the veld all need water to survive. Beyond needing water for life itself, nobody can make a living without water.

This chapter deals with the effect of the right of access to sufficient water on the allocation of water. The rest of the thesis deals with the effect of water law reform on the water use right as a property right. Because this chapter deals with the right of access to sufficient water the matters that will be discussed are how to achieve access to sufficient water for these water users and how to achieve the equitable allocation of water for all South Africans. One needs to investigate what the responsibility of government in terms of the *National Water Act*⁴⁹⁹ involves in the following reform-related instances: *Firstly*, Government has to achieve access to sufficient water for basic human needs and the aquatic ecology. *Secondly*, it has to achieve the equitable allocation of water in the

494 Act 54 of 1956. See para 4.4.1.

495 Placing a constitutional obligation on the State to ensure that everyone has “access to” sufficient water means that the meeting of the need for access to sufficient water is recognised as a public matter. See Liebenberg 2006 *Stell LR* 16.

496 See the long title of the *Water Act* 54 of 1956.

497 S 27(1)(b) *Constitution* of 1996.

498 Thompson *Water Law* 18 FN 5.

499 Preamble *National Water Act* 36 of 1998.

resource for beneficial use and the redistribution of rights to access water. The role of Parliament, the courts and the executive branch of government also needs to be analysed to determine what they are mandated to do and what they are restricted from doing when it comes to realising the right of access to sufficient water.

3.1.1 Overview

In this chapter the right of access to sufficient water is discussed in detail. It is the first steps in determining the answer to the research question how the concept "beneficial use" influences South African water law reform. The link between the public interest in water allocation reform and the concept "beneficial use" will be discussed in the light of the existence of the right of access to sufficient water. The first hypothesis that will be tested in this chapter is whether a right to sufficient water as entrenched in the *Bill of Rights* is a manifestation of the Roman law principle of *res omnium communes*. The second hypothesis that will be tested is whether the extent of the right of access to sufficient water as a human right should be limited by the concept "beneficial use". The third hypothesis that will be tested is whether beneficial use is the tool that is used to determine which uses are to be preferred to others when some private rights in a water resource are in conflict with other private rights. The last hypothesis that will be tested is whether the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest when water scarcity necessitates the reform of the water law dispensation.

In order to determine the truth of the above hypotheses, the right of access to water as a human or constitutional right will be discussed in detail. It is necessary to understand the place of Parliament, the courts and the executive in turning this right into a reality. In the beginning of the previous chapter it was stated that one would see features of legal systems that formed South African water law if one were to look in the mirror after washing one's hands in the history of South African law. In this chapter the reader is asked to view competing South African water users and other stakeholders through the lens of the South African *Constitution* of 1996 and the *National Water Act*⁵⁰⁰ in order to determine how the government should improve access to sufficient water. One should *inter alia* understand how the duty to deliver water services to achieve access to sufficient water is affected by the separation of powers in the *Constitution* of 1996. One should also understand why the right of access to sufficient water is a human right in the *Bill of Rights* and what the content of the right is. Only then will the principles relating to the equitable allocation of water use rights and the distribution of water in the resource be discussed.

500 Act 36 of 1998.

3.1.2 Background

Some of the issues, like the relative scarcity of water and the inequitable allocation of water use rights, which will be dealt with in this chapter, had already emerged in the time of the Dutch administration in the Cape.⁵⁰¹ The right of access to sufficient water⁵⁰² was entrenched in the *Constitution* of 1996 mainly because years of racial discrimination regarding access to land indirectly resulted in black people being denied access to sufficient water. The preamble to the *National Water Act*⁵⁰³ of 1998 states that water is a scarce and unevenly distributed national resource that belongs to all the people, but the discriminatory laws and practices of the past have prevented equal access to water. The Act was promulgated to provide for fundamental reform of the law relating to water use and water resources.⁵⁰⁴ The *National Water Act*⁵⁰⁵ acknowledges that the national government has overall responsibility for the equitable allocation of water for beneficial use and the redistribution of water. The advancement of racial and gender equality forms one of the core objectives of the *National Water Act*.⁵⁰⁶ The purpose of the *National Water Act*⁵⁰⁷ is to *inter alia* ensure that the nation's water resources are protected, used and developed in ways which take into account the promotion of equitable access to water and the redressing of the results of past racial and gender discrimination. This purpose is tempered by the purpose that the nation's water must be used in ways which take into account the *beneficial use* of water in the public interest.

The *National Water Act*⁵⁰⁸ states that the national government, acting through the Minister, is the public trustee of the nation's water resources. The Minister is ultimately responsible to ensure that water is allocated equitably and *used beneficially* in the public interest, while promoting environmental values.⁵⁰⁹ According to the *White Paper*⁵¹⁰ the beneficial use of water means the use of water for a productive purpose, such as farming or industry. "In the public interest"⁵¹¹ in the case of water allocation reform was defined to refer to water allocations that are to the benefit of the public and the nation. It attempts to balance the broader public interest with the rights of the individual. It includes the

501 See para 2.4.

502 S 27(1)(b) *Constitution of the Republic of South Africa* of 1996 (hereafter the *Constitution*).

503 Preamble *National Water Act* 36 of 1998.

504 Long title.

505 Preamble.

506 S 2.

507 S 2.

508 S 3(1).

509 S 3(2).

510 DWA 1997 *White Paper on a National Water Policy* para 4.2.1.

511 DWA 2006 *Strategy for Water Allocation Reform* 8.

commitment to equity.⁵¹² The influence of the concept "beneficial use" in the public interest on the allocation of water will be discussed in detail in paragraph 3.8.

3.1.3 *Problems with the quantity and quality of water*

Achieving access to sufficient water is a complex matter. Currently problems exist both regarding the quantity and the quality of available water. When South Africa became a democracy in 1994, there were approximately 12 to 14 million people without access to safe water and more than 20 million without access to adequate sanitation.⁵¹³ In 2006 there were about 8 million people who did not have adequate access to water.⁵¹⁴ About 98% of the country's water resources have already been allocated and economic development is already being impeded.⁵¹⁵ The Gauteng Province will likely start to experience a water shortage by 2013, should no alternative sources of water be found.⁵¹⁶ The situation is so dismal that it was earlier predicted that demand for water in the country will grow by 52% in less than 30 years. The lack of a suitable water supply will become an important impediment to the future socio-economic development of the country, in terms of both the quantity and the quality of available water.⁵¹⁷

Rural women and children bear the bulk of the negative impacts of inequitable and inadequate access to safe water and sanitation.⁵¹⁸ Water-borne diseases, such as cholera and typhoid, are some of the health risks many rural people face. Challenges regarding water quality faced by South Africans mentioned by Anthony Turton⁵¹⁹ are acid mine drainage; levels of eutrophication (the unnatural accumulation of nutrients in water resources), which are higher than elsewhere in the world; some of the highest levels of micro cysteine in the water in the world;⁵²⁰ a growing problem with endocrine disrupting compounds,⁵²¹ partially metabolised medication, radionuclide⁵²² and heavy metal pollution; an increase in cyanobacteria; and the dumping of untreated sewage.⁵²³ The last mentioned is a direct result of a problem with capacity in municipalities. Issues relating to water quality do not fall within the scope of this thesis, but they are a serious threat to the future well-being of South Africa and its people. However, one needs to understand the

512 See para 3.8.3.

513 Stein 2005 *Tex L Rev* 2169.

514 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 2.

515 Tempelhoff 2009 www.beeld.com.

516 Tempelhoff 2009 www.beeld.com.

517 Walmsley *et al* 2006 <http://www.ngo.grida.no/soesa/nsoer/issues/water/index.htm>.

518 Stein 2005 *Texas Law Review* 2169.

519 Turton "Clean South Africa" 16; Tempelhoff and Coetzee 2008 www.beeld.com. See Oberholster PJ and Ashton PJ "Water Quality and Eutrophication" 4.

520 Turton "Clean South Africa" 17; Tempelhoff and Coetzee 2008 www.beeld.com. See Oberholster PJ and Ashton PJ "Water Quality and Eutrophication" 7-9.

521 Turton "Clean South Africa" 17; Tempelhoff and Coetzee 2008 www.beeld.com.

522 Turton "Clean South Africa" 18; Tempelhoff and Coetzee 2008 www.beeld.com.

523 Oberholster PJ and Ashton PJ "Water Quality and Eutrophication" 4.

importance of the protection of the environment for all the water users in South Africa. Water for the aquatic ecosystem *inter alia* receives priority above water for other uses, as will be discussed in the next paragraph.

3.1.4 Importance of the Reserve

At the outset the *National Water Act*⁵²⁴ prioritises water for basic human needs and water for the protection of aquatic ecosystems above water for any other use.⁵²⁵ The *National Water Act*⁵²⁶ sets the priority by defining the Reserve as the quality and quantity of water required *firstly* to satisfy basic human needs by securing a basic water supply and *secondly* by protecting aquatic ecosystems. The Minister of Water and Environmental Affairs⁵²⁷ must, when determining the Reserve for a water resource, ensure that adequate allowance is made for each component of the Reserve.⁵²⁸ In other words, there must be enough water (in reserve) for basic human needs and aquatic ecosystems, before water entitlements may be allocated for any other type of use. One may conclude that certain water uses have a higher value than others do.

The right of access to sufficient water in section 27(1) of the *Constitution*⁵²⁹ forms the foundation of the protection of water for basic human needs. When the definition of the Reserve in section 1 of the *National Water Act*⁵³⁰ gives priority to the aquatic ecosystem, it gives effect to the right to the environment in section 24 of the *Constitution*.⁵³¹ Stewart⁵³² notes that the environmental right strengthens the importance of access to sufficient water to maintain health. Section 24 of the *Constitution inter alia* entails that everyone has the right to have the environment protected, for the benefit of present and future generations. Stewart⁵³³ argues that the environmental right implies that a scarce resource such as

524 See the definition of "Reserve" in s 1 read with *inter alia* s 6(1)(b); s 12(2)(b); s 16- s 18 *National Water Act* 36 of 1998.

525 The purpose of the *National Water Act*, as set out in s 2(a), is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account meeting the basic human needs of present and future generations amongst other factors.

526 S 1.

527 The Minister of Water and Environmental Affairs is the head of two separate government departments. They are the Department of Water Affairs and the Department of Environmental Affairs. The Department of Water Affairs (DWA) in the past was known as the Department of Water Affairs and Forestry (DWAF). Reference is now made to the Department of Water Affairs and DWA, although the name might have been different in the past.

528 S 16(2)(b) *National Water Act* 36 of 1998.

529 *Constitution* of 1996.

530 Definition of the Reserve in s 1 *National Water Act* 36 of 1998.

531 S 24 of the *Constitution* of 1996:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

532 2010 *Penn State Int LR* 502-503.

533 2010 *Penn State Int LR* 502-503.

water should also be protected for future generations.⁵³⁴ The protection of water resources for future generations is of course reminiscent of the concept "stewardship" as discussed in the conclusion to the previous chapter.⁵³⁵ Furthermore, the *National Environmental Management Act*⁵³⁶ states that the environment is held in public trust for the people. The beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

Stewart⁵³⁷ suggests that the courts address sustainability⁵³⁸ when either interpreting the content of the right of access to sufficient water or when enquiring into the reasonableness of policy adopted by the state. In the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management*⁵³⁹ the court, when discussing the topic "sustainable development," held that:

Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment.

The tension between development and the environment inherent in environmental law is also found in water law when it comes to the allocation of water. The question is which uses are so valuable to society that water should be allocated to them - environmental uses or socio-economic uses? Another way of putting the question is to ask which uses are regarded to be so beneficial to society that it would justify the allocation of water to those uses. The government has to choose how much water to allocate to the environment and how much water to allocate to socio-economic development. It also has to choose which uses will receive priority or will be regarded to be more beneficial than others. The *National Water Act*⁵⁴⁰ has made use of the concept "Reserve" to set out its priorities. When one analyses the goods protected by the definition of the Reserve, it appears that both water for basic human needs and water to protect aquatic ecosystems can be classified under the category of water as a social good.⁵⁴¹ Water for human needs as a "social good" refers to water necessary for households to maintain a healthy level of living and is considered to be a human right in South Africa.⁵⁴²

534 Stewart 2010 *Penn State Int LR* 502-503.

535 See para 2.7.

536 S 2(4)(o) *National Environmental Management Act* 107 of 1998. See para 4.4.2.3.

537 2010 *Penn State Int LR* 503.

538 See Bouillon Volhoubare *Grondontwikkeling* 62 for a definition of sustainable development.

539 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management* 2007 6 SA 4 (CC) para 44.

540 S 1 *National Water Act* 36 of 1998.

541 See para 3.8 on the allocation of water.

542 (Draft project report) Nedlac *Administered Prices Study* 6. Some of the dimensions of water that also need to be considered, in addition to the quantity of water provided, are the quality of water supplied; the reliability of the supply; and the location to which it is supplied.

Water as an “economic good” refers to use for commercial purposes or to water used by households beyond the basic minimum required to sustain a healthy level of living.⁵⁴³ Water as an economic good is important to enable the country to develop economically. The assumption is made that there is a difference between the legal rules applicable to water as a social good and water as an economic good. Water as a social good, as protected by the *Reserve*, receives more priority in South African law. However, there not only exists competition between water as a social good and water as an economic good. There is also an argument to be made that a healthy *Reserve* underpins economic development. Van Veelen⁵⁴⁴ states that the purpose of defining the *Reserve*, as explained above, was to ensure sustainable development. The *Reserve* is that quantity and associated quality of water that should be left in the resource in order to ensure its continued well-being.⁵⁴⁵ The *Reserve* is not aimed at the aquatic ecology, but at water users.⁵⁴⁶ A healthy river provides goods and services that have value. The role of the aquatic ecology is to be an indicator of whether the river is healthy or not. It appears from his analysis that the environment is not another part of the national household to which water needs to be allocated. The environment is present in every sector of the economy and its needs, depending on water resource classification, must be met before the needs of a sector can be met. Van Veelen⁵⁴⁷ is of the opinion that the implementation of the *Reserve* in water stressed river systems will require a reduction in the allocation of water for beneficial use, or at the very least a decrease in the assurance of supply. The implication of the protection of the right of access to sufficient water, as protected by the determination of the *Reserve*, is that less water from the resource will be available for allocation for economic purposes.⁵⁴⁸ The question why the right of access to sufficient water was protected as a socio-economic right will be discussed next.

3.2 The generations of human rights

3.2.1 Why is the right of access to sufficient water protected as a human right?

The South African *Constitution*⁵⁴⁹ in its *Preamble* states that the *Constitution* was adopted to establish a society based, *inter alia*, on social justice and fundamental human rights

543 Dellapenna 2000 *Wm. & Mary Envtl L & Pol'y Rev* 333 states that when a good is seen as essential for the minimum well-being of all members of the society (one that is socially acceptable) society undertakes to provide the good to all without direct cost for the amount consumed. Such goods could be termed socially created public goods. Examples of socially created public goods include fire protection or public education, both of which are sometimes private goods but are generally made available to all by governments, at no direct cost.

544 “Water Resource Protection” 3.

545 Van Veelen “Water Resource Protection” 4.

546 Stewart 2010 *Penn State Int LR* 503 argues that the need to preserve water for *inter alia* environmental sustainability should not compromise the health and well-being of poor communities.

547 Van Veelen “Water Resource Protection” 12.

548 The allocation of water will be discussed in paragraph 3.8.3.

549 *Preamble* to the *Constitution* of 1996.

and to improve the quality of life of all citizens. Water is a natural resource without which nobody can exist. Improved access to water will improve the quality of life of South Africans. The inequitable allocation of water⁵⁵⁰ led to the adoption of section 27(1)(b), a clause in the *Bill of Rights*⁵⁵¹ of the *Constitution*⁵⁵² that states that everyone has the right to have access to sufficient water. The protection of access to sufficient water is not unknown in our common law. In post classical Roman law an interim interdict for prohibition and restitution applied to daily and to summer water.⁵⁵³ Daily water was water that someone could use every day if he wished, it was not water that was used every day.⁵⁵⁴ Summer water was used in summer. The protection of daily and summer water probably existed because water was classified as a *res omnium communes*. The protection of daily and summer water arguably was the precursor of the protection of the right of access to sufficient water as a human right. The *White Paper on a National Water Policy for South Africa*⁵⁵⁵ reaffirmed that water is a *res omnium communes* and is a resource common to all, the use of which shall be subject to national control. Furthermore, the *National Water Act*⁵⁵⁶ appointed the national government as the public trustee of the nation's water resources. A right of access to sufficient water as entrenched in the *Bill of Rights* is a manifestation of the Roman law principle of *res omnium communes*.

The first time that a right of access to water received constitutional protection was in the *Constitution* of 1993⁵⁵⁷ when it was stated that local government had to provide access to water. The question is why the right of access to sufficient water is protected as a human right in the current *Constitution*⁵⁵⁸ and why it was not sufficient that municipalities had a duty to provide access to water. In the *locus classicus* of socio-economic rights, the *Grootboom*⁵⁵⁹ case, the Constitutional Court explained that human dignity, freedom and

550 Viljoen 2006 *Agrekon 2* explains that although poverty and inequality are frequently used as interchangeable terms, they are manifestations of two different problems. Poverty is characterised by the inability of individuals, households or communities to command sufficient resources to satisfy a socially acceptable minimum standard of living, but inequality refers to a state of social organisation where access to resources and opportunities are unequal.

551 Chapter 2 of the *Constitution* of 1996.

552 *Constitution* of 1996.

553 D 43.20.1.1 and D 43.20.1.3 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

554 D 43.20.1.2. *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

555 Principle 2 DWA 1997 *White Paper on a National Water Policy* 60.

556 See s 3(1) of the *National Water Act* 36 of 1998, para 4.4.2.3. and para 5.4.

557 The current *Constitution* more finely delineates the right of access to water than the 1993 *Constitution* (Act 200 of 1993). Under the 1993 *Constitution* no mention was made of any right of access to water in the *Bill of Rights*. S 175(3) of the 1993 *Constitution* did state that a local government shall make provision for access to water by all persons residing within its area of jurisdiction. This was stated in the context of the powers and functions of local government. There was a proviso that such services and amenities had to be able to be rendered in a sustainable manner and had to be "financially and physically practicable". The proviso illustrates the inherent tension between demand and affordability in the context of water entitlements in South Africa. This proviso is also reflected in s 27(2) of the 1996 *Constitution*.

558 S 27(1)(b) of the *Constitution* of 1996.

559 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23. De Vos 2001 *SAJHR* 259 states that the role of the *Bill of Rights* as a transformative document, aimed at addressing inequality, lies at the heart of the Court's approach.

equality are the foundational values⁵⁶⁰ of the society. They are denied those who have no food, clothing or shelter.⁵⁶¹ The court explained that affording socio-economic rights to all people enables them to enjoy the other human rights.⁵⁶² The realisation of socio-economic rights is the key to the advancement of race and gender equality and the evolution of a society in which men and women have equal opportunities. This also applies to those without access to sufficient water, as much as it applies to those who have no food, clothing or shelter. One may argue that the right of access to sufficient water⁵⁶³ is implied in the full and equal enjoyment of all rights and freedoms referred to in section 9(2). Liebenberg⁵⁶⁴ writes that state regulation and intervention to ensure a division of resources and benefits that would enable all people to develop their capacity for self-sufficiency should not be understood as limitation of freedom, but as fundamental to our constitutional concept of "freedom". According to the court in the *Grootboom*⁵⁶⁵ case, all the rights in the *Bill of Rights* are inter-related and support one another. In the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*⁵⁶⁶ the court held that *Constitutional Principle II* of the 1993 *Constitution*⁵⁶⁷ permitted the Constitutional Assembly to supplement universally accepted fundamental rights with other rights not universally accepted, like socio-economic rights.

The right of access to sufficient water is classified under socio-economic rights. Socio-economic rights are concerned with the material dimensions of human welfare.⁵⁶⁸ Socio-economic rights are categorised under the second generation of human rights.⁵⁶⁹ Second generation rights are based on equality.⁵⁷⁰ They emerged during the socialist

560 See s 1 of the *Constitution* of 1996.

561 De Vos 2001 *SAJHR* 265 states that at the heart of the Constitutional Court's approach to substantive equality lies the understanding that the right to equality (and the interlinking value of human dignity) and social and economic rights are two sides of the same coin. See Jansen van Rensburg 2005 *SAPL*116.

562 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

563 S 27(1)(b) of the *Constitution* of 1996. S 27 reads as follows:

Health care, food, water and social security

(1) Everyone has the right to have access to-

(b) sufficient food and water; and

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

564 2008 *Acta Juridica* 161.

565 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

566 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 76-78.

567 *Constitutional Principle II* of the *Constitution Act* 200 of 1993 states that:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

568 Liebenberg "Interpretation of socio-economic rights" in Woolman *et al* (eds) *Constitutional Law of South Africa* 33-1. See Jansen Van Rensburg 2003 *PER* 1.

569 See Gabru 2005 *PER* 3-4.

570 Koch 2002 *Wis Evtl LJ* 140-141. See para 3.8.2.

revolutions⁵⁷¹ of the 20th century and are positive rights that create a duty for government to intervene on behalf of individuals.⁵⁷² The first duty of the state is that it must create a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. The second duty of the state is to implement measures and programmes designed to assist individuals in realising their rights.⁵⁷³ Section 27(2) requires the progressive realisation of the right of access to sufficient water. It must be read in the context of the South African *Constitution*⁵⁷⁴ that as a whole is aimed at the achievement of equality.

The protection of second generation rights is a factor that distinguishes the South African *Constitution*⁵⁷⁵ from older constitutions like the American Constitution,⁵⁷⁶ which was adopted to protect liberty - civil and political. Civil and political rights, such as freedom of speech and association, emerged during the French and American Revolutions and are first generation rights.⁵⁷⁷ They are based on liberty.⁵⁷⁸ They are negative rights because they prevent governments from interfering with a protected activity.⁵⁷⁹ According to Liebenberg,⁵⁸⁰ the danger associated with merely protecting civil and political rights is that the rich and powerful may use them to protect vested interests. Devenish⁵⁸¹ writes that socio-economic rights are of cardinal importance for political and social stability. The *Proclamation of the Teheran Conference on Human Rights*,⁵⁸² organised under the auspices of the United Nations declared:

In our day political rights without social rights, justice under law without social justice, and political democracy without economic democracy no longer have any true meaning.

571 Taylor 1998 *Geo Int'l Envtl L Rev* 318 states that these rights try to control the less desirable consequences of excessive exercise of individual freedoms in that they developed in response to capitalist exploitation of the working class and colonial peoples.

572 American constitutional jurisprudence traditionally refused to recognise these rights. See para 5.3. See Gallagher *Fordham Envtl LJ* 117 on the fear of the American courts of being drawn into political, scientific, social and economic battles of the moment. See Hernandez-Truyol and Day 2000-2001 *Ind L Rev* 1227.

573 Gabru 2005 *PER* 7. According to UN CESCR 2002 *General Comment 15* para 14 <http://www.unhcr.org/refworld/Juridica> 163. See para 3.6.3 and 3.7.5.

574 S 1(a) of the *Constitution* of 1996 states that the Republic is *inter alia* founded on values like the achievement of equality and the advancement of human rights and freedoms.

575 *Constitution* of 1996.

576 Although the American Constitution does not protect second generation rights, water in America is valued and American water law is well developed. See para 5.4.1 on the *Commerce Clause* in the American Constitution and para 5.8 on property protection in American constitutional law. The American Constitution is relevant because South African water law has to a large extent been influenced by American water law. See para 2.6.1. On the other hand, a country like Australia has no *Bill of Rights* in its Constitution. See para 6.3. The lack of a *Bill of Rights* does not affect the importance attached to water or legal development relating to water in Australia.

577 Koch 2002 *Wis Envtl LJ* 140-141.

578 See Taylor 1998 *Geo Int'l Envtl L Rev* 312.

579 See Klare 1998 *SAJHR* 169 for a discussion of American legal culture.

580 "Interpretation of socio-economic rights" in Woolman *et al* (eds) *Constitutional Law of South Africa* 33-2.

581 Devenish 2007 *THRHR* 85.

582 UN Int Conf on Human Rights "Final Act" para 13.

In the case of “third generation” rights, such as the right to a safe environment, the right to development⁵⁸³ and the right to information, there need to be a balancing of the interests of the individual against those of the community.⁵⁸⁴ This is also required by second generation human rights. The constitutional welfare state involves social justice and should not be passive. It is an active state, where the executive and the legislature must intervene in the economy of a country to ensure that basic or core needs are met.⁵⁸⁵ It is because of the need for social justice and the need for state intervention in *inter alia* the allocation of water that the right of access to sufficient water is protected as a human right. One may conclude that the right of access to sufficient water was intentionally protected as a human right because of the need for social justice and the need for state intervention in *inter alia* the allocation of water. The effect of this is to limit the amount of water available in the resource for allocation for economic purposes. The difference between the Roman concept of *res omnium communes* and the right of access to sufficient water as a human right in South Africa is probably that the content of the public interest is different. Some people argue that the right of access to sufficient water does not contain all of the *res omnium communes*’ principle, as one cannot expect the state to be obliged to provide access to water for economic purposes. Other people argue that the state has a duty in terms of section 27(1) to create the conditions where people will be able to access water for economic purposes. Courts will probably rely on the context of every case to determine the extent of the right.⁵⁸⁶

3.2.2 Limitations to the right of access to sufficient water

Fortman and Salih⁵⁸⁷ warn that there are limitations to the right of access to sufficient water. The protection of human dignity by law assumes the existence of law and order so that law guarantees the security of people in their person, in their possessions and in their deals as the maxim *pacta sunt servanda*⁵⁸⁸ demands. Disputes over conflicting interests should be settled in an ordered manner. Unfortunately, the role of universal state law is rather constrained in many African states. The values behind human rights norms have to be “received” in the sense of a cultural reception of the law.⁵⁸⁹ Human rights norms like the principle of equality often only exist in the statute books. The struggle for social justice, by contrast, has to be directed against substantive socio-economic inequality that is of a

583 See discussion of this right in Taylor 1998 *Geo Int’l Envtl L Rev* 330 and Sengupta 2000 http://www.hsph.harvard.edu/fxbcenter/FXBC_WP7--Sengupta.pdf.

584 Devenish 2007 *THRHR* 86.

585 For transformation as a social and an economic revolution see Langa 2006 *Stell LR* 352. Compare the *Preamble* to the *Constitution* of 1996. See Botha 2004 *SAJHR* 252; Moseneke 2002 *SAJHR* 318; Albertyn & Goldblatt “Equality” 35 – 14 and 35 – 40; Roederer 1999 *SAJHR* 79; Klare 1998 *SAJHR* 150.

586 See para 3.7.2.

587 “The Life and Times of Religion and Human Rights” 91-111.

588 See Liebenberg 2008 *TSAR* 476.

589 Fortman and Salih “The Life and Times of Religion and Human Rights” 62-78.

relative nature. Human rights appear to function inadequately as a normative instrument in combating growing socio-economic inequality. Anderson *et al*⁵⁹⁰ explain that in developing countries, there is often a tension between the state's attempt to rationalise the world through defined rights and the complex and dynamic nature of the real world. Resource rights in developing countries are usually conceived through legal pluralism. A prescriptive approach to the allocation of rights may conflict with local approaches.

Fortman and Salih⁵⁹¹ argue that law is more than just state law, official courts and enforcement agencies. If the realisation of fundamental norms binding the use of power were only dependent on formal legal processes, in many places deficits in the enforcement of crucial standards would be even worse. Law can also work through *informal* mechanisms or, in another terminology, as *living law*. The term *living law* is used in the sense of *informal* processes of setting, monitoring and enforcing norms pertaining to order and justice within a certain community.⁵⁹² "Law" manifests itself as regulation of power, but living law has the nature of "anti-power". Through protesting and resistance the building of a dam that would cut people off from their water supplies may become impossible even if it had been incorporated in an official Act of Parliament. Agencies supplying water to households may be forced to tolerate tapping off practices that are not based on any formal contract. The transformation of declared rights into acquired rights *with* guaranteed freedoms and entitlements for everyone, calls for an enduring struggle. In South Africa this enduring struggle plays out in the municipal sphere⁵⁹³ of government when it comes to basic service delivery, and in the national sphere of government, when it comes to water allocation.⁵⁹⁴

3.3 Water as a resource and water services

Many people do not understand when national government is responsible for water and when a municipality is responsible. When water is flowing down a river, the Department of Water Affairs is responsible for the quality of the resource and for the quantity of water allocated to users. When water had been allocated to a municipality, it is the municipality that is responsible for delivering water services. One should distinguish between water as a natural resource⁵⁹⁵ and water supply services⁵⁹⁶ in order to understand the structure of South Africa's water industry.⁵⁹⁷ *Schedule 4B* to the *Constitution* of 1996 classifies water

590 2007 *LEAD J* 164.

591 Fortman and Salih "The Life and Times of Religion and Human Rights" 4.

592 Fortman and Salih "The Life and Times of Religion and Human Rights" 11.

593 See para 3.4.

594 See para 3.8.

595 It may occur in rivers, dams or underground.

596 It is typically delivered and removed through networks of pipes.

597 (Draft project report) Nedlac *Administered Prices Study* 4 and 6.

and sanitation services limited to potable water⁵⁹⁸ supply systems and domestic waste-water and sewage disposal systems as a local government matter. Water in a supply system, which has already been diverted and is meant for basic human needs or domestic purposes, is generally governed by the *Water Services Act*.⁵⁹⁹ However, the *Water Services Act*⁶⁰⁰ also states that the expression 'water supply services' means *inter alia* the treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use, but not water for industrial use.

Water as a resource is governed by the *National Water Act*.⁶⁰¹ Water that is to be diverted directly from the river generally may be diverted for a commercial purpose like irrigation farming or industry or a social purpose like municipal service delivery. Often different pieces of legislation govern water as a social good and water as an economic good. The distinction between water as a social good and water as an economic good is *inter alia* reflected in the way governments approach water pricing.⁶⁰² The next section sets out who in government is responsible for water as a resource and for water delivery and who keeps government in check.

3.4 The division of powers and functions

The value of a right of access to sufficient water being recognised as a human right is that the state has a duty to intervene to realise the right. This section explains which part of government has which responsibility in the light of the constitutional and legislative framework as a whole. The constitutional framework allocates responsibility for supplying certain water services to certain spheres of government, but it also keeps different branches of government responsible for different functions. They need to operate within a limited budget. For this reason there is often friction between different spheres and branches of government. The legislature, which makes the laws, does not always make sufficient money available to the Minister of Water and Environmental Affairs, who has the responsibility to oversee water services delivery.⁶⁰³

598 Drinking water.

599 *Water Services Act* 108 of 1997.

600 S 1 *Water Services Act* 108 of 1997.

601 Act 36 of 1998.

602 Dellapenna 2000 *Wm & Mary Envtl L & Pol'y Rev* 336.

603 See s 9(1) *Water Services Act* 108 of 1997 and Tempelhoff *Beeld* 10. In *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 181 the High Court noted that the equity share that the respondents had been allocated by the Treasury on behalf of the national government to realise the provision of water, had not even been utilised by the city.

The South African *Constitution* divides government into three branches, namely the executive,⁶⁰⁴ the courts⁶⁰⁵ and the legislature.⁶⁰⁶ In the case of water the Minister of Water and Environmental Affairs is the custodian of the nation's water resources on behalf of the national government.⁶⁰⁷ The legislative branch is divided into three spheres, namely Parliament⁶⁰⁸ in the national sphere; provincial legislatures in the provincial sphere,⁶⁰⁹ and municipal councils in the local sphere of government.⁶¹⁰ Municipalities derive their water services functions from the *Constitution*,⁶¹¹ as allocated in terms of the *Municipal Structures Act*.⁶¹² Where there is a district municipality with local municipalities, the district municipality has the function of providing potable water supply systems and domestic waste-water and sewage disposal systems in terms of the *Municipal Structures Act*.⁶¹³ The Minister for Cooperative Governance and Traditional Affairs has, however, authorised most local municipalities to deliver water-related municipal functions.⁶¹⁴ National government and the provinces⁶¹⁵ may both make laws relating to municipal water related services.⁶¹⁶

Local government has the duty to ensure the provision of certain water-related local government services to its communities in a sustainable manner.⁶¹⁷ The services are storm-water management systems⁶¹⁸ in built-up areas; water and sanitation services limited to potable water supply systems; domestic waste-water and sewage disposal systems; and municipal health services.⁶¹⁹ The latter is relevant when it comes to water pollution. The *Water Services Act*⁶²⁰ was enacted to provide for the rights of access to

604 S 85(1) *Constitution* of 1996 vests the executive authority of South Africa in the President, which he exercises together with other members of Cabinet [s 85(2)].

605 S 165(1) *Constitution* of 1996 vests judicial authority in the courts.

606 S 43 *Constitution* of 1996.

607 Preamble *Water Services Act* 108 of 1997. See s 3(1) *National Water Act* 36 of 1998.

608 S 43(a) *Constitution* of 1996.

609 S 43(b) *Constitution* of 1996.

610 S 43(c) *Constitution* of 1996.

611 Ss 151-164 *Constitution* of 1996.

612 S 83(1) *Municipal Structures Act* 117 of 1998.

613 S 84(1)(b) and (d) *Municipal Structures Act* 117 of 1998.

614 See s 84(3)(a) *Municipal Structures Act* 117 of 1998 and, for example, R2 of GN 811 in GG 25076 of 13 June 2003. S 84(3)(d) states that when the Minister revokes such an authorisation he must regulate the legal, practical and other consequences of the revocation. He may regulate the continued application of any by-laws and resolutions and the extent of their application in the area of the municipalities.

615 S 44(3) read with *Sched 4B* of the *Constitution* of 1996.

616 S 146(2)(c)(vi) *Constitution* of 1996 states that when national legislation is necessary for the protection of the environment, national legislation prevails over provincial legislation. In terms of *Sched 4A* of the *Constitution* every municipality must keep to national and provincial legislation relating to the environment, nature conservation and pollution control when it supplies municipal services.

617 S 152(1)(b) *Constitution* of 1996. S 1 *Water Services Act* 108 of 1997 draws a distinction between a "water services authority" and a "water services provider". A "water services authority" means any municipality responsible for ensuring access to water services. A "water services provider" means any person who provides water services to consumers or to another water services institution. The definition of "municipal service" in S 1 *Municipal Systems Act* 32 of 2000 allows for a municipal service to be provided by the municipality through an internal mechanism or by engaging an external mechanism in terms of s 76 of the Act.

618 Reminding one of the servitude *actio aquae pluviae arcendae*. See para 2.2.1 and para 2.3.5.

619 *Sched 4B Constitution* of 1996, read with s 155(6)(a) and (7).

620 Act 108 of 1997.

basic water supply⁶²¹ and basic sanitation.⁶²² The national government in the *Municipal Systems Act*⁶²³ defined basic municipal services to mean municipal services necessary to ensure “an acceptable and reasonable quality of life”. If these were not provided, it would endanger public health or safety or the environment. An environment⁶²⁴ that is not harmful to health or well-being can only exist where there are proper sanitation and efficient systems to dispose of domestic waste water and sewage. In terms of the *National Health Act*,⁶²⁵ “municipal health services” include water quality monitoring; environmental pollution control; and chemical safety.⁶²⁶ Water quality monitoring would help to alert municipalities to the existence of a problem with its water supplies. A municipality must provide for measures to realise the right of access to basic sanitation services in its *Water Services Development Plan*.⁶²⁷ Should a comparison of the results of water sampling with the drinking water specifications in *SANS 241* indicate that the water supplied poses a health risk,⁶²⁸ a municipality is supposed to inform the director-general of the Department of Water Affairs and the head of the provincial health department. The municipality is supposed to take steps to inform its consumers that the quality of the water that it supplies, poses a health risk. It must inform them of the reasons for the risk; of any precautions to be taken by the consumers; and of the time frame, if any, within which it may be expected that water of a safe quality will be provided. Every municipality must also make by-laws that contain conditions for the provision of water services.⁶²⁹

The Minister of Water and Environmental Affairs may provide water services in emergency situations⁶³⁰ and may perform the functions of a water services authority or water board.⁶³¹ The *Water Services Act*⁶³² states that the Minister and the province must monitor the performance of a municipality in order to ensure compliance with national water standards. If the municipality does not effectively perform any function imposed on it

621 The definition of “water supply services” in s 1 *Water Services Act* 108 of 1997 refers to potable water and water for commercial use.

622 S 1 *Water Services Act* 108 of 1997 defines “sanitation services” to mean the collection, removal, disposal or purification of human excreta, domestic waste-water, sewage and effluent resulting from the use of water for commercial purposes.

623 S 1 *Municipal Systems Act* 32 of 2000.

624 For the definition of “environmentally sustainable” in relation to the provision of a municipal service, see s 1 *Municipal Systems Act* 32 of 2000.

625 Act 61 of 2003.

626 S 1 *National Health Act* 61 of 2003.

627 S 12(1) *Water Services Act* 108 of 1997. The municipality is supposed to include a water services audit in its annual report on the implementation of its water services development plan required in terms of s 18(1) of the Act. In terms of R 10(2)(f) of GN R509 in GG 22355 of 8 June 2001 the water services audit must contain details for the previous financial year and, if available, figures for the preceding two financial years of the potable water quality sampling programme. It must also contain the results of the comparison with *SANS 241: Specifications for drinking water* or the *SA Water Quality Guidelines*. It must contain details of any reported occurrence of water posing a health risk. See s 3 *Water Services Act* 108 of 1997.

628 R 5(4) of GN R509 in GG 22355 of 8 June 2001 .

629 S 21(1) *Water Services Act* 108 of 1997.

630 S 73(1)(e) *Water Services Act* 108 of 1997.

631 S 73(1)(f) *Water Services Act* 108 of 1997.

632 S 62(1)(a).

by the *Water Services Act*,⁶³³ the Minister may request the province to intervene in terms of section 139 of the *Constitution*. If, within a reasonable time after the request, the province⁶³⁴ has not effectively intervened, the Minister may assume responsibility for that function to the extent necessary to maintain essential national standards, like the SANS standards for drinking water; to meet established minimum standards for providing services, like the provisioning of drinking water and the purification of sewage; or to prevent a province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole.⁶³⁵ If the Minister assumes responsibility for any function of a municipality,⁶³⁶ the Minister must table a notice to that effect in the National Council of Provinces. After assuming responsibility for a function, the Minister may issue a directive to the municipality to perform that function effectively.⁶³⁷ If the municipality fails to comply with that directive, the Minister may intervene⁶³⁸ by *inter alia* giving advice and assistance; or give notice to the municipality that it wants to take over that function. If the Minister takes over any function of the municipality,⁶³⁹ he or she must table a notice to that effect in the National Council of Provinces. Any expenses incurred or losses suffered by the Minister in taking over any function of the municipality may be recovered from the municipality.⁶⁴⁰

On the other hand, the *Municipal Finance Management Act*⁶⁴¹ states that if a municipality, as a result of a crisis in its financial affairs, were in serious breach of its obligations to provide basic services as a result of which the conditions for an intervention in terms of section 139(5) of the *Constitution*⁶⁴² are met, the provincial executive must intervene in the municipality. The *Constitution*⁶⁴³ spells out that the provincial executive must impose a recovery plan and dissolve the municipal council where it cannot or does not approve the necessary legislative measures. It must then appoint an administrator until a new municipal council has been elected. The reason why these remedies exist, is that people may die when municipalities cannot or do not provide basic services. The phrase “access to sufficient water”⁶⁴⁴ rings hollow when that water is either not delivered or is contaminated. There can be no beneficial use of water when municipalities function badly.

633 S 63(1).

634 S 63(2) *Water Services Act* 108 of 1997.

635 This reminds of the *Commerce Clause* in America. See para 5.4.1 and s 146(2)(b) and (c) *Constitution* of 1996.

636 S 63(3)(a) *Water Services Act* 108 of 1997.

637 S 63(4) *Water Services Act* 108 of 1997.

638 S 63(5) *Water Services Act* 108 of 1997.

639 S 63(6)(a) *Water Services Act* 108 of 1997.

640 S 63(8) *Water Services Act* 108 of 1997.

641 S 136(4) *Municipal Finance Management Act* 56 of 2003.

642 *Constitution* of 1996.

643 S 139(5) *Constitution* of 1996.

644 See s 27(1) *Constitution* of 1996.

It has just been explained who must deliver basic water services. The next section deals with a very contentious issue when it comes to socio-economic rights, namely the separation of powers. Where is the boundary between the various functions of the various branches of government?

3.5 Socio-economic rights and the separation of powers

Devenish⁶⁴⁵ explains that according to the doctrine of separation of powers, the courts cannot devise and make policy. Even though their decisions in relation to socio-economic rights impact on policy, it falls within the definition of separation of powers as meaning that separate institutions share powers. Because socio-economic rights are sometimes positive rights they then require the courts to become involved in the distribution of economic resources. But is the involvement of the courts a violation of the doctrine of separation of powers? State governance questions can usually not be resolved by adjudication because of political elements that require a political rather than a judicial resolution. The Constitutional Court early on decided that the protection of socio-economic rights does not imply a breach of the separation of powers between the courts and the executive. In the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*⁶⁴⁶ the objectors argued that socio-economic rights are not justiciable, particularly because of the budgetary issues their enforcement may involve. The Constitutional Court, however, held that when a court enforces civil and political rights, such as equality, the order may result in the courts dictating to the government how the budget should be allocated. Socio-economic rights do not confer a task upon the courts so different from the one ordinarily conferred on them by a *Bill of Rights*, that it results in a breach of the separation of powers. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

In *Bel Porto School Governing Body*⁶⁴⁷ the Constitutional Court held that a court should know when the polycentric elements have become so important and predominant that the limits of what a court can decide on have been reached. In *Lindiwe Mazibuko v City of Johannesburg*⁶⁴⁸ the Constitutional Court held that the positive obligations imposed upon government by social and economic rights will be enforced by the courts in a number of ways: *Firstly*, when government takes no steps to realise the rights, the courts will require

645 Devenish 2007 THRHR 88.

646 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 76-78.

647 *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 175. See Devenish 2007 THRHR 89.

648 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 67.

government to take steps. *Secondly*, when government's adopted measures are unreasonable, the courts will require that they be reviewed to meet the constitutional standard of reasonableness. *Finally*, there is a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.⁶⁴⁹

The Constitutional Court⁶⁵⁰ stressed that normally it is institutionally inappropriate for a court *firstly* to determine exactly what the achievement of any particular social and economic right entails. *Secondly* it is also inappropriate for a court to determine what steps government should take to ensure the progressive realisation of the right. The legislature and executive should determine this. They are the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable. It is desirable that they do so as it is their programmes and promises that have been chosen by the electorate. *In casu* the City was continually reconsidering its policy and investigating ways to ensure that the poorest inhabitants of the City gained access not only to water, but also to other services.⁶⁵¹ The City's comprehensive and persistent engagement might have been spurred by the litigation in this case,⁶⁵² however, this might be an indication that the system works. Justice O'Regan⁶⁵³ held:

If one of the key goals of the entrenchment of social and economic rights is to ensure that government is responsive and accountable to citizens through both the ballot box and litigation, then that goal will be served when a government respondent takes steps in response to litigation to ensure that the measures it adopts are reasonable, within the meaning of the Constitution.

3.6 The right of access to sufficient water and international agreements

Because of the historically unjust allocation⁶⁵⁴ of water in South Africa it is necessary to look at the right of access to sufficient water as a constitutional right in the international context. In the previous chapter⁶⁵⁵ the development of a right to use water in legal systems that currently form part of the developed world was studied. In this section international instruments that are mostly relevant to the developing world are studied. Because access to water is so essential, the limited supply of water for a growing population is of concern worldwide and not only in South Africa. The legal systems that were discussed in the

649 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 67.

650 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 61.

651 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 94.

652 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 96.

653 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 96.

654 See para 3.8.

655 Chapter 2.

previous chapter were applied in developed countries. In the case of South Africa, the law developed around the needs of first the Dutch East Indian Company and then the European colonialists. The needs of the less developed, often black, part of the population had largely been ignored. Because the United Nations and international law focus mainly on the needs of the poor and marginalised parts of society, international law is geared towards water as a social good and focuses on rights of access to water.

The *Dublin Statement on Water and Sustainable Development*⁶⁵⁶ in 1992 called fresh water a finite and vulnerable resource that is essential to sustain life, development and the environment. The United Nations *Committee on Economic Social and Cultural Rights*⁶⁵⁷ (hereafter known as the CESCR) states in *General Comment 15* that water is a limited natural resource, but a public good fundamental for life and health. The human right of access to sufficient water is crucial for humans to lead a life in dignity.⁶⁵⁸ The CESCR adopted *General Comment 15*, which deals with substantive issues arising in the implementation of the *International Covenant on Economic, Social and Cultural rights*⁶⁵⁹ (hereafter called the *Covenant*). *General Comment 15* deals with the right to water which flows from the interpretation of articles 11 and 12 of the *Covenant*.⁶⁶⁰ The *Covenant* when signed and ratified by a country has the effect of binding international law.⁶⁶¹ South Africa has signed the treaty but not ratified it.⁶⁶² The *Vienna Convention on the Law of Treaties*⁶⁶³ states that even when a state has signed a treaty but has still not ratified it; it may not defeat the object and purpose of the treaty prior to its entry into force. According to Bluemel,⁶⁶⁴ *General Comments* issued by the CESCR are non-binding interpretations of *Covenant* rights and obligations. They may be relied upon by various international bodies when deciding whether a state has met its obligations under the *Covenant*.⁶⁶⁵ If the requirements of *General Comment 15* are met, it would discharge all of a state's obligations under assorted international instruments. The *General Comment* does little to explain what would be required of states to ensure that water supplies are sufficient to

656 ICWE 1992 *Dublin Statement* principle 1 <http://www.inpim.org/files/Documents/DublinStatmt.pdf>.

657 UN CESCR 2003 *General Comment No. 15* para 1 <http://www.unhcr.org/refworld>.

658 The Supreme Court of Appeal based its judgment in *City of Johannesburg v L Mazibuko* [2009] ZASCA 20 para 17 on this paragraph in *General Comment 15*. See para 3.7.2.

659 UNGA 1966 *Covenant* <http://www.ohchr.org/english/law/cescr.htm>.

660 UN CESCR 2003 *General Comment No. 15* para 3 <http://www.unhcr.org/refworld>.

661 Pejan *et al Framework* 9.

662 Apparently SA signed the treaty on 3 October 1994. UNHCHR 2006 *List of state parties* <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>.

663 UN 1969 *Vienna Convention on the Law of Treaties* art 18. Pejan *et al Framework* 9.

664 Bluemel 2004 *Ecology* LQ 972.

665 The *Covenant* provides for the progressive realisation of rights and acknowledges the constraints due to the limits of available resources, but it also imposes on states duties that are of immediate effect. States have immediate duties regarding the right to water. The guarantee that the right will be exercised without discrimination of any kind (Art. 2(2)) and the obligation to take steps (Art. 2(1)) towards the full realisation of Articles 11(1) and 12 are some of the duties. The steps must be deliberate, concrete and they must have the full realisation of the right to water as goal. UN CESCR 2002 *General Comment 15* para 8(17) <http://www.unhcr.org/refworld>.

satisfy their legal obligations under international law. It does call for the establishment of an independent human right to (access) water.⁶⁶⁶

The value of *General Comment 15* lies in relating the right of access to sufficient water to various international human, economic, social, and cultural rights instruments. When analysing these instruments one is able to distil the many elements of the right of access to sufficient water as a human right. The interests realised by the right of access to water reflect various public interests in access to water. When one has a better understanding of those interests the interpretation of the right of access to sufficient water is broadened. In terms of *General Comment 15*⁶⁶⁷ the human right of access to sufficient water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. The right of access to sufficient water falls within the guarantees essential for securing an adequate standard of living, as it is one of the most fundamental conditions for survival.⁶⁶⁸ An adequate amount of safe water is necessary to prevent death from dehydration,⁶⁶⁹ to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

International law does recognise that access to water is needed for purposes besides personal and domestic uses to realise some of the rights in the *Covenant*.⁶⁷⁰ Access to water is essential for securing livelihoods (right to gain a living by work)⁶⁷¹ and enjoying certain cultural practices (right to take part in cultural life).⁶⁷² Article 25 of the United Nations *Declaration on the Rights of Indigenous Peoples*⁶⁷³ states that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned waters in order to uphold their responsibilities to future generations. Access to water is also necessary to produce food (right to adequate food)⁶⁷⁴ and forms part of the right to adequate housing.⁶⁷⁵

666 Bluemel 2004 *Ecology LQ* 972.

667 UN CESCR 2002 *General Comment 15* para 2 <http://www.unhcr.org/refworld>.

668 UN CESCR 2002 *General Comment 15* para 3 <http://www.unhcr.org/refworld>. See UN CESCR 2002 *General Comment 15* para 4 <http://www.unhcr.org/refworld> and Art 14(2) of CEDAW (UNIFEM 1979 http://www.unifem.org/cedaw30/about_cedaw/) and Art 24(2) of the CRC (UN OHCHR 1989 www2.ohchr.org/english/law/crc.htm). See Kok and Langford "Water" 56B-2.

669 See para 2.4.1 and the history of the thirsty Jacobsz who was thrown overboard because of the threats he had made to obtain more drinking water.

670 UN CESCR 2002 *General Comment 15* para 6 <http://www.unhcr.org/refworld>. According to Pejan *et al Framework* 9 SA has signed the treaty but not ratified it.

671 UNGA 1966 *Covenant* art 6(1) <http://www.ohchr.org/english/law/cescr.htm>.

672 UNGA 1966 *Covenant* art 15(1)(a) <http://www.ohchr.org/english/law/cescr.htm>.

673 Adopted by the General Assembly 13 September 2007. See Taylor 1998 *Geo Int'l Env'tl L Rev* 370.

674 UNGA 1966 *Covenant* art 11 <http://www.ohchr.org/english/law/cescr.htm>. Disadvantaged and marginalised farmers, including women farmers, should have equitable access to water and water management systems. Art 1(2) of the *Covenant* provides that a people may not be deprived of its means of subsistence. States should *inter alia* ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples. (UN CESCR 2002 *General Comment 15* para 4 <http://www.unhcr.org/refworld>).

675 UNGA 1966 *Covenant* art. 11(1) <http://www.ohchr.org/english/law/cescr.htm>.

The right should also be viewed together with other rights enshrined in the *Universal Declaration of Human Rights*, e.g. the right to life⁶⁷⁶ and human dignity.⁶⁷⁷ Bluemel⁶⁷⁸ explains that the Human Rights Committee has interpreted the right to life to require states to take positive measures to support "appropriate means of subsistence". The amount of water supported by this right ensures only the barest minimum quantity of affordable water necessary to support life, and does not ensure water sufficient for personal consumption or even for all forms of hygiene. There is a close relationship between the right to life and the right to health. Bad health as a result of waterborne diseases may shorten one's life or make it unbearable.

3.6.1 *The right of access to sufficient water and health*

In developing countries most diseases are directly or indirectly water-related.⁶⁷⁹ The right of access to sufficient water is integral in the right to attain the highest attainable standard of health.⁶⁸⁰ It ensures environmental hygiene that is an aspect of the right to health.⁶⁸¹ Priority should be given to the water resources required to prevent starvation and disease.⁶⁸² *General Comment 15*⁶⁸³ states that environmental hygiene encompasses the taking of steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. Natural water resources should be protected from contamination by harmful substances and pathogenic microbes. Steps should be taken to combat aquatic eco-systems being a habitat for vectors of diseases or posing a risk to human living environments.⁶⁸⁴ According to Bluemel,⁶⁸⁵ the right to health thus ensures that there should not only be access to clean and safe water to drink, but also water to assist in the disposal and clean-up of waste and the protection of existing bodies of water from contamination.

The *Convention on the Rights of the Child*⁶⁸⁶ obliges states to implement children's rights to health by providing adequate nutritious food and clean drinking water, considering the dangers and risks of environmental pollution. Several African human rights instruments emphasise the link between health and water. The *African Charter on the Rights and Welfare of the Child*⁶⁸⁷ stipulates that states shall take measures to ensure the provision of

676 UNGA 1948 *Declaration* Art 3 <http://www.udhr.org/UDHR/default.htm>.

677 UNGA 1948 *Declaration* Art 1 <http://www.udhr.org/UDHR/default.htm>.

678 2004 *Ecology LQ* 968-969.

679 Hilderling 2004 *International law* 79.

680 UNGA 1966 *Covenant* art. 12(1) <http://www.ohchr.org/english/law/cescr.htm>.

681 UNGA 1966 *Covenant* art 12(2)(b) <http://www.ohchr.org/english/law/cescr.htm> and UN CESCR 2003 *General Comment* 15(3)(6) <http://www.unhcr.org/refworld>.

682 UN CESCR 2002 *General Comment* 15 para 3 <http://www.unhcr.org/refworld>.

683 UN CESCR 2002 *General Comment* 15 para 4 <http://www.unhcr.org/refworld>.

684 Compare art 11 of the Council of Europe 1961 *European Social Charter*, <http://www.unhcr.org/refworld> See Gabru 2005 *PER* 17.

685 Bluemel 2004 *Ecology LQ* 969.

686 UN OHCHR 1989 *CRC* art 24 www2.ohchr.org/english/law/crc.htm.

687 OAU 1999 *African Charter on the Rights and Welfare of the Child* art 14(2) www.one.unn.edu/humanrts/africa/afchild.htm.

adequate nutrition and safe drinking water. The *Protocol to the African Charter on the Rights of Women in Africa*⁶⁸⁸ reads that states shall ensure that women have the right to nutritious and adequate food. They must take measures to provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food. According to the *African [Banjul] Charter on Human and Peoples' Rights*,⁶⁸⁹ all peoples shall have the right to a generally satisfactory environment favourable to their development.⁶⁹⁰ Parties to the charter must take the necessary measures to protect the health of their people.⁶⁹¹ Access to water is not explicitly mentioned, but the obligation to protect the health and environment of its citizens would imply that a state party must ensure that its subjects enjoy basic water and sanitation services. The African Commission on Human and Peoples' Rights has derived rights such as food and housing from the right to health and other Charter rights. In *Free Legal Assistance Group v Zaïre*⁶⁹² the commission held that the failure of the government to provide safe drinking water and electricity, and the shortage of medicine were in violation of article 16 (the right to health).⁶⁹³ In *Social and Economic Action Rights Centre v Nigeria*⁶⁹⁴ pollution of water in Nigeria was found to violate a right under the African Charter to food and a satisfactory environment favourable to development.⁶⁹⁵ The importance of water to protect health and the environment in developing countries, African countries in particular, cannot be over-emphasised. The aspects of the right of access to sufficient water as explained above all constitute examples of the beneficial use of water.

3.6.2 States' legal obligations

International instruments like the 2000 *Millennium Declaration*⁶⁹⁶ try to mobilise countries around development targets. The latter contains the international development target to halve the proportion of people who are unable to reach or to afford safe drinking water. The members of the United Nations General Assembly have resolved to adopt in all their environmental actions a new ethic of conservation and stewardship.⁶⁹⁷ The unsustainable

688 African Comm on Human and Peoples' Rights 2003 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* art 15 http://www.achpr.org/english/_info/women_en.html.

689 OAU 1981 *African [Banjul] Charter on Human and Peoples' Rights* art 24 <http://www1.umn.edu/humanrts/instrtree/z1afchar.htm>.

690 See also Gabru 2005 *PER* 18.

691 OAU 1981 *African [Banjul] Charter on Human and Peoples' Rights* art 16(2) <http://www1.umn.edu/humanrts/instrtree/z1afchar.htm>.

692 *Free Legal Assistance Group v Zaïre* ACHPR Comm No 25/89, 47/90, 56/91, 100/93 (1995) Communication 155/96.

693 Gabru 2005 *PER* 18.

694 *SERAC and CESR v Nigeria* ACHPR Comm No 155/96, 15th Annual Activity Report. 76 *Id* Comm No 25/89, 47/90 & 56/91, 199/93 (joined), 9th Annual Activity Report.

695 See Bluemel 2004 *Ecology LQ* 994. Pejan *et al Framework* 9-10 write that the right to development is often compared to people's right to self-determination. The right to development is concerned with the procedural aspect of realising an interdependent array of other human rights. See Currie & De Waal *Bill of Rights Handbook* 527.

696 UNGA 2000 *Millenium Declaration* para 19 <http://www.un.org/millennium/declaration/ares552e.htm>.

697 UNGA 2000 *Millenium Declaration* para 23 <http://www.un.org/millennium/declaration/ares552e.htm>. Compare this to the concept of "stewardship" as developed by Thomas of Aquino in para 2.3.3. See para 5.4 on the public trust principle in the US.

exploitation of water resources should be stopped by the development of water management strategies at the regional, national and local levels.⁶⁹⁸ They should promote both equitable access and adequate supplies.⁶⁹⁹ Gabru⁷⁰⁰ explains that in international law the positive component of socio-economic rights requires two forms of action from the state. The first is that the state must create a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. The second requires the state to implement measures and programmes designed to assist individuals in realising their rights. Pejan *et al*⁷⁰¹ divides the state's obligation into a duty to facilitate, to promote and provide.⁷⁰²

In *General Comment No. 3*⁷⁰³ (1990), the Committee had confirmed already that states have a core obligation to ensure the satisfaction of minimum essential levels of the rights articulated in the *Covenant*.⁷⁰⁴ A number of core obligations in relation to the right of access to sufficient water were identified.⁷⁰⁵ They include ensuring access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease. There should also be access to water and water facilities and services on a non-discriminatory basis, especially for the disadvantaged. Programmes should be aimed at vulnerable groups.⁷⁰⁶ There should be an equitable distribution of all obtainable water facilities and services. In terms of *General Comment 15*⁷⁰⁷ physical access to water services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times, and that are at a reasonable distance⁷⁰⁸ from the household, should be ensured. When one attempts to access water physically, one's personal security should not be threatened. The extent of the realisation of the right

698 UNGA 2000 *Millennium Declaration* para 23 <http://www.un.org/millennium/declaration/ares552e.htm>.

699 See Hilderling 2004 *International law* 4-6 on the various international instruments and conferences on water.

700 Gabru 2005 *PER* 7.

701 *Framework* 20.

702 See Liebenberg "Interpretation of socio-economic rights" in Woolman *et al* (eds) *Constitutional Law of South Africa* 33-6.

703 CESCR 1990 *General Comment No. 3* <http://www.unhcr.org/refworld> See Kok and Langford "Water" 56B-3.

704 In *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 40 and FN 31 the Constitutional Court emphasized that art 2(1) of the *Covenant* is a source of the concept "progressive realisation" of the rights. CESCR 1990 *General Comment 3* para 9 <http://www.unhcr.org/refworld> explains the concept.

705 UN CESCR 2002 *General Comment 15* para 37 <http://www.unhcr.org/refworld>.

706 According to Pejan *et al* *Framework* 13-15 *General Comment 15* does not stress adequately the importance of some principles, including the principles of participation and accountability. It is important also to focus on process requirements when attempting to realise human rights. Participation is tied to the right to seek, receive and impart information and the right to freedom of expression. Participation enables policy makers to understand the plurality in society and one's own biases and views in relation to others. The main objective of inclusive participation is to lead to just outcomes that do not wholeheartedly ignore vulnerable and marginalized voices. (See *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 94 where it was alleged that the poor did not have the opportunity to make representations because the water had been cut off automatically and the ILA 2004 *Berlin Rules* Art 18.) The right to participation has *inter alia* been elaborated on in the UNGA 1948 *Universal Declaration of Human Rights* Art 21 <http://www.udhr.org/udhr/default.htm>. It states that "[e]veryone has the right to take part in the government of his country directly or through freely chosen representatives."

707 UN CESCR 2002 *General Comment 15* para 37 <http://www.unhcr.org/refworld>.

708 See *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 121 where the plaintiff for seven months had no access to water when a reservoir was closed.

of access to sufficient water should be monitored. Measures should be taken to prevent, treat and control diseases linked to water, and to ensure access to adequate sanitation.

If any deliberately retrogressive measures⁷⁰⁹ are taken, the state must prove that they were introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the *Covenant* in the context of the full use of the State party's maximum available resources.⁷¹⁰ Bluemel⁷¹¹ writes that where social services expenditures are falling and costs such as military expenditures are increasing, a state may be in violation of the *Covenant*, since the State party may not be committing its maximum available resources to the supply of affordable water if the other expenditures are not justified by necessity. States in violation of the *Covenant* may be fined and ordered to adopt a specific remedial plan to address the violation.

3.6.3 Non-discrimination

In terms of *General Comment 15*⁷¹² states have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities. It must prevent any discrimination on internationally prohibited grounds in the provision of water and water services. Legislation, resource allocation and investment can all discriminate against vulnerable groups. States should remove *de facto* discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right of access to sufficient water. The allocation of water resources, and investments in water, should facilitate access to water for all people.⁷¹³ Inappropriate resource allocation can lead to hidden discrimination. Investments should not disproportionately favour expensive water supply services and facilities that are accessible only to a small, privileged fraction of the population. States have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.⁷¹⁴

The right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups, should be ensured. *General Comment 15* urges states to give special attention to those individuals and groups who

709 See *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 137 and para 3.7.5.

710 UN CESCR 2002 *General Comment 15* para 19 <http://www.unhcr.org/refworld>. See *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 37.

711 2004 *Ecology* LQ 975-976.

712 UN CESCR 2002 *General Comment 15* para 15 <http://www.unhcr.org/refworld>. See para 3.8.2 on the equitable allocation of water in South Africa and para 4.5 on water reform and the property clause.

713 UN CESCR 2002 *General Comment 15* para 14 <http://www.unhcr.org/refworld>.

714 UN CESCR 2002 *General Comment 15* para 15 <http://www.unhcr.org/refworld>.

have traditionally faced difficulties in exercising the right of access to sufficient water, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners⁷¹⁵ and detainees. In particular, state parties should take steps to ensure that women are not excluded from decision-making processes concerning water resources and water use entitlements. The disproportionate burden women bear in the collection of water should be alleviated.⁷¹⁶ Vulnerable people include children who may be vulnerable because they have to collect water or have insufficient water at school or home or because they live in rural or deprived urban areas. Indigenous peoples' access to water resources on their ancestral lands should be protected from encroachment and unlawful pollution. Nomadic and traveller communities should have access to adequate water at traditional and designated halting sites. Refugees, asylum-seekers, internally displaced persons and returnees should have access to adequate water whether they stay in camps or in urban and rural areas.⁷¹⁷ Refugees and asylum-seekers should be granted the right of access to sufficient water on the same conditions as nationals.⁷¹⁸ Prisoners and detainees should be provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law. Groups facing difficulties with physical access to water, such as older people, people with disabilities, victims of natural disasters, and those living in arid and semi-arid areas or on small islands should be provided with safe and sufficient water.⁷¹⁹

*General Comment 15*⁷²⁰ states that to ensure that water is affordable, states must adopt the measures that may include the use of a range of appropriate low-cost techniques and technologies; appropriate pricing policies such as free or low-cost water, and income supplements. A payment system for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Poorer households should not be disproportionately burdened with water expenses when compared to richer households.⁷²¹

715 Kok and Langford "Water" 56B-5 are of the opinion that the war crime in art 8(2)(b)(xxv) of the 1998 International Criminal Court *Rome Statute*, of using intentional starvation of civilians as a method of warfare through deprivation of objects indispensable to their survival, would by implication include water. International Criminal Court 1998 *Rome Statute of the International Criminal Court* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

716 See *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 159.

717 UN CESCR 2002 *General Comment 15* para 16 <http://www.unhcr.org/refworld>.

718 UN CESCR 2002 *General Comment 15* para 8 <http://www.unhcr.org/refworld>.

719 UN CESCR 2002 *General Comment 15* para 16 <http://www.unhcr.org/refworld>.

720 UN CESCR 2002 *General Comment 15* para 27 <http://www.unhcr.org/refworld>.

721 See Kok and Langford "Water" 56B-13.

3.7 Realising the right of access to sufficient water

It was the affordability of water for poorer households in Phiri in Soweto, and more particularly, the quantity of free basic water that is sufficient, that were at the heart of a dispute between residents of Phiri and the City of Johannesburg. The Constitutional Court in the case of *Lindiwe Mazibuko v City of Johannesburg*⁷²² has noted that the achievement of equality will not be accomplished while water is abundantly available to the wealthy, but not to the poor. The applicants in the case largely relied on *General Comment 15*. They *inter alia* relied on the minimum core of the right, the quantity of water that is sufficient, the requirement of access, the prohibition on retrogressive measures and non-discrimination.

3.7.1 Progressive realisation

In terms of section 27 of the *Constitution*⁷²³ there rests an obligation on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to sufficient water.

3.7.2 The minimum core

In *General Comment No. 3*⁷²⁴ (1990), the Committee confirmed that states have a core obligation to ensure the satisfaction of minimum essential levels of the rights articulated in the *Covenant*.⁷²⁵ In the *Grootboom*⁷²⁶ case the Constitutional Court did not make use of the minimum core⁷²⁷ concept in the context of housing, because it had insufficient information in front of it. In *Mazibuko v City of Johannesburg*⁷²⁸ the High Court held that all the attempts to determine the core minimum of the right of access to sufficient water boiled down to an attempt to determine the basic water supply,⁷²⁹ within the state's maximum available resources in compliance with the provisions of section 27. Judge

722 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 2.

723 S 27(2) of the *Constitution*. Klare 1998 SAJHR 188 points out that the 1996 *Constitution* has ... massively egalitarian commitments superimposed on a formalistic legal culture without a strong tradition of substantive political discussion and contestation through the medium of legal discourses.

724 CESCR 1990 *General Comment No. 3* <http://www.unhcr.org/refworld> See Kok and Langford "Water" 56B-3.

725 In *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 40 and fn 31 the Constitutional Court emphasized that art 2(1) of the *Covenant* is a source of the concept "progressive realisation" of the rights. CESCR 1990 *General Comment 3* para 9 <http://www.unhcr.org/refworld> explains the concept.

726 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33.

727 In terms of the UN CESCR 2003 *General Comment 15* para 37 <http://www.unhcr.org/refworld> the minimum core obligation regarding water *inter alia* includes ensuring access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease. See para 3.6.2 for a discussion of the core obligation concept regarding water as a right in international law.

728 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 133. The facts, as set out by the High Court in para 5 were that the 6 Kilolitre of water that the residents of Phiri received free every month was supplied by a prepayment meter system. Once the 6Kℓ have been used, the water supply was automatically disconnected. The residents of Phiri were in general impoverished and some people suffered from HIV/AIDS and diarrhoea (para 121). When the prepayment meters were introduced, Mrs Mazibuko at first refused to accept them and travelled 3 kilometres to the Chiawelo reservoir to fetch water. When the reservoir was closed, she for seven months had no access to water. She eventually accepted the installation of a prepayment meter.

729 See Khoza 2004 SAJHR 667 on the s 27(1)(b) right of access to sufficient food.

Tsoka⁷³⁰ did not think that the *Grootboom*⁷³¹ case disavowed the core minimum principle. The right of access to water was held to be different to the diverse needs contained in the right to access to adequate housing as pointed out in *Grootboom*.⁷³² However, in the Constitutional Court Justice O'Regan in the *Lindiwe Mazibuko v City of Johannesburg*⁷³³ case held that the applicants' argument was that the court should adopt a quantified standard determining the content of the right and not merely the minimum content of the right of access to a basic water supply. The court rejected the argument because the scope of the state's positive obligation in terms of section 27 is affirmed by the duty of progressive realisation.⁷³⁴ The fact that the state must take steps progressively to realise the right by implication recognises that the right of access to sufficient water cannot be achieved immediately. Implicit in the court's finding is the fact that where there are budgetary constraints, as there almost always are, the court is loath to state that a socio-economic right has a fixed content. It is possible that the concept "minimum content" emphasises the rights of the individual without bringing all the other obligations of the state into the equation. The fact that Justice O'Regan had a journey for the realisation of the right of access to sufficient water in mind, and not a destiny, appears from the statement that social and economic rights enable citizens to hold government to account for the way in which it pursues the achievement of social and economic rights.⁷³⁵ They empower citizens to demand of the state that it acts reasonably and progressively to ensure that people enjoy the basic necessities of life. What a right requires will vary over time and context. The context should be considered when determining whether a government programme is reasonable.⁷³⁶ The minimum content of the right by necessary implication is a rather fixed concept that is not flexible enough to adjust to changing circumstances.

What is remarkable about the judgement in the Constitutional Court is that it admitted new evidence tendered by the City of Johannesburg and Johannesburg Water, the first two respondents.⁷³⁷ This is contrary to ordinary appellate principles. The explanation for the admission of the new evidence was that the case concerns the state's obligations in

730 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 131.

731 *See Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33 and Devenish 2007 *THRHR* 87-88. Lenta 2004 *SAJHR* 544 calls the court's approach in *Grootboom* as unobtrusive as possible on the government's prerogative to allocate resources.

732 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 134.

733 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 56.

734 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 58.

735 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 59.

736 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 60. *See Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 39. According to Wesson 2004 *SAJHR* 293 *Grootboom* cannot be understood as expressing the ratio that the programmes should satisfy the standard of reasonableness found in administrative law.

737 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 39.

respect of a social right,⁷³⁸ which has its own peculiar characteristics. The court held that the concept of "progressive realisation" recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved. In this case, the evidence tendered by the City and Johannesburg Water shows that the City's water policy, and in particular its policy of providing services to indigent households within the city, had been under constant review and had been revised.⁷³⁹ The evidence was admitted for the purpose of showing that the City accepts an obligation to continue to revise its policy consistent with the obligation to ensure progressive realisation of rights, and that it has done so. According to the court, this type of evidence might be of assistance in determining the appropriate relief to be granted.⁷⁴⁰

According to the Constitutional Court⁷⁴¹ judgment, the High Court and the Supreme Court of Appeal did not first consider the content of the obligation imposed upon the state by section 27(1)(b) and 27(2), when it quantified the content of the right.⁷⁴² This criticism of the lower courts by the Constitutional Court is not quite fair as the lower courts had to make a decision based on what appears to have been a different set of facts. The City of Johannesburg appears to have set out its case more clearly in the Constitutional Court.

According to Liebenberg,⁷⁴³ "progressive realisation" is a sword and a shield. The state has a duty to take steps to ensure the basic needs of all are met. Progressive realisation, on the other hand, is also a brake on measures that reduce access to socio-economic rights. Pejan *et al*⁷⁴⁴ state that progressive realisation is regularly used as an excuse for inaction. The most significant extension of this obligation for the state is to ensure that conditions are created which make it possible for people to gain access to socio-economic rights through their own efforts by removing obstacles and adopting strategies that enable people.

738 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 40.

739 Compare this to *President of the RSA v Quagliani* 2009 2 SA 466 (CC) para 70 where Sachs held that. new evidence on appeal is only admitted in very rare circumstances. For such evidence to be admitted, a reasonably sufficient explanation for the failure to tender the evidence earlier in the proceedings had to be offered. In *L Mazibuko* the evidence was being created as the policy was adapted, which might explain why it was not available earlier. This makes it very difficult for a litigant to know which facts she bases her case on.

740 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 41.

741 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 68.

742 *City of Johannesburg v L Mazibuko* [2009] ZASCA 20 para 13.

743 Liebenberg 2001 *SAJHR* 252. Moseneke 2002 *SAJHR* 318 points out that fundamental rights are not capable of meaningful enjoyment if not accompanied by substantive fulfilment of socio-economic rights. Transformative adjudication must achieve social redistributive justice.

744 *Framework* 19-20.

3.7.3 *The quantity of water that is “sufficient”*

3.7.3.1 Legislation dealing with the quantity of water

The question remains what is meant by the right to have access to sufficient water. The *Water Services Act*⁷⁴⁵ defines “basic water supply” to be:

. . . the prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

This is further defined by Regulation 3(b)⁷⁴⁶ of the *National Standards Regulations*. It states that the minimum standard for basic water supply services is-

- (b) a minimum quantity of potable water of 25ℓ per person per day or 6Kℓ per household per month
 - (i) at a minimum flow rate of not less than 10ℓ per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.⁷⁴⁷

The substitution of *sufficient water* in the *Constitution* with *basic water supply* in legislation is already a limitation of the content of the right of access to sufficient water and is probably meant to bring it in line with section 27(2)’s requirement of “progressive realisation”. Parliament has limited the definition of basic water supply to water for households. Because 25ℓ per person per day is relatively little, the dispute on exactly what is the quantity of water that is sufficient, had to be adjudicated by the Constitutional Court.

3.7.3.2 Case law dealing with the quantity of water

The quantity of water that is sufficient is a hotly contested issue. The court *a quo* in the *Mazibuko*⁷⁴⁸ case held that expecting people to limit the number of toilet flushes to save water is to deny them the right to health⁷⁴⁹ and the right to lead a dignified lifestyle. People

745 *Water Services Act* 108 of 1997.

746 R 3(b) of GN R509 2001 in GG 22355 of 8 June 2001.

747 See *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 26 and Kok and Langford “Water” 56B-12.

748 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) 179.

749 See para 3.6.1.

suffering from HIV/AIDS need more water than those not afflicted by the illness.⁷⁵⁰ Following the example of *General Comment 15*,⁷⁵¹ the right of access to sufficient water in South Africa was interpreted by the Supreme Court of Appeal in *City of Johannesburg v L Mazibuko*⁷⁵² to mean access to the quantity of water that is required to lead a dignified human existence. It was held that the right of access to sufficient water falls within guarantees essential to secure an adequate standard of living, as it is one of the most fundamental conditions for survival.⁷⁵³ The elements of the right of access to sufficient water must be adequate for human dignity, life and health.⁷⁵⁴ The Supreme Court of Appeal held that the quantity of water that is required for dignified human existence depends on the circumstances of the individual.⁷⁵⁵ The basic minimum supply of water of 6Kℓ per household per month or 25ℓ per person per day in the regulations must have been determined by reference to the needs of households or individuals who can manage without waterborne sanitation. The Constitutional Court, however, followed an approach that was less lenient towards the interpretation of the regulation. It held that it will in most circumstances be difficult for an applicant who does not challenge the minimum standard set by the legislature or the executive for the achievement of social and economic rights to establish that a policy based on that prescribed standard is unreasonable.⁷⁵⁶ *In casu* the applicants did not persuade the Constitutional Court to specify what quantity of water is sufficient water within the meaning of section 27 of the *Constitution*.⁷⁵⁷ Justice O'Regan⁷⁵⁸ held that fixing a quantified content might, in a rigid and counterproductive manner, prevent an analysis of context. The concept of "reasonableness" places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.⁷⁵⁹ It can be argued that a determination of

750 Over 50% of patients with HIV/Aids have intractable water-related diarrhoea, and hand washing reduces the incidence of diarrhoea among children by 53%. Rudin 2008 *ESR Review* 9.

751 See para 3.6. The court in *City of Johannesburg v L Mazibuko* [2009] ZASCA 20 para 17 found support for its conclusion in UN CESCR 2002 *General Comment 15* para 1 <http://www.unhcr.org/refworld>. See Kok and Langford "Water" 56B-9.

752 *City of Johannesburg v L Mazibuko* [2009] ZASCA 20 para 17.

753 Khoza 2004 *SAJHR* 667 argues that in the case of food the state should take comprehensive and coordinated, sustainable and vigorous measures to combat hunger and malnutrition with the view to realise the right to food and to ensure that people live a dignified life.

754 See UN CESCR 2002 *General Comment 15* para 11 and para 3.8.2 on the equitable allocation of water.

755 *City of Johannesburg v L Mazibuko* [2009] ZASCA 20 para 18.

756 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 76. Contrast this with *Mazibuko v CoJ* [2008] 4 All SA 471 (W) para [53] where the standard was viewed as a floor and not a ceiling. See Jansen Van Rensburg 2008 *Stell LR* 429.

757 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 159. Rautenbach 2011 *THRHR* 119 opines that the impact of a state's inaction to provide sufficient water can differ. A lack of water that affects the right to life has a more serious impact. The basic rational relationship test cannot possibly be an appropriate test when the interests protected are the rights to life, dignity and personal freedom and integrity.

758 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 60.

759 See *Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 38; Iles 2004 *SAJHR* 448 and Gabru 2005 *PER* 14. See *Minister of Health v Treatment Action Campaign* (no2) 2002 5 SA 721 CC 738 para 25 and para 29. Jansen Van Rensburg 2008 *Stell LR* 429 writes that in defining a socio-economic right, a court is merely required to set an invariable, universal standard, and not specific measures that the state has to take. It is not expected to give a final and exhaustive definition of the particular right. See Bilchitz 2003 *SAJHR* 10 and Liebenberg 2001 *SAJHR* 257.

the context of a government programme is in fact a determination of the public interest in a particular case. Justice O'Regan⁷⁶⁰ rejected their quantification of the content of the right of access to sufficient water and held that the argument, that the Court should set 50ℓ per person per day as the content of the section 27(1)(b) right, had to fail.⁷⁶¹

3.7.4 Access

In the court *a quo* in the *Mazibuko*⁷⁶² case Judge Tsoka noted that the average household in Phiri has a minimum of 16 persons and that yard residents are often excluded in the determination of the 25ℓ per person per day or 6Kℓ per household per month.⁷⁶³ They have no access to water at all. One should keep in mind that there exists a right of access to sufficient water and not a right to water. The question to be answered in this section is what is meant by access. The court *a quo* in *Mazibuko v City of Johannesburg*⁷⁶⁴ quoted from the statements in *General Comment 15* about the availability and accessibility to water:

Availability means that the water supply must not only be sufficient for each person for personal and domestic use but must also be continuous. Accessibility means both physical and economic accessibility on a non-discriminatory basis.

The differences between the relevant provisions of the *International Covenant on Economic, Social and Cultural Rights*⁷⁶⁵ (the *Covenant*) and the South African *Constitution* are important. Section 27(2)⁷⁶⁶ of the *Constitution* is almost identical to section 26(2) of the *Constitution*.⁷⁶⁷ These differences, regarding food, are, *firstly* that the *Covenant* provides for a *right to adequate food* while section 27(1)(b) provides that everyone has the right to have *access to sufficient* food. The Constitutional Court held that the difference between a "right of access to adequate housing" in section 26(2) of the *Constitution* as distinct from

⁷⁶⁰ *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 68.

⁷⁶¹ Stewart 2008 *SAJHR* 482 writes that it seems that the central reason for the reluctance of the court to give meaning to socio-economic rights and its refusal to determine a minimum core is centred on the separation of powers argument. She argues (on 478) that when the court gives substantive content to a right, the values that may serve the particular right are identified. This process does not involve the balancing of values or a proportionality enquiry. They only take place when the inquiry into a possible limitation of the right in question is done. See Devenish 2007 *THRHR* 87.

⁷⁶² *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 168-169. See Khalfan and Conteh 2008 *ESR Review* 14 criticism relating to poverty and the affordability of water.

⁷⁶³ Rudin charges that all three spheres of government allow scarce water to be used for such "luxurious and self-gratifying purposes" as swimming pools and golf courses. (Rudin 2008 *ESR Review* 9; 11.) Rudin is of the view that a more accurate estimate of the basic amount of water needed for survival is around 94.5 litres per person per day. Some golf courses use up to 3 million litres of water per day per course. Jeff Rudin is the national research officer at the South African Municipal Workers' Union.

⁷⁶⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 36.

⁷⁶⁵ UNGA *Covenant* 1966 <http://www.ohchr.org/english/law/cescr.htm>.

⁷⁶⁶ S 27(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

⁷⁶⁷ S 26(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

the “right to adequate housing” encapsulated in the *Covenant* is substantial.⁷⁶⁸ The concept “housing” denotes more than bricks and mortar and requires available land, appropriate services such as the provision of water and the removal of sewage and also the financing of all of these.⁷⁶⁹ The right to have access to sufficient water in effect also forms a part of the right of access to adequate housing in section 26 of the *Constitution*. The *Covenant* *secondly* obliges states to take appropriate steps that must include legislation, while the *Constitution* obliges the South African state to take reasonable legislative and other measures.⁷⁷⁰ Section 26(1) of the *Constitution* confers a right to have access to adequate housing. Section 27(1)(b) of the *Constitution*, however, confers a general right of access to sufficient and not adequate water.⁷⁷¹ Gabru⁷⁷² is of the opinion that first, the “access to” qualification means that the state owes a duty only to those people without the means to ensure access to basics like health care, food, water and social security. Those who have the means already have access to those basics and cannot claim it from the state.

Section 27(2) of the *Constitution* provides that the state “must take reasonable legislative and other measures, within its available resources” to achieve the progressive realisation of each of these rights. In the case of a right of access to adequate housing it was held that it suggests that it is not only the state that is responsible for the provision of houses. Individuals themselves and others must be enabled by legislative and other measures to provide housing.⁷⁷³ The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must, therefore, take account of different economic levels in the society. This is also relevant for the provision of the conditions to make water available as an economic good, for instance in creating the regulatory framework for the functioning of a water market.⁷⁷⁴ It was argued in the *Mazibuko*⁷⁷⁵ case that in addition to the state's obligation to create the conditions for access to sufficient water, the state also had an obligation to respect existing access to water.

⁷⁶⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35.

⁷⁶⁹ Fredman 2009 SAJHR 434 writes that the right to adequate housing might be viewed as a right to action by the state to protect and expand the range of feasible options available to women. They are options such as the development of gender-sensitive policies for housing and legislation. They include access to affordable utilities such as water, electricity and heating, as well as access to education, employment and health care facilities, and protection against violence.

⁷⁷⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 28.

⁷⁷¹ See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 21.

⁷⁷² Gabru 2005 PER 12.

⁷⁷³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35.

⁷⁷⁴ The Minister may in terms of S 3(4)(j) of the *Housing Act* 107 of 1997 take any steps to promote the effective functioning of the housing market. A similar section is found in s 26 (1)(l) of the *National Water Act* 36 of 1998 which states that the Minister of Water Affairs may make regulations relating to transactions in respect of authorisations to use water.

⁷⁷⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 100.

3.7.5 Retrogressive measures

In the High Court in the *Mazibuko*⁷⁷⁶ case the applicants contended that in terms of section 27(2) of the *Constitution*⁷⁷⁷ the respondents were obliged to *respect and protect* their right to access to pressurised unlimited water at a flat rate, instead of discontinuing the water supply and installing prepayment meters. Judge Tsoka⁷⁷⁸ relied on *General Comment* 15⁷⁷⁹ when he noted that retrogressive measures taken by the state with regard to the right of access to sufficient water are prohibited. In the case of such retrogressive measures, the onus is on the state to prove that they are justified with reference to the totality of the rights provided for in the *Covenant*. The court held that if the deemed consumption was indeed a right that the respondents were obliged to respect and protect, such right was subject to the limitation in terms of the provisions of section 36 of the *Constitution*.⁷⁸⁰ Jansen van Rensburg⁷⁸¹ makes the point that the negative enforcement of socio-economic rights (not to interfere) does not necessitate the use of the internal limitations in sections 26(2) and 27(2). The negative content of the right is considered to be a free-standing right. It appears that the court regarded the duty to protect as a negative right. The result is that section 36 (whether the right may be limited) applies to the negative obligation placed on the state. In the case of the positive obligation (to promote and fulfil), the internal limitations (reasonableness) in section 27(2) applies. The Constitutional Court noted that under the previous system of deemed consumption invoicing, no free basic water allowance was provided to residents.⁷⁸² Residents had to pay a flat rate of R68,40 per month for their water supply. Because the new system for the first time provided free water allowance to all residents, it cannot be said that it interfered with the right of access to sufficient water. It stands to reason that in a country where the rule of law applies, the applicants could not successfully argue that, because in the past many residents did not in fact pay for their water, the introduction of a system that requires everyone to pay is unfair. Justice O'Regan⁷⁸³ held:

The fact that residents did not pay for water in the past in breach of their obligations cannot mean that a new system that provides them with free water for the first time is an infringement of their right of access to sufficient water.

According to the 2006/2007 tariff, consumers under the pre-paid system who have not been registered as indigents, will pay R95,80 per month for water and sanitation if they

776 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 100.

777 *Constitution* of 1996.

778 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 37.

779 UN CESCR 2003 *General Comment No. 15* para 8. See para 3.6.2.

780 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 103.

781 Jansen van Rensburg 2008 *Stell LR* 427.

782 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 136.

783 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 137.

use 20Kℓ of water.⁷⁸⁴ Consumers still charged on the deemed consumption tariff will be charged a flat rate of R131,25 for water and sanitation, more than 25 percent more than pre-paid meter customers. The Constitutional Court concluded that the move from the deemed consumption system to the pre-paid metered system with a free allocation of 6Kℓ per month did not constitute a retrogressive step.⁷⁸⁵ The average household with 3.2 people would receive about 60ℓ per person per day under the free basic water allowance.⁷⁸⁶ Raising the free basic water allowance for all so that it would be sufficient to cover stands with many residents would be both expensive and inequitable because it would disproportionately benefit stands with fewer residents. The applicants' argument that the policy was unreasonable because it was formulated as 6Kℓ per household (or account holder) rather than as an allowance per person, was also rejected. The City's evidence that it is difficult to establish how many people are living on one stand at any given time; was accepted.

3.7.6 Non-discrimination

The fact that in a patriarchal society, like South Africa, many domestic chores are performed by women and that many households in poor black areas, like Phiri, are headed by women, weighed heavily with the High Court in the *Mazibuko* case.⁷⁸⁷ It seemed to the court that the prepayment meters discriminated against women unfairly because of their sex. Discrimination on the basis of sex is unconstitutional and unlawful.⁷⁸⁸ The applicants argued that the prepayment meters also discriminated between the applicants (poor and predominantly black) and residents like those of Sandton (formerly white and still affluent) who get water on credit from the respondents.⁷⁸⁹ If the residents of Sandton are in arrears⁷⁹⁰ with their water bills, they are entitled to notices in terms of by-law 9 before their water supply is cut off. They are given an opportunity to make arrangements with the respondents to settle their arrears. The applicants, the residents of Phiri, were denied this right. This was not only unreasonable, unfair and inequitable; it was argued that it also was discriminatory solely on the basis of colour.⁷⁹¹ The High Court found that the introduction of the prepayment meters and their continued use violate both

784 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 140.

785 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 142.

786 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 88.

787 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 159. See UN CESCR 2002 *General Comment 15* para 37 <http://www.unhcr.org/refworld> and para 3.6.3 above.

788 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 160.

789 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 94.

790 Bond and Dugard 2008 *LDDEV* 11 note that the worst debtors in Johannesburg are government and institutional bodies. There was no suggestion that the city planned to impose pre-paid meters on them.

791 Khalfan and Conteh 2008 *ESR Review* 14 state that the court's *quo's* remedy applies to all residents of Phiri, not just those whom the City considered to be indigent. Geographically based subsidies for poor neighbourhoods can help to remedy the under-inclusion that results from individual means testing.

the *Constitution* and the *Promotion of Administrative Justice Act*.⁷⁹² The differentiation contravened the right to equality.⁷⁹³

The Constitutional Court, however, found that the by-laws dealing with the limitation and discontinuation of water supply provide for the permanent discontinuation or limitation of the water supply to customers with credit meters.⁷⁹⁴ They are not concerned with the suspension of water supply when a customer needs to purchase more credit to maintain the water supply through a pre-paid meter. A customer who has a pre-paid water meter understands that the water meter will provide a certain quantity of water which may be exhausted; and that, at the latest then, the customer should purchase new credit to recommence the water supply or wait for the beginning of a new month.⁷⁹⁵ To require the City to provide notice and an opportunity to be heard⁷⁹⁶ would be administratively unsustainable and in most cases serve no useful purpose. According to the Constitutional Court,⁷⁹⁷ it cannot be said that the introduction of pre-paid meters into Soweto was irrational. The actual monthly consumption per household in Soweto was 67Kℓ per month. It is not possible to determine how much of the water was consumed by residents and how much lost through leakage.⁷⁹⁸

Between one third and one quarter of all water purchased by Johannesburg Water, some 110 million Kℓ, was distributed in Soweto.⁷⁹⁹ Despite this only one percent of Johannesburg Water's revenue was generated from Soweto. To determine whether the discrimination in this case was unfair the Constitutional Court looked at the group affected, the purpose of the law and the interests affected. *In casu* the group affected are people living in Soweto who have been the target of severe unfair discrimination in the past.⁸⁰⁰ The purpose of the law was to eradicate severe water losses in the area of Soweto, a legitimate government purpose.⁸⁰¹ Justice O'Regan⁸⁰² warned that courts need to be cautious when approaching the question of different treatment circumstances like those *in casu* not to find legitimate government action to constitute unfair discrimination. It is implied that the City of Johannesburg has a duty to ensure that water is only used

792 *Promotion of Administrative Justice Act* 3 of 2000. *Mazibuko v City of Johannesburg* 2008] 4 All SA 471 (W) para 95.

793 *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 151.

794 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 116.

795 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 123.

796 See s 62 of the *Municipal Systems Act* 32 of 2000 for the right to an appeal against a decision of an office bearer or structure of the municipality.

797 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 147. S 95(i) of the *Municipal Systems Act* 32 of 2000 allows for a pre-paid system.

798 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 11.

799 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 146.

800 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 150.

801 Rautenbach 2011 *THRHR* 119 states that the most basic form of the rational relationship test requires that the state must be able to prove that its inaction to provide "sufficient" water can promote a legitimate purpose like the equitable and efficient management of the resources at its disposal.

802 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 151.

beneficially. It appears that when the extent of right of access to sufficient water as a human right is determined, it should be limited by the concept "beneficial use".

The third issue addressed by the court was the extent to which the new policy was harmful in effect. Credit-meter customers are charged higher tariffs than pre-paid meter customers.⁸⁰³ Pre-paid customers (who receive 6Kℓ of free water) pay R95,80 per month for water and sanitation if they use 20Kℓ of water while credit-meter customers pay R131,25 for the same amount. If credit-meter customers fail to pay their water account, interest may be charged on arrear amounts and the consumer may have his or her name listed with a credit bureau as a defaulter.⁸⁰⁴ It was not clear that a pre-paid meter system is harmful in the sense that the service it provides is less beneficial than a credit-meter service. It cannot be said that the introduction of a pre-paid water meter system in Phiri was unfairly discriminatory.⁸⁰⁵ The prohibition on unfair discrimination does not mean that government must always opt for a uniform system of service delivery if local circumstances vary.⁸⁰⁶ The conception of "equality" in the South African *Constitution* recognises that sometimes differential treatment will not be unfair. Correcting the deep inequality, which characterises the society as a consequence of apartheid, will often require differential treatment. It appears from the above that the existence of the constitutional right of access to sufficient water is limited by the affordability of providing access and by the requirement that water needs to be used beneficially. The right of access to sufficient water may be limited by the requirement of beneficial use as a result of the need to protect the resource and the need to protect the rights of other water users.

3.8 The allocation of water

It was determined above that the content of the right of access to sufficient water for basic human needs is dependent on the context in which a municipality operates. The Constitutional Court regarded a policy that supplied 6Kℓ of free basic water to a household per month to be reasonable. However, such a limited municipal service aimed at access to sufficient water for basic human needs, or water's function as a social good, will not assist members of a community in developing to the point where the community is economically self-sufficient. The Government also needs to allocate water to poor communities that need to have access to water resources to help them to develop sustainable enterprises, whether they are agricultural enterprises or not. In this paragraph the principles that apply when water from a resource is allocated for the purposes of water

803 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 152.

804 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 153.

805 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 154.

806 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 156.

entitlement allocation reform will be discussed. The aim of this paragraph is to explain the role of the concepts "beneficial use" and the "public interest" in water entitlement allocation reform. The first hypothesis that will be tested is that when some private rights to use a water resource are in conflict with other private rights to use the water resource, beneficial use is the tool that is used to determine which rights are to be preferred to others. The second hypothesis that will be tested is that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

3.8.1 *Beneficial use a requirement*

A beneficial use in terms of the *White Paper*⁸⁰⁷ means the use of water for an economically or socially useful purpose.⁸⁰⁸ The concept "beneficial use" is found throughout the *National Water Act*,⁸⁰⁹ but is also used with regard to the allocation of water use entitlements. The *Preamble* to the *National Water Act* acknowledges the national government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use. The Minister of Water and Environmental Affairs, who acts as public trustee, is ultimately responsible to ensure that water is used beneficially in the public interest.⁸¹⁰ When a responsible authority issues a general authorisation or licence, it must take into account efficient and beneficial use of water in the public interest.⁸¹¹ Beneficial use is also taken into account if it is desirable that water uses in respect of one or more water resources within a specific geographic area be licensed.⁸¹² In setting a pricing strategy for water use charges, the Minister may consider incentives and disincentives to promote the efficient use and beneficial use of water.⁸¹³ The question is what the content is of the concept "beneficial use" and whether it can be distinguished from a use that is beneficial in the public interest.

In *De Villiers v Barnard*⁸¹⁴ the court held that to say that a riparian owner may take the water which he requires for the efficient and economical irrigation of his land is exactly the same thing as saying that he may take his reasonable requirements and is not different from saying that he must make beneficial use of the water without waste. The meaning of beneficial use is constrained by the terms of the *Constitution*.⁸¹⁵ Section 195(1)(b) of the

807 Appendix 2 DWA *White Paper on a National Water Policy*.

808 Van der Merwe *Evaluating water uses* 30 defines the beneficial use of water as the use of a reasonable amount of water necessary to accomplish the purpose of the appropriation, without waste. It is too narrow as it does not refer to any productive or socially useful function.

809 *National Water Act* 36 of 1998.

810 S 3(2) *National Water Act* 36 of 1998.

811 S 27(1)(c).

812 S 43(1)(b).

813 S 56(6)(b)(i).

814 *De Villiers v Barnard* 1958 (3) SA 167 (A) 219.

815 *Constitution* of 1996.

*Constitution*⁸¹⁶ dictates that the public administration must be governed by the democratic values and principles enshrined in the *Constitution*, including the principles that efficient, economic and effective use of resources must be promoted. The phrase should be understood in the context of distributing water, as meaning a use that is producing a decided and economical effect and is without waste, in other words is efficient.⁸¹⁷ It is reconcilable with the idea stated above that an irrigator may take the water he requires for efficient and economical irrigation or that he must make beneficial use of the water without waste.⁸¹⁸

These principles apply to water as a natural resource and impact on the administration of the Department of Water Affairs. The Minister of Water and Environmental Affairs is in terms of section 3(2) of the *National Water Act*⁸¹⁹ ultimately responsible to ensure that water is allocated equitably and used beneficially⁸²⁰ in the public interest. When the Department or the Minister determines the meaning of the expression beneficial use in the public interest, the efficient, economic and effective use of resources has to be taken into account in terms of section 195(1). Pauw *et al*⁸²¹ write in the context of the management of public money that public goods and services must have tangible results to be to the benefit of the people. An action in the public sphere must be effective, which it will be if it reaches a defined goal. The Department of Water Affairs as a result needs to reach the goals set in the *National Water Act*⁸²² in order to fulfil its mandate.

The use and allocation of water resources are also constrained by the fact that they need to be economic. The economic viability⁸²³ of an undertaking for which water is used, is a condition for water use and not merely one of the factors to be considered when licenses are issued, as Uys⁸²⁴ argues. The *National Water Act*⁸²⁵ recognises that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users. The word “achieve” indicates that this expresses a wish for the future. The efficient, sustainable and beneficial use of water in the public interest should also be promoted.⁸²⁶

816 *Constitution* of 1996.

817 See Merriam Webster Inc 2010 www.merriam-webster.com.

818 *De Villiers v Barnard* 1958 (3) SA 167 (A) 219.

819 S 3(2) of the *National Water Act* 36 of 1998.

820 See para 4.4.2.4.

821 *Managing Public Money* 23.

822 *National Water Act* 36 of 1998.

823 See para 4.4.2.4.

824 Uys "Synopses" para 3.4.

825 *Preamble* of the *National Water Act* 36 of 1998.

826 S 2 of the *National Water Act* 36 of 1998.

Determining the public interest involves weighing several conflicting interests. For example, the deprivation of some private convenience when a decision is taken, has been compared to the benefit that is likely to result for the general public or part thereof.⁸²⁷ Public interest was described in section 25(4) of the *Constitution*⁸²⁸ to ensure that land reform is included in the concept. Du Plessis⁸²⁹ writes that public interest serves as an overarching value concept that is rooted in the common law. The state is *inter alia* duty bound to defer to the supremacy of the *Constitution* and to perform its administration in terms of the basic values and principles in section 195 of the *Constitution*. The meaning of public interest is different now that the equitable distribution of the water resource is at stake. The meaning of the concept "beneficial" will be described more closely in the next paragraph in order to determine whether the content of the public interest has changed.

Beneficial use⁸³⁰ used to mean promoting a broad range of uses of water across a variety of socio-economic sectors to support an economy that is diverse, robust and stable. The concept of "beneficial irrigation" used to mean the area of land that could be irrigated profitably.⁸³¹ The value of the crop produced on such land should reasonably have been expected to exceed the cost of producing it. Beneficial did not mean useful, but economically viable. Uneconomical use and wastage was not regarded to have been beneficial use. It would not have been beneficial use if the object was to farm at a loss.⁸³² Uys⁸³³ explains that the focus on irrigation, so characteristic of the previous water law dispensation, has been replaced by an integrated water management system in terms of

827 In *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 (1) SA 78 (LCC) para 13 the court held that in arriving at what is in the public interest the courts compare the deprivation of some private convenience with the benefit that is likely to result therefrom for the general public or part thereof. *In casu* the court considered the fact that restoration would be in the public interest in the light of the history of dispossession in Cato Manor and the resultant devastation and hardship suffered by the removed community, to determine the public interest. *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 (1) SA 78 (LCC) para 25. Against the advantages to the public interest of restoration there had to be weighed and balanced the advantages to the public interest of the development. The advantages of the development include (a) the provision of affordable housing for the disadvantaged communities of Greater Durban near places of potential employment; (b) the opportunities for employment as a result of the development; (c) the upgrading of informal settlements; (d) foreign investment; (e) economic upliftment of the Greater Durban area with the possibility of it spilling over into the entire KwaZulu-Natal area; (f) obviating potential violent strife between the informally settled communities and land claimants. The parties came to an agreement incorporating both restoration and development and the court approved it. *Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area* 1998 1 SA 78 (LCC) para 26. In *Khosis Community, Lohatla v Minister of Defence* 2004 5 SA 494 (SCA) para 31 the court weighed the ties of a community to its ancestral land and respected its emotional element. However, it did not mean that all other public interest considerations should be ignored. Land was finite and all claims and aspirations could not be satisfied. "A balance had to be struck and the limited resources of the country had to be considered." The court held that appellants did not convince it that the court *a quo* erred when it found that it was not in the public interest to restore the area to the appellants.

828 *Constitution* of 1996. See para 4.1.2 and para 4.3.6.3.

829 Du Plessis *Re-Interpretation of Statutes* 168.

830 See para 4.4.2.4.

831 *Minister of Water Affairs v Scheerpoort River Riparian Owners* 1994 Uys WLC 380 WC at WLC 380.39.

832 *Minister of Water Affairs v Scheerpoort River Riparian Owners* 1994 Uys WLC 380 WC at WLC 380.39. Van der Merwe *Evaluating water uses* 46 refers to the Codes for Broad-Based Black Economic Empowerment when he gives examples of beneficial use. He views the economic objectives of all members of the public as a combination of the need for *poverty alleviation* on the one hand, and the need for *economic prosperity* on the other. It is a rather narrow definition.

833 "Synopses" para 3.4.

which the needs of a variety of water user sectors are addressed. She speculates that the economic profitability of water use will probably no longer be a criterion to determine whether use is beneficial.⁸³⁴ Uys⁸³⁵ predicts that the focus in interpreting the concept "beneficial use" will rather be on the public interest, in order to promote the efficient, equitable and sustainable protection, development, conservation, management and control of all water resources. However, the efficient, equitable and sustainable protection, development, conservation, management and control of all water resources are actually all forms of beneficial use. It is possible to identify a benefit to society when each of them is promoted. They all contribute to the economic sustainability of society and contribute to profitability in that way. Job creation, for example, is a *species* of the *genus* profitability. When there are two uses in an area suffering from unemployment and the one use will create employment and the other won't, then the use creating employment will probably be preferred.⁸³⁶

One should keep in mind that in making regulations the Minister may differentiate between different water resources, classes of water resources and geographical areas.⁸³⁷ The *National Water Act*⁸³⁸ is based on the recognition that water is a scarce and unevenly distributed national resource that belongs to all people.⁸³⁹ The reason for the uneven distribution of water is that access to the water resources in South Africa has been limited to those with access to land because they were the ones who could irrigate the land for agricultural production. Ownership of riparian land was generally a requirement for access to water for irrigation.⁸⁴⁰ Apartheid era legislation governing water did not discriminate directly on the grounds of race, but if one was not allowed to own land in certain areas, one did not have access to sufficient water for *inter alia* irrigation.⁸⁴¹ Currently agriculture accounts for over 60 percent of total water use.⁸⁴² According to UNESCO,⁸⁴³ primary and processed agriculture contribute about 15 percent to the Gross Domestic Product or GDP. A lot of water is thus locked up in agriculture and the agricultural sector is the biggest user of water in South Africa. It is water used for irrigation that is under discussion when the agricultural sector is referred to. Water for irrigation by definition has to be used on land. The land need not be riparian land, but it might not be economical to use water on land that is too far away from a water resource because of the cost of energy.

834 Uys "Synopses" para 3.4.

835 Uys "Synopses" para 3.4.

836 See Van der Merwe *Evaluating water uses* 46.

837 Introduction to part 1 of Chapter 4 of the *National Water Act* 36 of 1998.

838 Preamble to the *National Water Act* 36 of 1998.

839 See Principle 2 DWA 1997 *White Paper on a National Water Policy* 60. Armitage *Economic Analysis* 114 is of the opinion that all water has been transformed into public property. See para 5.4 on the public trust in the US and para 6.4 on water vesting in governments in Australia.

840 See para 2.6.3.

841 Gabru 2005 *PER* 1.

842 UNESCO 2009 www.unesco.org/water/wwap/wwdr 503

843 UNESCO 2009 www.unesco.org/water/wwap/wwdr 503

De iure the link between land and water does not exist anymore.⁸⁴⁴ Water entitlements are in terms of the *National Water Act*⁸⁴⁵ not linked to land. "Entitlement" means a right to use water in terms of the Act or in terms of an instrument issued in terms of it.⁸⁴⁶ Any entitlement granted to a person by the *National Water Act*⁸⁴⁷ replaces any right to use water, which that person might otherwise have been able to enjoy or enforce under any other law. Furthermore, no authorisation to use water is in perpetuity.⁸⁴⁸ Armitage⁸⁴⁹ comments that the primary intention of the new water policy is to make use of the limited duration of water licenses as a means to reallocate existing water rights, based on bureaucratic discretion.

Although rights in land have been separated from rights to use water in terms of section 4 of the *National Water Act*,⁸⁵⁰ the existence of a link between land and water is still recognised in the Act. In terms of section 28(1) of the Act a licence must specify the property or area in respect of which it is issued. Section 25 of the *National Water Act*⁸⁵¹ allows a person holding an entitlement to use water from a water resource in respect of any land, to surrender that entitlement in order to facilitate a particular licence application for the use of water from the same resource in respect of other land. The Act in effect recognises that an entitlement to use water from a water resource allows a water use in respect of land. Moreover, water for irrigation, which is the biggest water use in the country, can only be applied when one is in possession of irrigable land. However strong one's right of access to sufficient water may be, one can only use significant quantities of water beneficially when one is in possession of the necessary land. The implication is that matters related to land reform should be addressed before targets can be set for water reform. Once people have possession of irrigable land, the allocation of water should be in proportion to the possession of the land where new land owners have the capacity to use the water beneficially.⁸⁵² Determining the meaning of the concept "beneficial use" in circumstances where water needs to be redistributed is therefore vitally important. A key concept is "beneficial use in the public interest".

844 See para 4.4.2.1.

845 *National Water Act* 36 of 1998.

846 S 1(1) *National Water Act* 36 of 1998. See para 4.4.2.2.

847 S 4(4) *National Water Act* 36 of 1998.

848 Principle 3 DWA 1997 *White Paper on a National Water Policy* 60. See chapter 4 for a discussion of the question whether a right to use water is a property right.

849 Armitage *Economic Analysis* 113.

850 See para 4.4.2.2.

851 S 25(2)(a) *National Water Act* 36 of 1998.

852 See para 4.4.1.

Although the South African *Strategy for water allocation reform*⁸⁵³ stated in 2006 that water allocation must promote the beneficial use⁸⁵⁴ of water in the public interest, no clear guidelines have yet been issued. "In the public interest"⁸⁵⁵ in the case of water allocation reform was defined to refer to water allocations that are to the benefit of the public and the nation. It attempts to balance the broader public interest with the rights of the individual. It includes the commitment to equity. "Equity in water use"⁸⁵⁶ refers to equitable access to water, as well as to actions to promote race and gender redress in water use. It has the equitable distribution of the benefits of water use, and not the equal distribution of water, at heart. In addressing equity issues, the allocation process must support water uses that generate employment and growth. Where water has to be re-allocated between competing users, the impacts of curtailing existing beneficial uses of water for establishing new enterprises must be considered with care.

Although the *National Water Act*,⁸⁵⁷ like its predecessor, the *Water Act*,⁸⁵⁸ uses the concept "beneficial use," it is constrained by the fact that in the year 2000, ten of the nineteen water management areas in the country were facing a water deficit.⁸⁵⁹ It means that there is more than one beneficial use competing for the available water. This is why one of the objectives of water policy in South Africa is to reallocate existing water uses to improve the optimum⁸⁶⁰ and equitable use of water.⁸⁶¹ The beneficial use of water used to mean the use of water for a productive purpose.⁸⁶² This was already a limitation on water use when water was less scarce. Since competition for the use of water has increased, there are a number of different users who could all claim to be using the water productively in some sense. The best use in these circumstances is use which is "beneficial in the public interest" or, more plainly, the "optimum" or best possible use. The concept "optimum" use weighs up different social, economic and environmental objectives

853 The strategy gives structure to the development of water allocation plans as contemplated in s 9(e) of the *National Water Act* 36 of 1998, with specific focus on race and gender water use reform. It is supposed to provide a guide for the way in which individual applications for s 21 water uses are authorised, as well as for the development of water allocation schedules. DWA 2006 *Strategy for water allocation reform* 20. The strategy only provides a framework for the abstraction of water (either from groundwater or surface water sources), the storage of water and stream flow reduction activities (on 6-7).

854 See para 4.4.2.4

855 DWA 2006 *Strategy for Water Allocation Reform* 8.

856 "Equity in water use" refers to equitable access to water, as well as to actions to promote race and gender redress in water use. It has the equitable distribution of the benefits of water use, and not the equal distribution of water, at heart. DWA November 2006 *Strategy for Water Allocation Reform* 8.

857 *National Water Act* 36 of 1998.

858 *Water Act* 54 of 1956.

859 In other words, in these catchments people are using so much water that either the ecosystems have been placed under severe stress or other users cannot rely on getting their fair share. DWA *National Water Resources Strategy* 3.

860 Principle 7 DWA *White Paper on a National Water Policy* states that:

The objective of managing the quantity, quality and reliability of the nation's water resources is to achieve optimum, long-term, environmentally sustainable social and economic benefit for society from their use.

861 DWA *White Paper on a National Water Policy* in para 2.1.8. This is in accordance with an international trend that has increased the role of the state as the public trustee of natural resources. See Chapters 5 and 6.

862 DWA *White Paper on a National Water Policy* in para 4.2.1.

and the practicality of their achievement in order to enable authorities to make the best decisions on water use. The concept balances equity within and between generations. The link between beneficial use and the public interest is thus clear, although uses that are beneficial are by definition also in the public interest. Perhaps the reason for the distinction is that uses that are beneficial in the public interest, or optimum uses, are more valuable than others. *In the public interest* would likely include any of the objectives in section 2 of the *National Water Act*,⁸⁶³ for example meeting the basic human needs of present and future generations; promoting equitable access to water; redressing the results of past racial and gender discrimination; and facilitating social and economic development. Balancing is needed because short term economic benefits may be outweighed by long term social or environmental costs. It might be advisable to draft a framework in terms of which beneficial uses are weighted depending on the needs of a water management area. When one reads section 27(1) together with section 3(2) of the *National Water Act*⁸⁶⁴ the function of the limitation of beneficial use is to ensure that whenever water is allocated, whether for purposes of equity or not, the water should be used beneficially.⁸⁶⁵ Furthermore, the purposes of the *National Water Act*⁸⁶⁶ that fall outside the achievement of equality as listed above, should also be taken into account. They are purposes like meeting the basic human needs of present and future generations; promoting the efficient, sustainable and beneficial use of water in the public interest; facilitating social and economic development; providing for a growing demand for water use; protecting aquatic and associated ecosystems and their biological diversity; and preventing pollution and the degradation of water resources.

The Department⁸⁶⁷ points out that in catchments where the application(s) may exceed the available water, the principles that apply to evaluating applications are *firstly*, that all applications must be tested against section 27 of the *National Water Act*.⁸⁶⁸ *Secondly*, licences may be refused if the use impinges on existing users, or on potential future beneficial uses.⁸⁶⁹ Beneficial use remains the underlying condition for water use. *Thirdly*, every effort must be made to find water for previously disadvantaged applicants.⁸⁷⁰ Attempts must also be made to find water for high priority applications. This is to be done by curtailing possible unlawful use, instituting water conservation measures and lowering the assurance of supply. It can also be done by encouraging water trading for water users

863 S 2.

864 S 3(2).

865 See para 3.7.6.

866 S 2.

867 DWA 2006 *Strategy for Water Allocation Reform* 15.

868 S 27 of the *National Water Act* 36 of 1998.

869 DWA 2006 *Strategy for Water Allocation Reform* 15.

870 DWA 2006 *Strategy for Water Allocation Reform* 15.

who are able to purchase water entitlements.⁸⁷¹ The underlying principle is that as many of the outstanding applications as possible should be authorised, with preference being given to uses that represent beneficial use in the public interest. Unsuccessful applicants can be helped to identify opportunities for water trading. Water pricing⁸⁷² could also be used to assist in the allocation process.

Objectives like maintaining food security and the balance of payments should also be valued when the public interest is determined. One might even argue that if there were sufficient water in the Reserve for human needs and the aquatic ecology, the economic purposes of water become more important and the concept "beneficial use" should mean an economically productive use. There should not be a direct correlation between the number of people in the country and the quantity of water that they may use. There should, however, be a rough correlation between the beneficial use people make of water and the quantity of water they use.

Where the water has already been over-allocated and there has been a call for compulsory licensing, the water will be allocated by *firstly*, assigning water to meet the requirements of the Reserve, class, and international obligations.⁸⁷³ Water will *secondly* be assigned to meet the requirements of existing licences and strategic users. A lack of administrative capacity in the verification of existing uses and the issuing of licences would be a serious impediment to this. Water will *thirdly* be allocated to applicants to redress race and gender imbalances. Water will *fourthly* be allocated to existing lawful users of water, who have made application under compulsory licensing, and who have demonstrated *beneficial use* of the water in the public interest. Water may *finally* also be allocated to previously disadvantaged users via general authorisations before the remainder of the water is allocated according to the above guidelines. This does not mean that all the water will be given to historically disadvantaged individuals. The provisions of *Guideline 5* must be applied. A fair process will be vital. The strategy for water allocation reform consists of policy or practice guidelines. Much skill is needed to interpret and apply them. It is very likely that the application of these guidelines will lead to much litigation. On the other hand, the courts are likely to give much scope to government to develop its policy on the allocation of water entitlements.⁸⁷⁴

871 See Chapter 7 and in particular para 7.6.

872 See para 7.6.2.

873 DWA 2006 *Strategy for Water Allocation Reform* 17-18.

874 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 68.

3.8.2 Achieving equality

According to the *National Water Act*,⁸⁷⁵ some of the factors that have to be taken into account when water resources are managed, are the promotion of equitable access to water and the redress of the results of past racial and gender discrimination. Fredman⁸⁷⁶ suggests that substantive equality demands a reformulation of socio-economic rights themselves. The focus should move away from a conception of a fixed bundle of goods, to one which aims to enhance the range of feasible options for women. The *White Paper*⁸⁷⁷ stated that water resources shall be developed, apportioned and managed to enable all user sectors to gain equitable access to the desired quantity, quality and reliability of water. According to the *National Water Resource Strategy*,⁸⁷⁸ there are three fundamental objectives in managing South Africa's water resources. *Firstly*, the achievement of equitable access to water implies equity of access to water services, the use of water resources, and the benefits from the use of water resources. *Secondly*, the sustainable use of water would be achieved by making progressive adjustments to water use with the objective of striking a balance between water availability and legitimate water requirements. It would also be done by implementing measures to protect water resources. *Thirdly*, the achievement of efficient and effective water use must be for optimum social and economic benefit. The need to strike a balance between water availability and legitimate water use requirements is clear. Sustainable use of water has to be achieved in the context of the creation of a just society where there is equitable access to water.⁸⁷⁹

Government policy has interpreted social equity in the context of water resources to mean that all users should have fair and reasonable access to the nation's scarce water resources. The allocation of water resources should facilitate universal and affordable access to a basic water supply.⁸⁸⁰ There rests an obligation on the state, in terms of section 27(2), to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to sufficient water.⁸⁸¹ When one achieves access to sufficient water, it will help to achieve equality. The public interest in this instance is one of achieving access to sufficient water in order to achieve equality. The national government has the overall responsibility for the equitable

⁸⁷⁵ S 2.

⁸⁷⁶ 2009 SAJHR 440. At the same time caring and interdependence within a community should be valued.

⁸⁷⁷ Principle 14 DWA 1997 *White Paper on a National Water Policy* 61.

⁸⁷⁸ DWA 2004 *National Water Resource Strategy* 7.

⁸⁷⁹ *Len 2004 U Denv Water L Rev* 87 states that when everyone receives a benefit, everyone has a stake. If all of the interests are recognised, impacts on third parties are diminished.

⁸⁸⁰ GN 1353 in GG 20615 of 12 November 1999 para 9.

⁸⁸¹ S 27(2) of the *Constitution*. Klare 1998 SAJHR 188 points out that the 1996 *Constitution* has massively egalitarian commitments superimposed on a formalistic legal culture without a strong tradition of substantive political discussion and contestation through the medium of legal discourses.

allocation and beneficial use of water in the public interest.⁸⁸² The *Constitution* embraces a substantive concept of "equality" that includes measures to redress existing inequality.⁸⁸³ If there were no commitment to eradicate socially constructed barriers to equality progressively and to root out institutionalised under-privilege, the promise of equality before the law would appear empty. The general principle is contained in section 9(1) which states that everyone is equal before the law and has the right to equal protection and benefit of the law. It is however qualified by section 9(2) which states that equality includes the full and equal enjoyment of all rights and freedoms. It allows legislative and other measures that have been designed to protect or advance persons disadvantaged by unfair discrimination to be taken in order to promote the achievement of equality.

The *National Water Act*⁸⁸⁴ attempts to rebalance the scales of supply and demand by taking water use rights from those who did not use them in the two years before the promulgation of the Act, and in effect gives water use entitlements to those who were granted water use rights by the new legislative order. When there had been permission to use water during a period of two years⁸⁸⁵ immediately before the commencement of the *National Water Act*, but the water had not in fact been used,⁸⁸⁶ it cannot be an existing lawful water use in terms of section 32 of the Act.⁸⁸⁷ One of the main questions researched in this thesis is whether section 32 of the *National Water Act* merely regulates water rights by limiting them to uses exercised in the two years before the promulgation of the Act, or whether it "goes too far" and amounts to a deprivation or an expropriation of property for which compensation is payable. The question will be discussed in chapter 4. The question that is discussed in this paragraph is whether these measures are in conflict with the equality clause or not.

In the *Minister of Finance v Van Heerden*⁸⁸⁸ case the Constitutional Court held that remedial measures are not a derogation from the protection of equality, but a substantive and composite part of the equality protection of section 9 and the *Constitution*⁸⁸⁹ as a whole. Differentiation aimed at protecting persons disadvantaged by unfair discrimination is warranted, as long as they conform to the internal test set by section 9(2). Savoy⁸⁹⁰ argues that the conflict over affirmative action reflects a split between the left-brain's consciousness of rigorous legal rules and the right-brain's moral scruples of equity. It is in

882 Chapter 4 of the *National Water Act* 36 of 1998 deals with the use of water in s 21.

883 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 31.

884 See discussion of s 32 and s 33 of the *National Water Act* 36 of 1998 in para 4.5.

885 It is the period which existed between 1997 and 1999 for surface water and between 1996 and 1998 for groundwater, as the relevant sections came into effect on different dates.

886 See Thompson *Water Law* 497.

887 See para 4.5 for a discussion of s 32 of the *National Water Act* 36 of 1998.

888 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 32.

889 *Constitution* of 1996.

890 1985 *Howard* LJ 831.

the collective legal unconsciousness where there is a conflict between the jurisprudence of the heart and a sense of duty to the rule of law. The question is how one should balance legal rules and the moral scruples of equity. An example of how this balancing was done in terms of section 9(2) of the *Constitution*⁸⁹¹ is found in the *Van Heerden* case.

In the *Minister of Finance v Van Heerden*⁸⁹² case Justice Moseneke set out a test that made use of a threefold enquiry to test whether a measure was lawful in terms of the equality clause in the *Constitution*. He wanted to determine whether a measure fell within section 9(2).⁸⁹³ The first yardstick he used relates to whether the measure targets persons or categories of them who have been disadvantaged by unfair discrimination. The second yardstick was whether the measure is designed to protect or advance such persons or categories of persons. The third yardstick used by Justice Moseneke was whether the measure promotes the achievement of equality. Depending on how they are implemented, the measures in sections 32 and 33 of the *National Water Act*⁸⁹⁴ target people who have been disadvantaged by unfair discrimination. The measure to cancel unexercised water uses means that more water is available for the common pool. They have thus been designed to protect or advance persons or categories of persons who have been disadvantaged by unfair discrimination. They also promote the achievement of equality. The question is what the legislative framework is within which water should be allocated. The legislation giving effect to section 9 of the *Constitution* is the *Broad-Based Black Economic Empowerment Act*⁸⁹⁵ that was enacted to promote the achievement of the constitutional right to equality. The relevance of the Act is that every organ of state must take into account and, as far as is reasonably possible, apply a code of good practice issued in terms of the Act in determining qualification criteria for the issuing of licences.⁸⁹⁶ It needs to be stated that as water, which is classified as *res omnium communes*, is a resource that is needed to sustain life and economic activity, licences to use water cannot be equated to other forms of licences⁸⁹⁷ or allocations like fishing quotas, although there are certain similarities.⁸⁹⁸

891 *Constitution* of 1996.

892 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 37. Albertyn 2007 *SAJHR* 256 makes a distinction between equality claims that result in inclusion and those that contribute to transformation. A transformatory approach to equality claims aims to shift the underlying power relations that maintain the inequality. See Albertyn & Goldblatt "Equality" 35–14 and 35-40.

893 According to Albertyn & Goldblatt "Equality" 35-32 compliance with s 9(2) does not exempt positive measures from attack that they amount to unfair discrimination. It means that they are fair.

894 Act 36 of 1998. See para 4.5 for a detailed discussion of the measures in s 32 and s 33 of the *National Water Act* 36 of 1998.

895 Preamble *Broad-Based Black Economic Empowerment Act* 53 of 2003.

896 S 10 *Broad-Based Black Economic Empowerment Act* 53 of 2003.

897 The Australian court in *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 19 drew a distinction between a fee to make use of a resource and a fee for a licence to do something that would otherwise have been forbidden (like selling liquor). See para 6.6.1.

898 See para 6.6.

3.8.3 How water is to be allocated

Bronstein⁸⁹⁹ in 2002 was concerned because the state “assumed” the power to allocate almost all the water in the country without having had any specific idea how the allocations were to be made. Section 27 of the *National Water Act*⁹⁰⁰ states that a responsible authority must take all relevant factors into account when issuing general water authorisations and water licences. The factors include *inter alia* the existing lawful water uses; the need to redress the results of past racial and gender discrimination and the efficient and beneficial use of water in the public interest. The factors include those relating to the water use. They are the socio-economic impact-of the water use or uses if authorised; or of the failure to authorise the water use or uses;⁹⁰¹ investments already made and to be made by the water user in respect of the water use in question;⁹⁰² the strategic importance of the water use to be authorised;⁹⁰³ and the probable duration of any undertaking for which a water use is to be authorised.⁹⁰⁴ Factors relating to the resource include the quality of water in the water resource which may be required for the Reserve and for meeting international obligations;⁹⁰⁵ the likely effect of the water use to be authorised on the water resource and on other water users;⁹⁰⁶ any catchment management strategy applicable to the relevant water resource;⁹⁰⁷ and the class and the resource quality objectives of the water resource.⁹⁰⁸ However, when an application for a water licence is refused in cases where there was an existing lawful water use, consequential financial compensation is payable where the refusal resulted in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used.⁹⁰⁹ The diminution in the value of land when an application for a water licence for an existing lawful water use has been refused should be included in the calculation of consequential financial loss. However, the amount of any compensation payable must be determined by disregarding any reduction in the existing lawful water use made in order to provide for the Reserve.⁹¹⁰ The Reserve includes water for basic human needs and water for the aquatic ecology, as was discussed in para 3.1.4. The reduction in compensation for an existing lawful water use to provide for the Reserve operates as a reduction in the compensation payable for consequential financial loss. Some

899 2002 SALJ 474.

900 S 27 *National Water Act* 36 of 1998.

901 S 27(1)(d).

902 S 27(1)(h).

903 S 27(1)(i).

904 S 27(1)(k).

905 S 27(1)(j).

906 S 27(1)(f).

907 S 27(1)(e).

908 S 27(1)(g).

909 S 22(6). See para 4.4.2.4.

910 S 22(7)(b) *National Water Act* 36 of 1998.

commentators, like Soltau,⁹¹¹ argue that the requirement for the Reserve never formed part of the water use right. On the other hand one may argue that the reduction for the Reserve operates in the same way that a "tax" to pay for transformation would. It is therefore vitally important that the Reserve for the water resources has been determined at least provisionally⁹¹² and that a proposed allocation schedule⁹¹³ should have been prepared in the case of compulsory licensing. The proposed allocation schedule should set out the quantity of water that has been assigned to: the Reserve and international obligations; the requirements of existing licences; applicants who should receive licences to redress past racial and gender discrimination; existing lawful water users who should be issued with licences; and the quantity of water that should be allocated to applicants taking into account section 27. It should also set out the quantity of water that should be allocated to every other applicant by public tender or auction. The schedule in fact should contain uses that are regarded to be in the public interest. The liability of the state to pay compensation for the refusal to issue licences implies that functionaries should only refuse to issue licences when it is required by a majority of the considerations in section 27(1) of the *National Water Act*.⁹¹⁴ In terms of section 9(e) of the *National Water Act*,⁹¹⁵ catchment management strategies must also contain water allocation plans setting out principles for allocating water, taking into account the factors mentioned in section 27(1) of the Act.

Water allocation reform includes a commitment to the fair, reasonable and equitable allocation of water to all South Africans.⁹¹⁶ In terms of *Guideline 5*⁹¹⁷ of the *Water Allocation Reform Strategy* the water allocation process must be done in a fair, reasonable and consistent manner. It brings due process requirements and the *Promotion of Administrative Justice Act*⁹¹⁸ into play. Existing lawful uses must not be arbitrarily curtailed, but will be curtailed to meet equity goals in catchments where there is inequity.⁹¹⁹ It is the manner in which the objective is achieved that will be the subject of much debate and much litigation.

The government plans to do the reallocation of water in such a manner that the extent of disruption to the local, regional and the national economy is minimised.⁹²⁰ Various options to meet water demands will be assessed before the re-allocation of water is considered. The curtailment of water uses will be done progressively. Users will be given the

911 See para 4.5.1.

912 See s 17 of the *National Water Act* 36 of 1998.

913 S 45.

914 S 27.

915 S 9(e).

916 DWA 2006 *Strategy for Water Allocation Reform* 10-11.

917 DWA 2006 *Strategy for Water Allocation Reform* 10-11.

918 *Promotion of Administrative Justice Act* 3 of 2000.

919 DWA 2006 *Strategy for Water Allocation Reform* 10-11.

920 DWA November 2006 *Strategy for Water Allocation Reform* 10-11. See also the discussion of "optimum water use" in para 3.8 and the DWA 1997 *White Paper on a National Water Policy* para 4.2.1.

opportunity to reduce their water use by becoming more efficient water users.⁹²¹ Where new applications compete with existing uses, the criteria that guide the granting of renewals or new allocations include the Reserve,⁹²² equity and the optimum use of water.⁹²³ The system could function on a purely administrative basis.

Anderson *et al*,⁹²⁴ however, point out that the wealthy can manipulate administratively directed water allocation. This may enable them to augment their wealth and power. Where there are established inequalities of power, participants may not be able to contribute equally. Certain groups, like women or the rural poor, often lose out in processes of resource formulation because they lack the resources (knowledge; time; ability to travel; money) to obtain formal authorisation through the state. Fredman⁹²⁵ is of the opinion that rather than regarding socio-economic rights as bundles of goods to be distributed, "engendered socio-economic rights" should take into account the ways in which goods and opportunities can in fact be enjoyed by real women who are probably taking care of other people. Perhaps one should encourage those with water in rural areas, the irrigators, to communicate with rural women in order to solve those problems preventing development in rural areas. The problems might be a lack of access to sufficient water or even a lack of skills when taking part in subsistence farming. Working together they can achieve more than when working against one another. Whatever one does, the aim should be to use water beneficially, while at the same time catering for the public interest.

3.9 Conclusion

3.9.1 *Res omnium communes and the public interest*

The purposes of the *National Water Act*⁹²⁶ to ensure that the nation's water resources are *inter alia* used and managed in ways which take into account promoting equitable access to water and the beneficial use of water in the public interest form the focus point of this thesis.⁹²⁷ More particularly, the question that is in need of an answer is: How does the concept "beneficial use" influence South African water law reform?

921 DWA November 2006 *Strategy for Water Allocation Reform* 10-11. See also the discussion of "optimum water use" in para 3.81 and the DWA 1997 *White Paper on a National Water Policy* para 4.2.1.

922 See s 1 of the *National Water Act* 36 of 1998.

923 DWA 1997 *White Paper on a National Water Policy* 28. See discussion of beneficial and optimum use in para 3.8.1.
924 2007 *LEAD J* 164.

925 2009 SAJHR 416.

926 S 2 of the *National Water Act* 36 of 1998.

927 See para 1.1.

One of the first indications that some uses have higher values than others is to be found in the definition of the Reserve.⁹²⁸ The Minister of Water and Environmental Affairs⁹²⁹ must, when determining the Reserve for a water resource, ensure that adequate allowance is made for basic human needs and aquatic ecosystems, before water entitlements may be allocated for any other type of use. One may conclude that the water uses basic human needs, as protected in section 27(1)(b) of the *Constitution* and aquatic ecosystems, as protected in section 24(b) of the *Constitution* have higher value than other uses. The environment, moreover, plays a role in every sector of the economy and its needs, depending on water resource classification, must be met before the needs of a sector can be met. It is likely that the implementation of the Reserve in water stressed river systems will require a reduction in the allocation of water for beneficial use, or a decrease in the assurance of supply.⁹³⁰

Although the Reserve is a modern term, water has long been protected in the common interest. Water for domestic purposes has *inter alia* been protected as daily water in post classical Roman law.⁹³¹ The environment was also protected. Labeo was of the opinion that the interdict in D 43.20.1.11 protecting water for use by town properties might have been used to prohibit someone from sowing and digging on a farm when there was a danger that he might pollute the water. The protection of daily water and the prohibition on pollution probably occurred as a result of water being classified as a *res omnium communes*. The *White Paper on a National Water Policy for South Africa*⁹³² reaffirmed that water is a *res omnium communes* and is a resource common to all, the use of which shall be subject to national control. It is possible to conclude that a right to sufficient water as entrenched in the *Bill of Rights* is a manifestation of the Roman law principle of *res omnium communes*. The extent to which the *res omnium communes* is protected by the *Constitution* has not yet been determined by the courts. The difference between the Roman concept of *res omnium communes* and the right of access to sufficient water as a human right in South Africa is *inter alia* that the content of the public interest is different because the concerns of the public depends on the matters of the day.

3.9.2 Why is the right of access to sufficient water a constitutional right?

In terms of the *Constitution* of 1993 local government had to provide access to water. The question was posed why the right of access to sufficient water is protected as a human

928 See para 3.1.4.

929 The Minister of Water and Environmental Affairs is the head of two separate government departments. They are the Department of Water Affairs and the Department of Environmental Affairs.

930 See para 3.1.4.

931 See para 2.2.3.1.

932 Principle 2 DWA 1997 *White Paper on a National Water Policy* 60.

right in the *Bill of Rights* of the current *Constitution*⁹³³ and why it was not sufficient that municipalities had a duty to provide access to water. It was found that the need for social justice and the need for state intervention in *inter alia* the allocation of water is responsible for the fact that the right of access to sufficient water is not merely to be delivered as a right to a basic municipal service, but is protected as a human right.⁹³⁴ The right of access to sufficient water is classified under socio-economic rights because the government needs to restructure the water industry to improve access to water.

3.9.3 *Progressive realisation*

The distinction between water as a social good and water as an economic good is reflected in legislation managing water. Water as a social good must be delivered by municipalities. The content of the right of access to sufficient water as a human right has *inter alia* been set out by international instruments, like *General Comment 15*.⁹³⁵ The decisions in the High Court and Supreme Court of Appeal in the *Mazibuko case* relied extensively on international law.⁹³⁶ However, as the real issues in the case crystallised with the admission of new evidence by the Constitutional Court, the facts led the court to come to a decision based on the realities of the situation. Context determined the reasonableness of the city's policy.⁹³⁷ Context reflects the public interest. Little mention was made of international law. The Constitutional Court held that the positive obligations imposed upon government by social and economic rights will be enforced by the courts by requiring government to take steps.⁹³⁸ Government's adopted measures are reviewed to meet the constitutional standard of reasonableness. Importantly, there is a duty upon government to review continually its policies to ensure that the achievement of the right is progressively realised. It was held that it is institutionally inappropriate for a court to determine exactly what the achievement of any particular social and economic right entails. It is also inappropriate for a court to determine what steps government should take to ensure the progressive realisation of the right. The legislature and executive should determine this. It will in most circumstances be difficult for an applicant who does not challenge the minimum standard set by the legislature or the executive for the achievement of social and economic rights to establish that a policy based on that prescribed standard is unreasonable.⁹³⁹

933 S 27(1)(b) of the *Constitution* of 1996.

934 See para 3.2.1.

935 See para 3.6.

936 See para 3.7.

937 See para 3.7.2.

938 See para 3.5.

939 See para 3.9.3.

To determine whether the discrimination in this case was unfair, the Constitutional Court took into account the group (people living in Soweto)⁹⁴⁰ affected, the purpose of the law (eradicating severe water losses) and the interests affected. Because pre-paid customers (who receive 6Kℓ of free water) pay R95,80 per month for water and sanitation if they use 20Kℓ of water while credit-meter customers pay R131,25 for the same amount,⁹⁴¹ it could not be said that the introduction of a pre-paid water meter system in Phiri was a retrogressive step or unfairly discriminatory. One can conclude that the laudable objectives of *General Comment 15* have to be tempered by the fact that due to financial constraints the right of access to sufficient water can only be progressively realised. *In casu* the group affected are people living in Soweto who have been the target of severe unfair discrimination in the past.⁹⁴² The purpose of the law was to eradicate severe water losses in the area of Soweto, a legitimate government purpose. Justice O'Regan⁹⁴³ warned that courts need to be cautious when approaching the question of different treatment circumstances like those *in casu* not to find legitimate government action to constitute unfair discrimination. Although not mentioned by the court, it appears that the principle is that the waste of water falls outside the protection of the right of access to sufficient water because of the principle of beneficial use. It is implied that the City of Johannesburg has a duty to ensure that water is only used beneficially. The hypothesis when the extent of the right of access to sufficient water as a human right is determined, it should be limited by the concept "beneficial use," has been proven to be true.

3.9.4 *Beneficial use and the allocation of water*

The background law that controls the concept "beneficial use" is *inter alia* to be found in the terms of the *Constitution*.⁹⁴⁴ Section 195(1)(b) of the *Constitution* of 1996 dictates that the public administration must be governed by the democratic values and principles enshrined in the Constitution, including the principles that efficient, economic and effective use of resources must be promoted. In the context of the distribution of water, it means an economic use that is producing a decided effect and is without waste. The Minister of Water and Environmental Affairs, who acts as public trustee of the water resources, is ultimately responsible to ensure that water is used beneficially in the public interest.⁹⁴⁵ The latter actually involves weighing several conflicting interests. For example, the deprivation of some private convenience when a decision is taken, is compared to the benefit that is

940 See para 3.7.6.

941 See para 3.7.5.

942 See para 3.7.5.

943 See para 3.7.6.

944 See para 3.8.1.

945 See para 4.4.2.3.

likely to result for the general public or part thereof.⁹⁴⁶ Public goods and services must have tangible results to be to the benefit of the people. The public should be able to see that their needs are being met, and not only that of certain individuals.

The first hypothesis that was tested in this section was that when some private rights in a water resource are in conflict with other private rights, beneficial use is the tool that is used to determine which uses are to be preferred to others. It is indeed so, but it is the meaning of beneficial use in the public interest that is very fluid. The best water use is use which is “beneficial in the public interest” or the “optimum” or best possible use.⁹⁴⁷ When authorities make decisions on water use, they should use the concept “optimum” use to weigh up different social, economic and environmental objectives. They should also use the concept “optimum use” and the practicality of achieving certain uses in order to enable authorities to make the best decisions on water use. The concept “optimum use” balances equity within and between generations.⁹⁴⁸ There thus exists a link between beneficial use and the stewardship role of the public trust concept. It was explained above⁹⁴⁹ that uses that are beneficial are by definition also in the public interest. Perhaps the reason for the distinction is uses that are beneficial in the public interest, or optimum uses, are more valuable than others because they meet the social, economic and environmental objectives of the day. *In the public interest* would likely include any of the objectives in section 2 of the *National Water Act*, for example meeting the basic human needs of present and future generations; promoting equitable access to water; redressing the results of past racial and gender discrimination; and facilitating social and economic development. Balancing is needed because short term economic benefits may be outweighed by long term social or environmental costs. The second hypothesis is also true that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. It is the determination of what is in the public interest that might in future lead to litigation.

The public interest consists of more than just the delivery of water services for basic human needs. When a certain level of services has been received, the object of the water user's water use must be to produce another product. The economic viability of an undertaking for which water is used, when water for basic human needs are not at stake, is a condition for water use. It is not merely one of the factors to be considered when licenses are issued. For example, somebody should not receive a licence to use water for

946 See para 3.8.1

947 See discussion in para 3.8.1.

948 See para 3.1.4.

949 See para 3.8.1.

irrigation when he does not possess land where he could use the water. Water for irrigation has to be used on land. The land need not be riparian land, but it might not be economical to use water on land that is too far away from a water resource because of the cost of energy.

The separation of rights in land from rights to use water in terms of section 4 of the *National Water Act*,⁹⁵⁰ sometimes is of merely academic importance. The Act in the case of water trading recognises the link between land and water. The *National Water Act*⁹⁵¹ allows a person holding an entitlement to use water from a water resource in respect of any land, to surrender his entitlement in order to facilitate a licence application for the use of water from the resource in respect of other land. The same principle should apply when people are granted licences to use water. One can only use significant quantities of water beneficially when one is in possession of the necessary land. Matters related to land reform should be addressed before targets can be set for water reform.

Plans for water reform should also be in harmony with catchment management strategies. The drafting of catchment management strategies would help to ensure that the requirements of the public interest are met. In terms of section 9(e) of the *National Water Act*⁹⁵² catchment management strategies must contain water allocation plans setting out principles for allocating water, taking into account the factors mentioned in section 27(1) of the Act. When one reads section 27(1) together with section 3(2) of the *National Water Act*⁹⁵³ the function of the limitation of beneficial use is to ensure that whenever water is allocated, whether for purposes of equity or not, the water should be used beneficially.⁹⁵⁴ Furthermore, the purposes of the *National Water Act*⁹⁵⁵ that fall outside the achievement of equality should also be taken into account.

3.9.5 Achieving equitable allocation

All measures to achieve equality should be measured against the three yardsticks in *Minister of Finance v Van Heerden*.⁹⁵⁶ The most important one is whether they indeed promote the achievement of equality. Moreover, South Africa cannot afford to allocate water to users who will not use it beneficially. Once there is sufficient water in the Reserve, the right of access to sufficient water as a basic human need loses its priority and has to compete with other uses. Water has to be used productively when allocated. In a water-stressed country the waste of water cannot be tolerated. When one uses more

950 See para 3.8.1 and para 4.4.2.2.

951 See para 7.6.4

952 See para 3.8.3.

953 See para 4.4.2.3.

954 See para 3.7.6 and para 3.8.

955 See para 3.8.3.

956 See para 3.8.3.

water than one needs, one is wasting water. Furthermore, water use rights have their origin in Roman law and should not be altered as often as allocations to fishing quotas.⁹⁵⁷

The concept "public trusteeship"⁹⁵⁸ has been mentioned above. It will be discussed in more detail in the next chapter, where the link between the concept "water use right" and the water use right as a property right will also be discussed. Moreover, the mechanism in sections 32 and 33 of the *National Water Act*⁹⁵⁹ to make more water available for reallocation, for *inter alia* social purposes will also be discussed. The question is whether and how it affects water as an economic good and what the legal effects of this are. In other words, should compensation be paid for the forfeiture of unexercised water uses?

957 See para 3.8.2.

958 See para 4.4.2.3.

959 *National Water Act* 36 of 1998. See para 4.5.

CHAPTER 4

WATER LAW REFORM AND THE PROPERTY CLAUSE

4.1 Introduction

In chapter 3 it was pointed out that in terms of section 32 of the *National Water Act*⁹⁶⁰ more water is made available to reallocate for the reform of access to water by only defining a water use that had been beneficially exercised in the two years before the promulgation of the Act as an existing lawful water use. An unexercised water use may only be declared to be an existing lawful water use in terms of section 33 if there had been a good reason for the non-exercise. The importance of a use being considered an existing lawful water use is that in terms of the *National Water Act* an existing lawful water use is protected as a water use entitlement.⁹⁶¹ An unexercised old order water use right is not recognised as a water use entitlement. In this chapter the objective is to determine whether the definition of an existing lawful water use in section 32 led to an arbitrary deprivation or an expropriation of unexercised water use rights in terms of the property clause of the *Constitution* of 1996. It *inter alia* needs to be determined whether the concept "beneficial use" that underlies the term existing lawful water use in fact limited the water use right in terms of the previous or current water law dispensation. If the term beneficial use was a condition for the existence of the water use right, then section 32 would only have been stating the obvious. If beneficial use was not a condition for the existence of a water use right, then it needs to be determined whether the cancellation of the unexercised water use right is an arbitrary deprivation or an expropriation of property in terms of the property clause of the *Constitution*.⁹⁶² It also needs to be determined whether compensation is payable for the cancellation of the unexercised water use right.

In this thesis the concept "water entitlement" refers to an entitlement to use water that has been granted by a statute. It is a *species* of the *genus* water use right. The *National Water Act*⁹⁶³ structured the concept "water entitlement" to have a certain meaning.⁹⁶⁴ Water use rights have traditionally been treated as limited real rights. The effect of section 32 on the right holder, whose unexercised water use right was extinguished by the operation of section 32, will be discussed in this chapter. It is possible that the holder of the extinguished old order water use right might have suffered damages as a result of the cancellation of the right. In this chapter it will be investigated whether such a right holder is

960 *National Water Act* 36 of 1998.

961 S 4 *National Water Act* 36 of 1998.

962 S 25 *Constitution* of 1996.

963 S 4(4) *National Water Act* 36 of 1998.

964 See para 4.4.2.2.

entitled to the payment of compensation in terms of the property clause of the *Constitution*.⁹⁶⁵ Before that can be determined, it needs to be established whether water use entitlements in terms of the Act are rights in property. It also needs to be established if there are conditions underlying the exercise of water use rights. More particularly, it needs to be established how the concepts "public trust"⁹⁶⁶ and "beneficial use"⁹⁶⁷ affect the right to use water.

4.1.1 Overview

Because of South Africa's history of colonialism⁹⁶⁸ there is a need to reform access to natural resources. This chapter explains that property does not exist in a vacuum. The law prescribes the background conditions in terms of which property is owned or used. The question is where the point of equilibrium is between private interests, like money invested in buying land with water use rights in terms of the previous water law order, and the public interest in achieving greater access for all to a natural resource such as water. The method used in this chapter will be to identify and explain the role of the concept "beneficial use" in the limitation of water use rights or water use entitlements. The objective is to assist the reader in understanding how the concept "beneficial use" assists one in reaching the point of equilibrium between private and public interests.

The concept "beneficial use" is more important than it was in the past. A major development brought about by the *National Water Act*⁹⁶⁹ is that the national government acting through the Minister of Water Affairs now is the custodian of the nation's water resources. The Minister acts as the public trustee of the water resources. The expression beneficial use,⁹⁷⁰ which often goes hand in hand with the public trust doctrine⁹⁷¹ in America, is found in several places in the Act. How do the concepts "public trusteeship" and "beneficial use" impact on the water use right? Another important development is that rights to use water and rights in land have been separated. What does it mean for the riparian owner's old order water use right? Unexercised old order water use rights have been cancelled by the definition of an existing lawful water use in section 32 of the *National Water Act*,⁹⁷² which is a manifestation of the concept "beneficial use", but are current water use entitlements also affected by the concept "beneficial use"?

965 S 25 *Constitution* of 1996.

966 See para 4.4.2.3.

967 See para 4.4.2.4.

968 See para 2.4 and 2.6.

969 See the *Preamble* and s 3(1) of the *National Water Act* 36 of 1998 and the discussion in para 4.4.2.3.

970 See para 4.4.2.4.

971 See para 5.4 for a discussion of the American public trust doctrine.

972 *National Water Act* 36 of 1998.

Some of the hypotheses that will be tested in this chapter were tested in chapter 2 to determine whether the concept "beneficial use" or a precursor of the concept played a role in legal systems that historically influenced South African water law. In the previous chapter the effect of the concept "beneficial use" on the obligation of the state to achieve access to sufficient water in terms of section 27(1) of the *Constitution* of 1996 was discussed. In this chapter the focus shifts to the effect of the concept "beneficial use" on the water use right and the water use right holder. The role of the concept "beneficial use" on South African water law reform will be determined by testing the following hypotheses: *Firstly*, the concept "beneficial use" is utilised to determine the existence of the right to use water. *Secondly*, when some private rights to use a water resource are in conflict with other private rights to use the water resource, beneficial use is the tool that is used to determine which rights are to be preferred to others. *Thirdly*, the public interest plays a larger role in the allocation of water use rights in South Africa than in the allocation of rights to other forms of property. In the next section the need for water law reform in the context of the property clause will be discussed.

4.1.2 Reform and the regulation of property

The tension between the protection of private property and the public interest in property law reform in South Africa is also played out in the sphere of reform of access to natural resources. The property clause sets the framework in terms of which *inter alia* water reform must take place. According to Du Plessis,⁹⁷³ an interpretation of section 25 rests on three premises. *Firstly*, all constitutional property clauses have an inherent tension between the protection of existing rights and the state's power to invade them. The land reform provisions of subsections (5) – (9) of the property clause⁹⁷⁴ add a context-specific dimension to the idea that the state has the power to infringe on existing property rights. *Secondly*, the 1996 *Constitution's* power to infringe on private property for land and natural resource reform developed in the context of the country's history. A proper interpretation of the property clause has to keep this in mind, whenever the state limits private property. *Thirdly*, despite the fact that the property clause is transformative, it cannot be said that the *Constitution* does not value and protect private property.⁹⁷⁵ The classic protection of private property exists next to the need to transform the distribution of property.⁹⁷⁶ These premises must be considered in every expropriation case.

973 Compensation for Expropriation 78.

974 S 25 *Constitution* of 1996.

975 In the case of *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 5 SA 387 (T) the court held that the State had to exercise its duties in terms of s 25(5) of the *Constitution*. The State had a duty to uphold the rule of law. (See also *Mike Campbell Ltd v The Republic of Zimbabwe* SADC Tribunal Case Number 2/2007.)

976 See para 6.5.4.6 for a view on the competing visions of the role of property in Australia.

The nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources⁹⁷⁷ is included in the concept *public interest* when the property clause is analysed. Property is not limited to land.⁹⁷⁸ This means that property may be regulated or expropriated in terms of legislation for reforms to bring about equitable access to all South Africa's natural resources, including water resources. The state must take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis.⁹⁷⁹ This is once again limited by the proviso "within its available resources". The subsection should arguably be interpreted in the same way as section 26(2) and 27(2).⁹⁸⁰ It is arguable that access to land is worth little without access to water and *vice versa*. Mostert⁹⁸¹ notes that land reform and redistribution are important enough to make regulation and expropriation of property possible. The same applies in the case of water law reform.

This is the case even if existing property relations are to a certain extent protected through the property guarantee. No provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform.⁹⁸² The reform must take place to redress the results of past racial discrimination. The proviso is that any departure from the provisions of section 25 must be in accordance with the provisions of section 36(1). A person or community dispossessed of property, which is not limited to land, after 19 June 1913 as a result of past racially discriminatory laws or practices is also entitled either to restitution of that property or to equitable redress⁹⁸³ in terms of an Act of Parliament. Du Plessis⁹⁸⁴ emphasises that section 25 is evidence of a compromise reached at multi-party negotiations.

The fact that property is not limited to land means that one needs a clear understanding of the constitutional property concept in South Africa to enable one to understand whether a water use right or water use entitlement is a property right or not. An understanding of the constitutional property concept will also enable one to understand the protection afforded by the property clause in the *Constitution*.⁹⁸⁵ The latter sets the boundaries within which water reform should take place. The constitutional property concept will be discussed next.

977 S 25(4)(a) *Constitution* of 1996.

978 S 25(4)(b) *Constitution* of 1996.

979 S 25(5) *Constitution* of 1996.

980 See para 3.7.1 for a discussion of the meaning of "the progressive realisation of the right..."

981 2000 HJL322.

982 S 25(8) *Constitution* of 1996.

983 S 25(7) *Constitution* of 1996.

984 *Compensation for Expropriation* 72. See Carter 1997 *Colo J Int'l Env'tl L & Pol'y* 361.

985 S 25 *Constitution* of 1996.

4.2 The constitutional property concept

The first fact that needs to be established in the case of the interpretation of the property clause in section 25 of the *Constitution*⁹⁸⁶ is that the object of enquiry is indeed "property". It is called the threshold question.⁹⁸⁷

4.2.1 Definition of property

Section 25 of the Constitution does not contain any express or positive guarantee of property. It does provide safeguards relating to the deprivation and expropriation of property. In the *First Certification*⁹⁸⁸ case the Constitutional Court held that section 25, despite the absence of express wording to that effect, protects the right to hold property. In the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*⁹⁸⁹ the Constitutional Court indicated that it was impossible to define property comprehensively for purposes of section 25. Ownership of corporeal movables and of land is at the heart of the constitutional property concept. However, it does not mean that constitutional property is limited to these categories. According to Van der Walt,⁹⁹⁰ a failure to mention a particular kind of property in the property clause does not mean that the class or kind of property is excluded. It is not usual to list all types of property included in the generic term 'property'.⁹⁹¹ If property is protected in general and no mention is made of any specific kind of property, it has to be inferred that any kind of property interest that is not excluded explicitly or by necessary implication is included. At least economically distinct and significant intangible property interests should be included under the generic protection of property in section 25.⁹⁹²

4.2.2 The shift from ownership to rights in property

Pienaar and Van der Schyff⁹⁹³ make the point that the definition of property is determined by various factors, including, but not limited to, religious, philosophical, historical,

986 Constitution of 1996.

987 See Van der Schyff *Constitutionality of the MPRDA* 65.

988 In *Ex Parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC)* para 72 the court held that the argument could not be upheld that, because s 25 did not contain an express recognition of the right to acquire and dispose of property, it failed to meet the prescription of *Constitutional Principle II*. There existed a variety of formulations of the right to property in the constitutions of different democracies. Van der Walt 1998 *SAJHR* 560 states that the property clause in most constitutions consists of sections dealing with the regulation of the use and exploitation of property (police power), the power of expropriation or compulsory acquisition (eminent domain), compensation, exclusions from the property guarantee in the case of emergency situations or in general, and provisions for land reform.

989 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC). FNB had leased two vehicles and sold another under an instalment sale agreement to two companies. In all cases FNB remained the owner of the vehicles. The Commissioner of SARS detained and thereby established a lien over the vehicles to obtain security for customs-related debts owed to it by the companies.

990 2004 *SAPL* 55.

991 2004 *SAPL* 55.

992 Van der Walt 2004 *SAPL* 56.

993 2007 *LEAD J* 188.

economic, political and social factors. They explain that although ownership used to be the most comprehensive real right in property and was regarded as the source of all limited real rights, it lost its hierarchical foothold.⁹⁹⁴ The emphasis gradually shifted from ownership to rights in property.⁹⁹⁵ In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*⁹⁹⁶ the Transvaal Provincial Division of the High Court held that owners of land no longer enjoy the absolute real rights known to earlier generations. An owner may not use his or her land in a way which may prejudice the community in which he or she lives because, to a degree, he or she holds the land in trust for future generations.⁹⁹⁷

Currie and De Waal⁹⁹⁸ explain that real rights other than ownership are also likely to be protected as property by the property clause. This line of thought is strengthened by the decision given in the case of *Ex Parte Optimal Property Solutions CC*⁹⁹⁹ where the court held that a purposive construction of 'property' means that it should be read to include any right to, or in property. The court found that registered praedial servituted rights are included in the 'property' concept in terms of section 25(1).¹⁰⁰⁰ The development of the constitutional property concept also suggests that the different entitlements of ownership, such as the right to transfer it to others may in certain circumstances individually be regarded as property for the purposes of section 25.¹⁰⁰¹ There would be little point in protecting the shell of ownership if the state could interfere as it wished with the entitlements of ownership.

This development is not as far reaching as it seems at first sight. Other rights besides ownership formed part of the pre-constitutional property concept. As society developed from an agricultural society to a consumerist society, the types of things it valued as property have changed. The *dephysicalisation* of property is the consequence of a change in the economic basis of society, as well as a result of technological advances.¹⁰⁰² As early as 1974 a right to use water was regarded as 'goods' that could be expropriated. It was implicitly accepted that the water use right was 'property'.¹⁰⁰³ Van der Schyff¹⁰⁰⁴ explains that in terms of the *Expropriation Act*¹⁰⁰⁵ a right to use water, patent rights and shares

994 2007 LEAD J 188.

995 Van der Schyff *Constitutionality of the MPRDA* 60. See Badenhorst "Property and the Bill of Rights" *Butterworths Bill of Rights Compendium* para 3FB-3 and Mostert and Badenhorst "Property and the Bill of Rights" *Bill of Rights Compendium* 3FB-21.

996 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T).

997 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) para 17-19. See para 3.1.4.

998 *Bill of Rights Handbook* 538-539.

999 *Ex Parte Optimal Property Solutions CC* 2003 2 SA 136 (C) para 19.

1000 *Ex Parte Optimal Property Solutions CC* 2003 2 SA 136 (C) para 19.

1001 Currie and De Waal *Bill of Rights Handbook* 538-539.

1002 *Constitutionality of the MPRDA* 60 fn 33.

1003 Pienaar and Van der Schyff 2007 LEAD J 188. See the discussion of *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) in para 4.3.7 and Van der Schyff *Constitutionality of the MPRDA* 161-162.

1004 *Constitutionality of the MPRDA* 59.

1005 *Expropriation Act* 63 of 1975.

could all be expropriated. The *Insolvency Act*¹⁰⁰⁶ included all contingent interests in property in its operation.

There is not yet a *numerus clausus* of types of property protected by the *Constitution*.¹⁰⁰⁷ Van der Walt¹⁰⁰⁸ states that a relatively accommodating notion of property is appropriate when interpreting section 25, to ensure that economically significant intangible property interests that might not be considered property in private law are included in its protection. According to Van der Walt,¹⁰⁰⁹ it may even be said that there is a general trend in Roman-Germanic legal systems for constitutional property to be more accommodating towards the protection of intangible property than private law.¹⁰¹⁰ Social, economic and legal processes exist by which incorporeal or intangible property becomes important for personal wealth and security and for social welfare, while the importance of traditional tangible property such as land declines.¹⁰¹¹ Currie and De Waal¹⁰¹² write that property, for the purposes of the property clause in the *Constitution*, should be seen as those resources that are generally taken to constitute a person's wealth and are recognised and protected by law. Currie and De Waal explain that a great deal of wealth consists of personal rights, which are rights to a performance.¹⁰¹³ For a right to constitute property, it must be a vested right that has accrued to the claimant in terms of the common law or a statute.¹⁰¹⁴

Soltau¹⁰¹⁵ notes that sources of wealth like shares, intellectual property and government largesse¹⁰¹⁶ have been recognised as property in other jurisdictions. It is thus clear that the constitutional property concept includes, but is not limited to ownership.¹⁰¹⁷ In the South African case of *Transkei Public Servants Association v Government of the Republic of South Africa*¹⁰¹⁸ the court held *obiter* that it would seem that the meaning of 'property' in section 28 of the (interim) *Constitution* may well be sufficiently wide to encompass a state

1006 *Insolvency Act* 24 of 1936.

1007 S 25 *Constitution* of 1996.

1008 Van der Walt 2004 *SAPL* 51-52.

1009 Van der Walt 2004 *SAPL* 52.

1010 In the case of *Kjartan Ásmundsson v Iceland* (application no 60669/00) the European Court of Human Rights (Second Section) held that the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected by the manner in which the fund is distributed.

1011 See also Arnold 2002 *Harv Envtl L Rev* 288.

1012 *Bill of Rights Handbook* 539.

1013 Currie and De Waal *Bill of Rights Handbook* 538-539.

1014 Currie and De Waal *Bill of Rights Handbook* 540. See *Lebowa Minerals Trust Beneficiaries Forum v President of the RSA* 2002 1 *BCLR* 23 (T). See Mostert and Badenhorst "Property and the Bill of Rights" *Bill of Rights Compendium* 3FB-29.

1015 1999 *Acta Jur* 239.

1016 Soltau writes that in Germany employment, pensions and welfare benefit claims against the state are recognised as constitutionally protected property for the purposes of Art 14 (Property Clause) of the *Basic Law*. The Federal Constitutional Court has held that the claimant must be able to show that he or she has contributed financially to the benefit. See Soltau 1999 *Acta Jur* 239 fn 62.

1017 *Constitutionality of the MPRDA* 63.

1018 *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 *BCLR* 1235 (Tk) 1246-1247. See Mostert's discussion of the case in 2000 *HJIL* 308-309.

housing subsidy. Examples of rights in property are limited real rights, renting and leasing and common law land use rights. The latter are often based on personal rights.¹⁰¹⁹

4.2.2.1 Are water use rights regarded as rights in property?

a) The *Water Act* of 1956

A rental contract was protected as a right in property for which compensation had to be paid in the case of expropriation in *Minister van Waterwese v Mostert*.¹⁰²⁰ The *Water Act*¹⁰²¹ of 1956 protected rights in respect of land as rights in property when allowing the Minister to expropriate a right in respect of land subject to compensation.¹⁰²² Water use rights were in the previous water law dispensation recognised by the courts as rights in property for which the rights holder had to be compensated when the water use rights were expropriated. In the 1988 case of *GJO Boerdery Ondernemings Edms (Bpk) v Bloemfontein Municipality (2)*¹⁰²³ it was held that when a municipality's servitude of storage on another's land gave the municipality the right to submerge the land, the municipality had to pay compensation for the expropriation of the water use rights.¹⁰²⁴ The court held that:¹⁰²⁵

One of the plaintiff's property rights included in his water rights is the right to abstract the water from the river to which he is entitled at any chosen point on his property, of course subject to the usual limitations on the use of public water, such as that he may not waste it.

Section 6 of the *Water Act*¹⁰²⁶ of 1956 stated that there was no right of property in public water. The court in *Ohrigstad Irrigation Board v Slabbert*¹⁰²⁷ explained that what section 6 prevents is the acquisition of the right of ownership or *dominium* in public water, but nothing prohibits the acquisition of a lesser right to such water. The nature of the right to

1019 See Gildenuys *Onteieningsreg* 1 and Mostert and Badenhorst "Property and the Bill of Rights" *Bill of Rights Compendium* 3FB-22 to 3FB-23. The case of *Jooste v Government of the South African Republic* 1897 4 OR 147 provides an example where a statutory right to use a natural resource, namely land, for grazing was granted protection by a constitutional property clause. Section 194 of the Constitution of the Zuid-Afrikaansche Republiek of 1858 guaranteed the ownership of land. The court applied the constitutional protection to the right to graze cattle. The source of the right was the town regulations of 1858. *Jooste v Government of the South African Republic* 1897 4 OR 149. See Badenhorst and Tempelhoff 1996 TSAR 405.

1020 *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 669 A. See para 5.5 on the concept "water use right" in the US and para 6.6 on the property concept and para 6.7 on the concept "water entitlement" in Australia.

1021 S 60(2)(a) *Water Act* 54 of 1956.

1022 *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 667 H - 668 A.

1023 *GJO Boerdery Ondernemings Edms (Bpk) v Bloemfontein Municipality (2)* 1988 Uys WLC 373 (A).

1024 In terms of s 60(1) of the *Water Act* 54 of 1956 the Minister of Water Affairs and Forestry was, subject to an obligation to pay compensation, allowed to expropriate (or take the right to use temporarily) any property if he *inter alia* considered it necessary for any government water work. 'Property' was defined to mean both movable and immovable property. 'Immovable property' included a real right in or over land. S 60(2)(a) *Water Act* 54 of 1956.

1025 *GJO Boerdery Ondernemings Edms (Bpk) v Bloemfontein Municipality (2)* 1988 Uys WLC 373 (A) 373.30.

1026 S 6(1) of the *Water Act* 54 of 1956 stated that there should be no right of property in public water. The control and use thereof should be regulated as provided in the Act. See Lazarus *Regulatory Framework for Groundwater* 12; Pienaar and Van der Schyff 2003 *Obiter* 135 and Thompson *Water Law* 80.

1027 *Ohrigstad Irrigation Board v Slabbert* 1965 Uys WLC 318 WC 318.18.

water was that it was a right of use.¹⁰²⁸ Uys¹⁰²⁹ is of the opinion that the term "ownership" of the water resource was intentionally abolished in the *Water Act*¹⁰³⁰ of 1956 in favour of a classification of water resources as being *res communes*. The legislator also did not use the term ownership with regard to private water. The sole and exclusive use and enjoyment of private water vested in the owner of the land where it was found.¹⁰³¹ This right of exclusive use was restricted.¹⁰³² Using Currie and De Waal's¹⁰³³ criterion water use rights were vested rights in property in terms of the *Water Act*.¹⁰³⁴ The reason is that a water use right is a vested right that has accrued to the claimant in terms of a statute. These rights were protected by the courts under the previous water law dispensation.¹⁰³⁵

b) The *National Water Act* of 1998

Despite the fact that old order water use rights have now been converted into statutory water use entitlements, they are still in certain circumstances protected as property rights by the payment of compensation for an infringement. Under the current water law dispensation compensation is payable for the refusal of a compulsory licence application for an existing lawful water use when there has been severe prejudice to the economic viability of an undertaking.¹⁰³⁶ The same is true where a licence is amended¹⁰³⁷ and the effect is severe prejudice to the economic viability of an undertaking.¹⁰³⁸ It is implicit in the phrase "economic viability of an undertaking" that the existing lawful water use or water use licence must be exercised at the time of the application for the compensation to be payable.

In addition to the implied limitation that the water use entitlement has to be exercised, it may be argued that the amount of the compensation that is payable is subject to the same limitations that restrict the entitlement to use the water. The payment of compensation is

1028 See *GJO Boerdery Ondernemings Edms (Bpk) v Bloemfontein Municipality* (2)1988 Uys WLC 373 (A) 373.17.

1029 *Structural analysis of water allocation* 303-304. Compare Pienaar and Van der Schyff 2003 *Obiter* 135.

1030 See s 5 and s 6 *Water Act* 54 of 1956.

1031 S 5(1) *Water Act* 54 of 1956. Thompson *Water Law* 89.

1032 Uys *Structural analysis of water allocation* 321. Compare Pienaar and Van der Schyff 2003 *Obiter* 135.

1033 *Bill of Rights Handbook* 540. See *Lebowa Minerals Trust Beneficiaries Forum v President of the RSA* 2002 1 BCLR 23 (T).

1034 *Water Act* 54 of 1956.

1035 See *GJO Boerdery Ondernemings Edms (Bpk) v Bloemfontein Municipality* (2)1988 Uys WLC 373 (A) 373.30.

1036 S 22(6) *National Water Act* 36 of 1998. See para 4.2.2.

1037 A responsible authority may in terms of S 49(1) of the *National Water Act* 36 of 1998 only review a licence at stipulated times. When the licence is reviewed the authority may amend any condition, except the period of the licence. (S 49(2) of the *National Water Act*.) This may be done *firstly*, to prevent the deterioration of the quality of the water resource; *secondly*, if there were insufficient water in the water resource to accommodate all authorised water uses after allowing for the Reserve and international obligations; or *thirdly* if it were necessary to accommodate changes in socio-economic circumstances, and it is in the public interest to meet those demands. Such an amendment may only be made if the conditions of other licences for similar water use from the same water resource in the same vicinity have also been amended in an equitable manner through a general review process. (S 49(3) of the *National Water Act*).

1038 S 49(4) *National Water Act* 36 of 1998. In terms of section 48(1) of the Act a licence issued pursuant to a compulsory licence application replaces any existing lawful water use entitlement of that person in respect of the water use in question. Section 49(4) of the Act states that where a licence had been granted, but there is an amendment of a licence condition on review that severely prejudices the economic viability of any undertaking in respect of which the licence was issued, the provisions of section 22(6) to 22(10) similarly apply. See para 4.2.2.

subject to section 22(7), which states that the amount of the compensation must be determined *inter alia* in accordance with section 25 (3) of the *Constitution* of 1996.¹⁰³⁹ Section 25(3)¹⁰⁴⁰ demands that the amount of the compensation for an expropriation of property must be just and equitable. Some would argue that the implication of the utilisation of section 25(3) of the *Constitution* is that regulatory compensation is paid in terms of section 22(7) of the *National Water Act*¹⁰⁴¹ for the refusal of an application for a licence for an existing lawful water use as though it was an expropriation of property.¹⁰⁴² Others would argue that the *National Water Act*¹⁰⁴³ is the law of general application required in terms of section 25(2) for an expropriation of property. The possibility of compensation for an amendment of a water use licence¹⁰⁴⁴ and the refusal of a licence for an existing lawful water use implies that a water use licence is a right in property. Furthermore, the fact that section 22(7) states that the amount of the compensation¹⁰⁴⁵ must be determined in accordance with section 25(3) of the *Constitution* means that the legislature has recognised that a water use entitlement is constitutional property.

The compensation that is payable should in terms of section 25(3)¹⁰⁴⁶ reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances. The first circumstance mentioned is the current use of the property.¹⁰⁴⁷ Some would argue that the legislator in the *National Water Act* in this manner drew attention to the importance of the current exercise of a beneficial use when the value of a water use entitlement is determined. Another circumstance that must be taken into account when the amount of the compensation is calculated is the history of the acquisition and use of the property.¹⁰⁴⁸ Some people may interpret the phrase "history of the use of the property" to be *inter alia* referring to the question whether a water use right was historically exercised beneficially. In terms of the *National Water Act*¹⁰⁴⁹ the amount of compensation must also be calculated by disregarding any reduction in the existing lawful water use made in order to provide for the Reserve. When water in the resource is

1039 S 22(7)(a) *National Water Act* 36 of 1998.

1040 25(3) *Constitution* of 1996:

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

1041 *National Water Act* 36 of 1998.

1042 The property is the entitlement to use water that exists in terms of section 4 of the *National Water Act* 36 of 1998.

1043 S 22(6) and s 22(7) *National Water Act* 36 of 1998.

1044 S 49(4) *National Water Act* 36 of 1998.

1045 S 22(7)(a) *National Water Act* 36 of 1998.

1046 25(3) *Constitution* of 1996. See the discussion of section 25(3) of the *Constitution* of 1996 in para 4.3.6.3.

1047 25(3)(a) *Constitution* of 1996.

1048 25(3)(b) *Constitution* of 1996.

1049 S 22(7)(b) *National Water Act* 36 of 1998.

allocated, provision should first be made to meet the requirements of the Reserve before water can be allocated for economic purposes.¹⁰⁵⁰ The explanation is that one's water use entitlement or property right to use the water resource can only exist as a right in property once there is sufficient water in the resource to be allocated for economic purposes.¹⁰⁵¹

The amount of compensation must also be calculated by disregarding any reduction in the existing lawful water use made in order to rectify an over-allocation of water use from the resource in question.¹⁰⁵² An over-allocation of water from the resource may for example refer to a water use right holder in a Government Water Control Area who had been granted more water in terms of a notice by the Minister than he had the capacity to use beneficially.¹⁰⁵³ The amount of compensation must also be calculated by disregarding any reduction in the existing lawful water use made in order to rectify an unfair or disproportionate water use.¹⁰⁵⁴ An unfair water use may *inter alia* refer to an unreasonable¹⁰⁵⁵ use of the water. A disproportionate water use may refer to a water use that is excessive or even wasteful when compared to other water users of the same water resource.¹⁰⁵⁶ It is possible that the objective of subsection 22(7)(b) of the *National Water Act*¹⁰⁵⁷ is merely to underline basic premises of the *National Water Act*. They are that a water use right to use water for economic purposes can only exist when there exists sufficient water in the resource to meet the requirements of the Reserve and to enable the water use entitlement to be exercised.¹⁰⁵⁸ Furthermore, once a water use entitlement is exercised, the use should be beneficial.¹⁰⁵⁹ It should not be unfair or disproportional. It will be argued later on that a principle that flows from the concepts "custodianship" or "public trusteeship" of the water resource is that the water use right or entitlement of the water use right holder exists in proportion to the rights of other water use right or water use entitlement holders.¹⁰⁶⁰ The principle of proportionality is an underlying condition of the water use right. A use which is disproportionate or unfair can never be beneficial.¹⁰⁶¹ The fact that reductions for the Reserve and disproportionate and unfair uses are disregarded when compensation for the refusal of a licence application for an existing lawful water use is calculated, is an indication that the water use right is limited by the basic principles of the *National Water Act*. The stipulations of section 22(7) draw the attention to the fact that

1050 See para 3.1.4 and para 3.8.3.

1051 See Soltau 1999 *Acta Jur* 252 and para 4.5.2 where water reform is discussed.

1052 S 22(7)(b) *National Water Act* 36 of 1998.

1053 See para 4.4.1.1.

1054 S 22(7)(b) *National Water Act* 36 of 1998.

1055 See the discussion of *Joubert v Benede-Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 14 in para 4.5.1 below.

1056 See para 4.4.2.3.

1057 S 22(7)(b) *National Water Act* 36 of 1998.

1058 See para 3.1.4.

1059 See para 4.4.2.4.

1060 See para 4.4.2.3 and para 8.3.4.8.

1061 See para 3.8.1 and para 4.4.2.4.

the exercise of both existing lawful water uses and water use licences as rights in property is subject to basic principles of the *National Water Act* like the Reserve and the concepts "public trusteeship" and "beneficial use" of the water resources. One can never be entitled to use water in the Reserve for economic purposes, or to use water for economic purposes disproportionately or unfairly. The reduction in the value of compensation for water use entitlements illustrates the principle that the extent of the water use entitlement is limited by the principles of the Act. One can never be entitled to compensation for something to which one does not have a right.

The question that will eventually be answered is the following: Did the legislator when defining an existing lawful water use as one that had been exercised at a certain time period in terms of section 32 of the *National Water Act*¹⁰⁶² bring about an arbitrary deprivation of property or an expropriation of property? In the section that follows it is explained that whereas the state has to pay compensation for an expropriation of property, the payment of compensation usually is not compulsory for a mere regulatory deprivation of property.

4.3 Deprivation or expropriation of property

4.3.1 Regulation of property

A government fulfils its functions by way of regulating affairs in a country. Gildenhuys and Grobler¹⁰⁶³ explain that when an authority exercises a statutory power not aimed at the compulsory acquisition of property, but to serve a public need¹⁰⁶⁴ (such as protecting public health) or a control measure¹⁰⁶⁵ (such as town planning),¹⁰⁶⁶ it does not amount to

1062 S 32 *National Water Act* 36 of 1998.

1063 "Expropriation" 1998 *LAWSA* para 136.

1064 In the case of *Cape Town Municipality v Abdulla* 1976 2 SA 370 (C) 373 the major concern of the council in exercising its powers under an enabling ordinance was a mitigation of health hazards associated with the enclosing of verandas on shops and business premises. The power of the then provincial council to enact the ordinance was found in the general power conferred upon the council by the 1961 *Constitution* Act 32 of 1961 to legislate in relation to municipal institutions.

1065 In *Feun v Pretoria City Council* 1949 1 SA 331 (T) 342 Justice Williamson held that it was untenable to hold that a by-law was *ultra vires* because a restriction of rights is in the nature of an expropriation that can only be brought about if due provision is made for compensation. Mere restriction on user is probably not expropriation. (See Gildenhuys *Onteieningsreg* 23). In *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163, 172 Chief Justice Innes held that the legislature is not presumed to intend an interference with private rights where no provision is made for compensation. An intention to interfere with private rights without compensation is, however, more easily inferred where statutory powers are conferred upon a public body acting in the public interest. In *Breedde River (Robertson) Irrigation Board v Brink* 1936 AD 359, 366 the court held that the powers conferred by the Act were expressed in general terms, and not localised, but could not be exercised without interfering with private rights. It is impossible to carry an irrigation canal for miles across the countryside without interfering with the natural flow (or drainage flow) of surface drainage water.

1066 Currie and De Waal *Bill of Rights Handbook* 553 explain that town planning regulations provide an example of a deprivation where rights are extinguished, but not acquired by the public authority. For this reason it is not an expropriation. Badenhorst "Property and the Bill of Rights" *Butterworths Bill of Rights Compendium* 3fB-22 writes that zoning legislation will be deemed confiscatory if it effectively deprives a property owner of the beneficial use of the property by precluding any reasonable use of it. See para 5.8.2 relating to values protected by regulatory takings jurisprudence in America. Gildenhuys *Onteieningsreg* 25-26 notes that some regulatory measures exist that provide for compensation. It might mean that they are not arbitrary and thus constitutional. See s 22(6) and 22(7) of the *National Water Act* 36 of 1998.

expropriation even though the owner or possessor may be deprived of property or negatively affected thereby.¹⁰⁶⁷ Van der Schyff¹⁰⁶⁸ stresses that although both regulation and expropriation may burden the holder of a right in property:

it is generally accepted that only expropriations are compensated unless the payment of compensation for losses caused by regulatory actions is specifically authorised by the legislation authorising the regulatory measure.

Bouillon¹⁰⁶⁹ points out that rights in property are not absolute and are limited by the common law doctrine *sic utere tuo, ut non alienum laedas*¹⁰⁷⁰ as well as by statutory stipulations requiring the reasonable use of property. Regulatory measures, however, have to be reasonable at all times.¹⁰⁷¹ The High Court in Natal in the case of *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town and Regional Planning Commission*¹⁰⁷² held that while *dominium* in property generally constituted the most comprehensive rights of use and control over property, *dominium* was never absolute. *In casu* the *Town Planning Ordinance* was one of many common-law and statutory limitations on an owner's right of use and control over property.¹⁰⁷³ The rationale underlying such limitations is that in case of conflict the individual's interest had to yield to the interests of the community. The developers' proprietary rights were limited by the provisions of the scheme. They were subject to the further qualification that those rights might be modified in terms of s 48(1).¹⁰⁷⁴ An alteration or modification to the developers' rights brought about under section 48(1) could not constitute an arbitrary deprivation of property in breach of section 25(1) of the *Constitution*. It also did not constitute expropriation as contemplated in section 25(2). Expropriation involved appropriation, but appropriation did not happen in the *Colonial Development* case.¹⁰⁷⁵

1067 See Badenhorst "Property and the Bill of Rights" *Butterworths Bill of Rights Compendium* 3FB-13 for a similar view. See also Mostert and Badenhorst "Property and the Bill of Rights" *Bill of Rights Compendium* 3FB-42.

1068 Van der Schyff *Constitutionality of the MPRDA* 159.

1069 Bouillon *Volhoubare Grondontwikkeling* 10.

1070 See *Retief v Louw* 4 Buch 165 (1874) 182 and *Tyler v Wilkinson* 4 Mason 397 (1827) on 474 and the discussion in para 2.6.1.1.

1071 Gildenhuys *Onteieningsreg* 24.

1072 *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town and Regional Planning Commission* 2002 2 SA 589 (N) 610I-611B.

1073 In America in the case of *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* 535 US 302, 306 (2002) the question was whether a moratorium on development during the process of devising a comprehensive land-use plan constituted a *per se* taking of property requiring compensation under the takings clause of the American Constitution. A temporary deprivation of an economically viable use of the property was not a taking because the moratorium was temporary in nature, and not a serious intrusion upon the landowners' rights (on 320-321; 329; 333). See Davenport and Bell 2005 *U Denv Water L Rev* 19-20.

1074 *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town and Regional Planning Commission* 2002 2 SA 589 (N) 611B-E.

1075 *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town and Regional Planning Commission* 2002 2 SA 589 (N) 611D-G.

In another relevant case, *Steinberg v South Peninsula Municipality*¹⁰⁷⁶ the applicant approached the Cape High Court for an order to the local authority to complete an expropriation process initiated by a road scheme adopted by the respondent. It was alleged that the scheme prevented the applicant from either selling or properly using her land.¹⁰⁷⁷ The Supreme Court of Appeal pointed out that section 25 of the Constitution draws a fundamental distinction between deprivation and expropriation. This distinction allows the state to regulate the use of property without incurring impossible compensation obligations.¹⁰⁷⁸

The fact that one person's water use may impact on the water use right of another necessitates the regulation of water use rights. Roux,¹⁰⁷⁹ who states that state "largesse"¹⁰⁸⁰ such as licences, permits and quotas are public law entitlements and are called "new property", warns that one should not impose on the state a duty to compensate individuals when state largesse is withdrawn.¹⁰⁸¹ This would lock the state into its policies and would be at the expense of the state's obligation to promote the public interest by adapting its policies to changing circumstances¹⁰⁸² by regulating the resource. Roux¹⁰⁸³ argues that where the law is a welfare law and a public law entitlement is at stake, a court is likely to give the state a wide margin to adjust the structure and method of enjoyment of the entitlement. The extent and the protection of the new property embodied in licences, for example water licences and quotas, for example fishing quotas, are becoming more relevant as natural resources are becoming scarcer. The *crux* of the matter is that natural resources, like water resources and fisheries, are under stress. Regulators have to continually adapt the size of entitlements to use the resources to the capacity of the resources to withstand exploitation. For this reason, use entitlements tend to be much regulated and limited in duration.

1076 *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

1077 See Van Der Walt 2004 *SAPR/PL* 77.

1078 *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 4.

1079 "Property" 46-15 in Woolman *et al Constitutional Law of South Africa*.

1080 See Soltau 1999 *Acta Jur* 239.

1081 See also para 5.9 on whether government has to pay compensation when water rights are "taken" in America.

1082 See para 6.5. In Australia a law is not a law for the acquisition of property where the law resolves or adjusts competing claims, obligations or property rights (*Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 23 and *Health Insurance Commission v Peverill* [1994] HCA 8 para 8.) The adjustment of competing claims for water would be a case in point. In *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 in para 25 the court held that the mere extinguishment of a right enjoyed by an owner in relation to his or her property does not amount to an acquisition of property in the absence of an acquisition of a benefit or an interest in property. In *Smith v ANL Ltd* [2000] HCA 58 para 45, common law rights, which had been unlimited in time, were replaced with a right to bring an action within six months of a certain date. The court held that the consequence was that the act brought about an acquisition of property. In *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 74 there was an acquisition where legislation that purported to withdraw the power to make an award for pain and suffering led to a direct financial gain to the government, as measured by the reduction of the liability to make payment to the respondents of a component for pain and suffering.

1083 "Property" 46-17 in Woolman *et al* (eds) *Constitutional Law of South Africa*.

In *Duncan v Minister of Environmental Affairs and Tourism*¹⁰⁸⁴ the court held that it was not reasonable for the appellant to expect to acquire a long term licence because he was granted a medium term fishing right.¹⁰⁸⁵ He knew that his medium term licence was granted for a specific period only, from 1 January 2002 until 31 December 2005.¹⁰⁸⁶ Limiting the duration of an entitlement by way of regulation impacts on the value of the entitlement as a right in property. However, it needs to be repeated that the distinction between deprivation and expropriation allows the state to regulate the use of property without incurring impossible compensation obligations.¹⁰⁸⁷

The manner in which the property clause distinguishes between deprivations and expropriations will be discussed in the next paragraph.

4.3.2 Hierarchical distinction

The question is how property protection is influenced by the need for transformation of access to natural resources in the society. The South African property clause¹⁰⁸⁸ states that no one may be deprived of property,¹⁰⁸⁹ except in terms of a law of general

1084 *Duncan v Minister of Environmental Affairs and Tourism* [2009] ZASCA 168. The applicant took the refusal of a fishing licence under section 18 of the *Marine Living Resources Act* 18 of 1998 under review. The chief director explained that his decision not to accept the boat as a suitable vessel must be understood against the precarious state of South Africa's line fish stocks. *Duncan v Minister of Environmental Affairs and Tourism* [2009] ZASCA 168 para 9. Most commercially exploited species of line fish were depleted to dangerously low levels. The legitimacy of the applicant's expectation was held not to be established on the facts. According to Justice Brand, the appellant could not have expected to acquire a long term licence without any reservation and regardless of the circumstances. *Duncan v Minister of Environmental Affairs and Tourism* [2009] ZASCA 168 para 17. He knew that the concept of a "medium term licence" was introduced as a precursor to long term licences and to provide the department with a window of observation and research. His subjective expectation must have been subject to reservations and conditions in the light of an uncertain future.

1085 *Duncan v Minister of Environmental Affairs and Tourism* [2009] ZASCA 168 para 19.

1086 In *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 2 the Australian High Court held that the right of commercial exploitation of a public resource has been turned into a "privilege" confined to commercial licensees. It is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is beginning to recognise that to fail to protect such resources may destroy them. In *Brian Clarence Bienke, Irene Anne Bienke and Brian Trevor Bienke v the Minister of Primary Industries and Energy; Australian Fisheries Management Authority and Commonwealth of Australia* [1996] FCA 1220 para 58 the court held that the compulsory surrender of units in a fishery programme did not result in the government, or anybody else, acquiring an identifiable proprietary interest or a direct financial benefit commensurate with any interest that was extinguished in the fishery. The right is not a common law right, but rather a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation (*Bienke* case para 54).

1087 *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 4.

1088 S 25 of the *Constitution*.

1089 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf 1-3 explains that before *FNB* there were at least six instances in the inquiry into the property clause, where the interests of the public in a just and socially beneficial distribution of property rights and the right of the individual to the protection of his property interests, are weighed. 1) When the definition of what is constitutionally protected property is determined. 2) When deprivation is defined. It may be defined strictly, with the result that certain types of regulation are not covered by the concept. This would mean that the interests of the state are favoured above those of the individual. On the other hand, if deprivation is defined generously, other parts of the property clause will have to resolve the competition between public and private interests. Courts might tend to be casuistic. 3) When the test for arbitrary deprivation is applied. 4) When deprivation and appropriation are distinguished from one another. A categorical approach would be formal and one where the state transfers property to itself or another. A less categorical approach might include cases where a test is developed to determine whether the impact of the regulation was so severe that it had to be justified in terms of s 25(2)(a). 5) When the amount and time and manner of compensation have to be determined. 6) When competing claims are resolved by the general limitations clause in s 36 of the *Constitution*. [In *FNB* there was an extra stage because the general limitations clause is used with regard to deprivations in s 25(1) and with regard to expropriations in regard to s 25(2) and 25(3) (Roux 4).]

application.¹⁰⁹⁰ No law may permit arbitrary deprivation of property. An important clarification of section 25 took place when the court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,¹⁰⁹¹ hereafter referred to as the *FNB* case, explained that section 25(1) deals with all “property” and all deprivations, including expropriations. If the deprivation infringes section 25(1) and cannot be justified under section 36 that is the end of the case. The provision is unconstitutional. Van der Walt¹⁰⁹² notes that the Constitutional Court in the earlier case of *Harksen v Lane*¹⁰⁹³ employed a conceptual distinction between deprivation and expropriation¹⁰⁹⁴ in terms of which the two were portrayed as discrete categories that can be distinguished clearly on conceptual grounds. In the later *FNB*¹⁰⁹⁵ case, however, the court used a hierarchical distinction, where a larger category, deprivation, included a smaller category, expropriation. This approach is contrary to the portrayal of two discrete categories in *Harksen v Lane*.¹⁰⁹⁶ The application of the *FNB* case is limited in the sense that the court did not deal with the implementation of socio-economic legislative policies, nor did it deal with mere differentiation in the context of equality jurisprudence.¹⁰⁹⁷ It did not deal with any policy to bring about reform.¹⁰⁹⁸ The court in the *FNB*¹⁰⁹⁹ case held that, when considering the purpose and content of the property clause, one should move away from a static, typically private-law conceptualist view of the *Constitution* as a guarantee of the status quo to a dynamic, typically public-law view of the *Constitution* as an instrument for social change and transformation under the auspices of entrenched constitutional values. In the next section the concepts “arbitrary deprivation” and “expropriation” in the property clause of the *Constitution*¹¹⁰⁰ are discussed before the concept “constructive expropriation” is discussed.

1090 S 25(1) of the *Constitution* reads that no one may be deprived of property except in terms of law of general application. It continues that no law may permit arbitrary deprivation of property.

1091 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 58. See Van der Walt 2004 *SAPL* 62-63 for an interpretation of the expression arbitration prior to *FNB*. See Roux “Property” 46-29.

1092 2004 *SAPL* 77.

1093 *Harksen v Lane* 1998 1 SA 300 (CC).

1094 Gildenhuis and Grobler “Expropriation” in 1998 *LAWSA* para 134 explain that the aim of expropriation is the acquisition of property in the public interest or for a public purpose. The act of expropriation entails the *bona fide* obtaining of the *dominium* in the property when the provisions of the authorising legislation are complied with. See Gildenhuis *Oniteieningsreg* 8.

1095 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 57.

1096 *Harksen v Lane* 1998 1 SA 300 (CC).

1097 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 70. Rautenbach 2002 *TSAR* 817-818 doubts the existence of legislation that does not reflect legislative policy.

1098 It did not deal with a policy to bring about water reform.

1099 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 52. Van der Walt 2004 *SAPL* 69 states that the decision leaves room for the application of varying levels of scrutiny in the arbitrary deprivation test. This might mean that a more accommodating level of scrutiny could apply to (for example) land reform cases.

1100 *Constitution* of 1996.

4.3.3 “Deprivation”

In the *FNB* case¹¹⁰¹ the court held that dispossessing an owner of all rights, use and benefit to and of (corporeal) movable goods is a prime example of deprivation in its grammatical and contextual sense. It is an extreme example of a deprivation. There also exist lesser limitations that still amount to a deprivation. In the *Mkontwana*¹¹⁰² case the court stated that at the very least a substantial limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society¹¹⁰³ would amount to deprivation.¹¹⁰⁴ The court relied on the *FNB* case that stated that the taking away of property is not required for a deprivation of property to occur. The state merely interfering with property rights does not amount to an expropriation. The court in the *Mkontwana*¹¹⁰⁵ case held that whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not a deprivation of property that is prohibited by the *Constitution*.¹¹⁰⁶ Section 25(1) of the *Constitution*¹¹⁰⁷ states that no law may permit arbitrary deprivation of property. The arbitrary deprivation is prohibited, and it is thus necessary to establish what is meant by the term "arbitrary".

4.3.4 “Arbitrary”

The court in the *FNB* case¹¹⁰⁸ explained that "arbitrary" in terms of section 25 was not limited to non-rational deprivations in the sense of there being no rational connection between means and ends.¹¹⁰⁹ It referred to a wider concept and a broader controlling principle that was more demanding than an enquiry into mere rationality.¹¹¹⁰ It was a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36 of the *Constitution*.¹¹¹¹ The standard set in section

1101 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 61.

1102 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC). The *Mkontwana* case concerned the constitutional validity of laws that burdened owners of property in relation to consumption charges for water and electricity supplied to people (like tenants) occupying the properties who were not the owners themselves.

1103 To see what restrictions in an open and democratic society would entail, see chapters 5, 6 and 7 on respectively US and Australian water and property law.

1104 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 32. See Van der Walt 2005 SALJ 80; Currie and De Waal *Bill of Rights Handbook* 541; Freedman 2006 TSAR 93. Plasket and Euijen 2005 *Annu Surv SA L* 402.

1105 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 32. The Constitutional Court reiterated this *dictum* in *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) para 39.

1106 S 25(1) *Constitution of 1996*.

1107 S 25(1) *Constitution of 1996*.

1108 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 CC.

1109 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 65.

1110 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf 7 states that the grounds for one or other level of review should be ascertainable in advance. *FNB* does not provide this degree of certainty.

1111 See para 4.3.5.

36¹¹¹² is *reasonableness* and *justifiability*. The standard set in section 25 is *arbitrariness*.¹¹¹³

In the *FNB*¹¹¹⁴ case the court held that a deprivation of property is in the first instance arbitrary in terms of section 25(1) when the law referred to in the subsection is procedurally unfair.¹¹¹⁵ Currie and De Waal¹¹¹⁶ explain that procedural fairness means that the state should exercise its powers in terms of rules and principles set out in advance. The exercise of power is arbitrary where it is unpredictable. This coincides with the administrative law concept of "fairness". It is their opinion that administrative actions that effect a procedurally unfair deprivation of property should be adjudicated under the *Promotion of Administrative Justice Act*.¹¹¹⁷ Roux¹¹¹⁸ is of the opinion that, while the state has a wide margin to adjust the structure and method of enjoyment of new property, adjustments should be made in a procedurally fair manner.¹¹¹⁹ Currie and De Waal¹¹²⁰ explain that procedural fairness means that the state should exercise its powers in terms of clear rules and principles set out in advance. The exercise of power is arbitrary where it does not follow rules or precedents, where it is unpredictable. Claims based on public law entitlements are typically given protection against procedurally unfair deprivation, and not against expropriation.¹¹²¹ These entitlements are by their nature contingent on mutable government policies and programmes.¹¹²² Roux¹¹²³ states that the only reason for excluding claims based on public law entitlements would be to eliminate cases where the interest has not yet taken the form of a vested right.¹¹²⁴ This is especially true where compensation, rather than procedural due process, is claimed.¹¹²⁵

1112 Mostert 2003 SAJHR 584 states that s 7(3) of the Constitution excludes the possibility that s 36 could not be applicable to s 25. It reads that the rights in the *Bill of Rights* are subject to the limitations contained or referred to in s 36, or elsewhere in the bill.

1113 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 65.

1114 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100. See Du Plessis *Compensation for Expropriation* 83.

1115 Currie and De Waal *Bill of Rights Handbook* 542 explains that the protection against deprivations of property that are not in accordance with due process should be understood in a wider substantive sense, as well as in a narrower procedural sense. Currie and De Waal *Bill of Rights Handbook* 544.

1116 *Bill of Rights Handbook* 544.

1117 *Promotion of Administrative Justice Act* 3 of 2000. See para 4.5.2.1 and para 4.6.3.

1118 Roux "Property" 46-17.

1119 See para 4.5.2.1 on the issue of retrospectivity.

1120 *Bill of Rights Handbook* 544.

1121 Roux "Property" 46-16. See para 4.5.2.1.

1122 See para 6.6 on rights to natural resources in Australia and para 6.9.7 on Commonwealth water legislation dealing with the Murray Darling river basin in Australia. In particular see *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; *Harper v Minister for Sea Fisheries* [1989] HCA 47; *Brian Clarence Bienke, Irene Anne Bienke and Brian Trevor Bienke v the Minister of Primary Industries and Energy; Australian Fisheries Management Authority and Commonwealth of Australia* [1996] FCA 1220; *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38; *South Australian River Fishery Assoc & Warrick v State of South Australia* [2003] SASC 174 and s 254 of the *Water Act* 2007, which deals with the Murray Darling river basin in Australia.

1123 Roux "Property" 46-17.

1124 See also Currie and De Waal *Bill of Rights Handbook* 540.

1125 Roux "Property" 46-17.

In the *FNB*¹¹²⁶ case the court held in the second instance that a deprivation of property is “arbitrary” when the law referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question. The following are taken into account when “sufficient reason” is established: the relationship between the deprivation and the purpose of the law; the nature of the property; the extent of the deprivation; the complexity of relationships; the objective of the regulation in the light of the effect of the deprivation; whether the standard should be rationality or proportionality and the facts of a case. These factors will be discussed in more detail below.

4.3.4.1 “Means and ends”

Sufficient reason is to be established by evaluating the relationship between means employed, namely the deprivation in question, and ends¹¹²⁷ sought to be achieved, namely the purpose of the law in question. The court in the *FNB*¹¹²⁸ case held that a comparative perspective demonstrates two important principles. *Firstly*, in some circumstances it is permissible for legislation to deprive persons of property without payment of compensation in the broader public interest. *Secondly*, there has to be an appropriate relationship between means and ends, between the sacrifice the individual was asked to make and the public purpose intended to be served, for such deprivation to be valid.¹¹²⁹ In the *Mkontwana*¹¹³⁰ case the court held that the greater the extent of the deprivation, the more compelling the purpose and the closer the relationship between means and ends had to be. The court held that there are three interrelated steps to the enquiry whether legislation was arbitrary for want of the appropriate relationship between means and ends.¹¹³¹

- (i) the nature of the property concerned and the extent¹¹³² of the deprivation.
- (ii) the nature of the means-ends relationship that is required in the light of the nature and extent of the deprivation;¹¹³³ and

1126 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100.

1127 In the *FNB* case the facts were that the end sought by the deprivation was to exact payment of a customs debt. This was a legitimate and important legislative purpose, but *in casu* the section cast the net too wide. The means sanctioned the total deprivation of a person's property under circumstances where (a) it had no connection with the transaction giving rise to the customs debt; (b) where the property also had no connection with the customs debt; and (c) where it had not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to his detriment in relation to the incurring of the customs debt.

1128 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 97.

1129 Van der Walt 2004 SAPL 66 notes that the Court found support for an approach based on a concept of “proportionality” when dealing with deprivation of property.

1130 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 34 - para 35.

1131 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 para 43.

1132 Du Plessis *Compensation for Expropriation* 84 notes that the Court in *Mkontwana* reworked the definition of deprivations as defined in *FNB* and focussed on the extent of the interference (and not on any interference per se).

1133 See chapters 5 and 6.

- (iii) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation.¹¹³⁴

4.3.4.2 Nature of the property.

In the *FNB* case¹¹³⁵ the court held that when the property is ownership of land or a corporeal moveable, a more compelling purpose will have to be established for the depriving law to constitute sufficient reason for the deprivation than when the property is something different and the property right something less extensive. The court stressed that in the specific circumstances of the case the judgment was not concerned with incorporeal property.

4.3.4.3 Extent of the deprivation

The court in the *FNB* case¹¹³⁶ explained that when a deprivation embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when it embraces only some incidents of ownership and only partially.¹¹³⁷ In the *Mkontwana*¹¹³⁸ case the court held that the nature of the relationship between means and ends that must exist to satisfy the section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.¹¹³⁹ If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary.¹¹⁴⁰ This would likely not be applicable in the case of water reform, as there would never be a relationship between the person with the unexercised water uses and the beneficiaries of water reform.

In the *Mkontwana*¹¹⁴¹ case a uniquely South African problem formed part of the background of the case: a tenant who did not pay for municipal services where a culture of non-payment of municipal services existed. The problem of non-payment of services

1134 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 44.

1135 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100.

1136 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100.

1137 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf saw this as an indication that in future constitutional property cases all things will be considered when determining the seriousness of the deprivation and the impact on the claimant. Botha 2004 SAJHR 278 regards the concept of "rights as graded categories" which are strongest at the core and get progressively weaker as one moves to the periphery, as a combination of a flexible, context sensitive approach with a measure of finality.

1138 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 35.

1139 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 35.

1140 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 34.

1141 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 35.

also formed part of the background of *Lindiwe Mazibuko v City of Johannesburg*¹¹⁴² where residents did not pay for water in the past in breach of their obligations. In the *Mkontwana*¹¹⁴³ case the court held that section 118(1) does not permit the deprivation of property where there is no connection between the property and the consumption charges. The consumption of water and electricity by the occupier of a property in a town was integral to the use and enjoyment of the affected property and to its inherent worth.¹¹⁴⁴ It can be argued that the use of the water for irrigation is also integral to the use and enjoyment of the affected property and to its inherent worth. However, in the case of water for irrigation, water entitlement holders know that they have to use their water allocations or risk that the water would flow away and somebody else would use the water. Like legislation to stabilise the municipal payment system, legislation to give greater access to sufficient water is in accordance with a laudable governmental purpose and will likely be respected by the courts. According to Roux,¹¹⁴⁵ the law is unlikely to be found unconstitutional where only some rights in the property are affected. An example would be when only unexercised use rights in public water are forfeited, and the law does not impose a disproportionate burden on those affected when compared to the purpose of the law, for example reform of access to natural resources.

4.3.4.4 Complexity of relationships

Certain resources, like water and other environmental resources, are utilised in conjunction with other users. In modern parlance there exists a web of interests.¹¹⁴⁶ Similarly there exists a web of interests when municipal services are delivered to a property. It was mentioned above that the fact that services are delivered enhances the value of the property.¹¹⁴⁷ This is in accordance with a view that land is a part of the community rather than merely a combination of isolated, individualised areas of land.¹¹⁴⁸ Much of the value of the property that property owners enjoy, is the product of public investment in infrastructure like transportation and utilities, rather than the product of individual enterprise. The criterion of a complexity of relationships used by the court in *Mkontwana v Nelson Mandela Metropolitan Municipality*¹¹⁴⁹ provides an excellent example of a web of interests. The court held that the relevant legislative provision required the owner of the property to bear the risk of non-payment of consumption charges by non-

1142 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 136 and 137.

1143 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 39.

1144 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 39-40.

1145 Roux "Property" 46-25.

1146 See Arnold's article on property as a web of interests in 2002 *Harv Envtl L Rev* 334-335; Zellmer and Harder 2008 *Ala L Rev* 684-685.

1147 See para 4.3.4.3.

1148 See Sax 1983 *Wash L Rev* 494 and para 5.8. See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 41.

1149 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 51.

owner occupiers. There would be sufficient reason for the deprivation if the government purpose were both legitimate and compelling.¹¹⁵⁰ There would also be sufficient reason for the deprivation if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment. The circumstance in South Africa, where the non-payment of service charges threatens to derail the realisation of socio-economic rights,¹¹⁵¹ and as a result social stability, justifies the court taking into account a complexity of relationships. This is so even if an innocent party like the landlord would have to bear the risk of non-payment. The landlord also has an interest in social stability that can only be promoted by the tenant paying service charges. In the same way water use right holders can benefit from the social stability promoted by the realisation of the right of access to sufficient water.

4.3.4.5 Objective v effect

The objective of the regulation seen in the light of the effect of the deprivation is important. In the case of *Mkontwana* the constitutional duty on municipalities to provide water and electricity to its residents weighed heavily with the court, as should the duty to provide access to sufficient water in section 27(1) of the *Constitution*. In the same way that the court in *Mkontwana*¹¹⁵² has held that the purpose is important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions, a court might find the purpose of the *National Water Act*¹¹⁵³ to be similarly laudable.

Van der Walt¹¹⁵⁴ states that in the *Mkontwana* case there was a less rigorous analysis of the relationship between purpose, property and owner than in the *FNB* case.¹¹⁵⁵ Freedman¹¹⁵⁶ explains that the test which the court applied in order to determine whether there was a sufficient reason for the deprivation was one of reasonableness. This test does not indicate the level at which the deprivation should be scrutinised. It does not consist of a single test. It encompasses a wide range of tests, which include the test for rationality and the test for proportionality. It is difficult to say what the court's level of scrutiny would be in the case of water. Because the scope of the deprivation did not

1150 Van der Walt 2005 SALJ 83 is of the opinion that the purpose in *Mkontwana* might have been legitimate, but it was not compelling.

1151 See para 3.7.

1152 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 52. Van der Walt 2005 SALJ 83 states that this fact is never weighed up against the fact that the public only indirectly benefits from this, while the whole burden for the benefit is placed on property owners and tenants, but no burden is placed on municipalities.

1153 *National Water Act* 36 of 1998.

1154 2005 SALJ 83.

1155 See Du Plessis *Compensation for Expropriation* 89.

1156 2006 TSAR 97-98.

clearly indicate that a relatively low level of scrutiny should be adopted, Freedman¹¹⁵⁷ is of the opinion that the court should have taken other factors into account. The court might have adopted a(n unarticulated) deferential attitude towards fiscal provisions affecting local government. The court also significantly downplayed the complex procedural and substantive requirements which have to be satisfied before a land owner may obtain an eviction order. It is quite possible that a court may adopt a deferential attitude towards the difficulty the government experiences in realising the right of access to sufficient water in section 27(1) of the *Constitution*.¹¹⁵⁸

4.3.4.6 Rationality or proportionality

Depending on the interplay between means and ends, the nature of the property and the extent of the deprivation, there may be circumstances when sufficient reason is established by no more than a mere rational relationship between means and ends.¹¹⁵⁹ In others circumstances this might only be established by a proportionality evaluation closer to that required by s 36(1)¹¹⁶⁰ of the *Constitution*.¹¹⁶¹

4.3.4.7 The facts of a case

Whether there is sufficient reason to warrant the deprivation, is to be decided on all the facts of each case.¹¹⁶² It is difficult to predict when a court would use which method, but water being so important, mere rationality would probably be too light a test and the test in section 36(1)¹¹⁶³ would probably be too heavy a burden for the state.

The above are some of the factors that a court would typically look into when establishing whether a deprivation of property is “arbitrary” when the law referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question.¹¹⁶⁴ Although the court in the *FNB*¹¹⁶⁵ case held that the standard set in section 25, the property clause, is *arbitrariness* and the standard set in section 36, the limitations clause, is *reasonableness* and *justifiability*, the factors to determine whether the standards have been met often overlap. The limitations clause will be discussed next.

1157 2006 TSAR 97-98.

1158 Hopkins and Hofmeyr 2003 SALJ 58 believe that the factors used to determine whether there was sufficient reason for the deprivation emphasises the effect of the deprivation on the individual. There is scope for finding that deprivations which go too far, empty the right of all content and impose an extraordinary burden on the individual, are regulatory takings which should be compensated. See para 5.8 and 5.9.

1159 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS 2002 4 SA 768 (CC)* para 100.

1160 See para 4.3.5.

1161 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf 7 regards the test as giving a discretion to the courts to adjust the level of review when important social objectives like land and other reform are at stake.

1162 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS 2002 4 SA 768 (CC)* para 100.

1163 See para 4.3.5.

1164 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS 2002 4 SA 768 (CC)* para 100.

1165 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS 2002 4 SA 768 (CC)* para 65.

4.3.5 Limitations clause

In addition to the prohibition on the arbitrary deprivation of property in section 25(1) of the *Constitution*¹¹⁶⁶ protecting the right to property, section 36(1) of the *Constitution* states that the rights in the *Bill of Rights* may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Any possible arbitrary deprivation of property by the *National Water Act* will thus always have to be measured against section 36(1) of the *Constitution*.¹¹⁶⁷ The court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,¹¹⁶⁸ explained that if a deprivation infringes section 25(1) and cannot be justified under section 36, the provision is unconstitutional.¹¹⁶⁹ As explained above, the standard set in section 36¹¹⁷⁰ is *reasonableness* and *justifiability*, but the standard set in section 25 is *arbitrariness*.¹¹⁷¹ Rautenbach¹¹⁷² explains that the factors when arbitrariness is to be determined, overlap with the factors applied in terms of section 36(1)(e) because of compromises made during negotiations on the wording of the right to property.

Freedman¹¹⁷³ points out that it is difficult to envision how a deprivation, which the court has already found is unreasonable and therefore arbitrary in terms of section 25, can subsequently be saved on the grounds that it is "reasonable and justifiable in an open and democratic society" in terms of section 36 of the *Constitution*.¹¹⁷⁴ The devastating effect a complete deprivation of water might have on a property owner or a business person will likely mean that a mere rational relationship between means and ends would not establish *reasonableness* and *justifiability*. The requirement that the limitation should be reasonable and justifiable in an open and democratic society necessitates a comparative legal study to determine what other open and democratic societies do when limiting water use rights as property rights.¹¹⁷⁵

There may theoretically be cases where a deprivation is arbitrary because there was a retrospective limitation of a right and thus no due process of law. However, when the standard in section 36 of *reasonableness* and *justifiability* is applied, it may be proven that

1166 *Constitution* of 1996.

1167 *Constitution* of 1996.

1168 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 58. See Van der Walt 2004 SAPL 62-63 for an interpretation of the expression arbitrary prior to *FNB*. See Roux "Property" 46-29.

1169 See para 4.3.2.

1170 See para 4.3.4.

1171 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 65.

1172 Rautenbach 2002 TSAR 822. See Roux "Property" 46-27.

1173 2006 TSAR 99.

1174 *Constitution* of 1996. See also Iles 2007 SAJHR 71 and 90.

1175 See chapters 5, 6 and 7.

the retrospective limitation of the right to uses that were exercised in the past is reasonable and justifiable because there currently only exists sufficient quantities of the resource to back up those rights that had been exercised. Although the legislation was retrospective, the retrospective application of the section was reasonable and justifiable.

4.3.6 Expropriation

4.3.6.1 Background

Cornelius van Bijndershoek,¹¹⁷⁶ writer on Roman-Dutch law, stated that the right of eminent domain includes the power to declare war, make peace, sign treaties, levy taxes and duties and appropriate property.¹¹⁷⁷ In his day dispute already existed concerning the definition of the control of this authority of the sovereign. According to Van Bijndershoek,¹¹⁷⁸ the ideal ruler was concerned for the public welfare, and could give reason for his decisions and commands. The just ruler limits his own authority, and does not fear to hear the judgment of others regarding its limitations.¹¹⁷⁹ The right of eminent domain must be exercised with “prudence not rashly abused”. Van Bijndershoek¹¹⁸⁰ explains that it is:

...an abuse of the right to use compulsion under it without adequate grounds or to take more than public necessity or utility absolutely requires.

A ruler, who appropriates upon adequate grounds, does it with the least possible harm to his subjects and upon payment of compensation. Adequate grounds refer to necessity or public utility.¹¹⁸¹ According to Van der Schyff¹¹⁸² the justification for state interference in property is contained in the principle that every member of the community “must contribute to the obligations of the community according to his means”. When an individual's contribution is excessive, he must be compensated.¹¹⁸³ Gildenhuys¹¹⁸⁴ calls this the principle of proportionality. In this case the individual's contribution must be

1176 Van Bijndershoek was a Dutch jurist who lived from 1673-1743. (Wikipedia http://nl.wikipedia.org/wiki/Cornelis_van_Bijndershoek date of use 17 October 2008).

1177 Van Bijndershoek *Questions of Public Law II XV*. Translated into English by Tenney Frank (1929) <http://www.lonang.com/exlibris/byndershoek/index.html>. Permission to use granted by the Lonang Institute.

1178 Van Bijndershoek *Questions of Public Law II XV*. Translated into English by Tenney Frank (1929) <http://www.lonang.com/exlibris/byndershoek/index.html>.

1179 Van Bijndershoek *Questions of Public Law II XV*. Translated into English by Tenney Frank (1929) <http://www.lonang.com/exlibris/byndershoek/index.html>.

1180 *Questions of Public Law II XV*. Translated into English by Tenney Frank (1929) <http://www.lonang.com/exlibris/byndershoek/index.html>.

1181 Van Bijndershoek *Questions of Public Law II XV*. Translated into English by Tenney Frank (1929) <http://www.lonang.com/exlibris/byndershoek/index.html>. Walker *Lord De Villiers* 95 writes that Lord De Villiers, the late South African Chief Justice at the Cape and first Chief Justice of the Union of South Africa, apparently had an understanding of the administration of justice that resembled that of Van Bijndershoek.

1182 *Constitutionality of the MPRDA* 158.

1183 See *Armstrong v United States* 364 US 40 (1960) at 49; para 4.3.6; para 4.6.4; para 5.8 and para 5.9.

1184 *Onteieningsreg* 3.

proportional to that of other members of society. In the case of section 25(1) the focus of proportionality is generally to ensure that the regulation is not out of proportion to the clause empowering the regulation.

4.3.6.2 Expropriation in terms of the property clause

The law directing expropriation of property in South Africa is the *Constitution*¹¹⁸⁵ and the *Expropriation Act*.¹¹⁸⁶ The word 'expropriate'¹¹⁸⁷ is used in South African law to describe the process whereby a public authority takes property for a public purpose - usually against payment of compensation.¹¹⁸⁸ As explained above in para 4.3.2, the Constitutional Court in the *FNB*¹¹⁸⁹ case considered the category of deprivation to include expropriation. The result is that only once a deprivation passes scrutiny under section 25(1), because it does not infringe section 25(1) or, if it does, it is a justified limitation, need one ask whether it amounts to an expropriation.¹¹⁹⁰ Currie and De Waal¹¹⁹¹ also regard expropriation as a subset of deprivation. Expropriations are to be compensated.¹¹⁹²

4.3.6.3 Section 25(2)(a) and (b) of the *Constitution*

An expropriation must be in terms of a law of general application, for a public purpose or in the public interest and subject to compensation.¹¹⁹³ Van der Walt¹¹⁹⁴ identified the following characteristics of an expropriation: *Firstly*, expropriation takes place by operation of law. It is a unilateral act where the cooperation of the owner is not needed. *Secondly*, it always involves a loss of property. The loss is usually total and permanent. *Thirdly*, the property is usually acquired by or on behalf of the state, although the property might be acquired by a private person. *Fourthly*, the compulsory loss and resultant acquisition or destruction of the property is brought about for a public purpose or in the public interest. *Fifthly*, the loss of property for a public purpose must be accompanied by compensation.

1185 S 25(2) of the *Constitution* of 1996.

1186 *Expropriation Act* 63 of 1975. See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC). See discussion in Couzens "Expropriation" 2009 *LAWSA Supp* para 2.

1187 The *Expropriation Act* 63 of 1975 states in s 2(1) that
Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.

1188 *Harksen v Lane* 1998 (1) SA 300 (CC) 315 para 32. In *Harksen*, the Constitutional Court concluded that s 21 of the *Insolvency Act* 24 of 1936 did not have the purpose or the effect of a compulsory acquisition or expropriation of the property of the solvent spouse, because the property was not appropriated or acquired by the state, and the solvent spouse was not divested permanently of the property. See Van Der Walt 2004 *SAPR/PL* 74. Hopkins and Hofmeyr 2003 *SALJ* 51 state that the fact that the trustee did not derive any benefit from the temporary vesting of the property in the insolvent estate, is a better reason to argue that there was no expropriation. Mostert 2000 *HJIL* 319 explains that the legal question in the *Harksen* case should have been whether the temporary and preventive vesting of the spouse's property could be regarded as a valid regulation (deprivation) of the rights in that property. It should not have been whether such a temporary vesting amounted to an expropriation.

1189 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 57.

1190 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 59.

1191 *Bill of Rights Handbook* 551.

1192 Van der Schyff *Constitutionality of the MPRDA* 155.

1193 S 25(2)(a) and s 25(2)(b) *Constitution* of 1996.

1194 *Constitutional Property Law* 188-189.

Finally, expropriation is a lawful exercise of a legitimate state power and must be distinguished from compensation for damages in delict.

Du Plessis¹¹⁹⁵ gives the following description of expropriation:

Expropriation is usually a unilateral act by the state which (on account of its eminent domain), based on operation of law, acquires private property, where the loss of property for the former owner is usually total and permanent. The property is ordinarily acquired by or on behalf of the state for a public purpose or in the public interest and compensation is payable.¹¹⁹⁶

Currie and De Waal¹¹⁹⁷ regard expropriation to be some form of interference with property with two characteristics. *Firstly*, there must be some form of appropriation or taking of the property. In the *Colonial Development*¹¹⁹⁸ case, for example, the court held that expropriation involved appropriation. Mostert,¹¹⁹⁹ however, argues that it cannot be said that expropriation¹²⁰⁰ has taken place only if the public authority has acquired exactly the same benefit or interest that had been lost by the expropriated party. One should not reduce the scope of expropriation or compulsory acquisition to permanent physical dispossession or actual permanent acquisition by the state.¹²⁰¹ These qualifications are not stated in the *Constitution*.¹²⁰² There are indications that the courts are willing to look at the substance and not the form when rights are extinguished. In the *Agri South Africa v Minister of Minerals and Energy (2)*¹²⁰³ case the High Court of North Gauteng held that the phrase "acquiring rights" must not be understood to mean a transfer of rights in the legal sense. The court interpreted section 5 of the *Mineral and Petroleum Resources*

1195 *Compensation for Expropriation* 31.

1196 See *Harksen v Lane* 1998 1 SA 300 (CC) 315 para 32; Van der Walt 2004 SALJ 867. In *Harksen* the Constitutional Court concluded that s 21 of the *Insolvency Act* 24 of 1936 did not have the purpose or the effect of a compulsory acquisition or expropriation of the property of the solvent spouse, because the property was not appropriated or acquired by the state, and the solvent spouse was not divested permanently of the property. (See Van der Walt 2004 SAPL 74). Hopkins and Hofmeyr 2003 SALJ 51 state that the fact that the trustee did not derive any benefit from the temporary vesting of the property in the insolvent estate, is a better reason to argue that there was no expropriation. Mostert 2000 HJIL 319 explains that the legal question in the *Harksen* case should have been whether the temporary and preventive vesting of the spouse's property could be regarded as a valid regulation (deprivation) of the rights in that property.

1197 Currie and De Waal *Bill of Rights Handbook* 553.

1198 *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town and Regional Planning Commission* 2002 2 SA 589 (N) at 611D-G.

1199 Mostert 2000 HJIL 318.

1200 Mostert 2003 SAJHR 573 describes the characteristics that distinguish expropriations from deprivations as the requirements of 'appropriation', compensation and the idea that expropriation typically targets individual right holders rather than groups.

1201 Mostert 2003 SAJHR 569 explains that a legislative or administrative measure that removes or destroys all the rights of a particular property holder (whether or not the appropriator or somebody else receives a corresponding advantage) without the payment of compensation, can usually be described as constructive expropriation. See para 4.3.7 and para 4.6.5.

1202 *Constitution* of 1996.

1203 *Agri South Africa v Minister of Minerals and Energy (2)* Case number 55896/07 para 80 (Unreported judgement delivered on 24 April 2011).

*Development Act*¹²⁰⁴ to mean that the Minister when granting a mineral right is granting a real right with substantially the same content as the right that the holders of mineral rights had before the Act.¹²⁰⁵ The state as a result acquired the substance of the property rights of the former holders of mineral rights.¹²⁰⁶

The court rejected the contention that the *Mineral and Petroleum Resources Development Act*¹²⁰⁷ did not deprive the complainant of his coal rights, but only regulated the use thereof.¹²⁰⁸

Regulating the use of property presupposes that the person whose use is regulated, still has the property, albeit with truncated content. It is, as I have pointed out, settled that Sebenza's coal rights have been legislated out of existence. From the date that the MPRDA took effect, it no longer had coal rights the use whereof could be regulated.

In casu the court used the injunction in section 25(4)(a) of the *Constitution*¹²⁰⁹ that the public interest includes the nation's commitment to reforms to bring about equitable access to all South Africa's natural resources as the basis for a finding that in terms of the *Constitution* the content of the property rights expropriated need not always be acquired by the state.¹²¹⁰ It is sufficient if the property is expropriated in the public interest to be acquired by third parties. Furthermore, the rights extinguished by the expropriation and the rights acquired by the expropriator need not be identical.¹²¹¹

The second requirement that an expropriation has to meet, is according to Currie and De Waal,¹²¹² that the appropriation must be with an expropriatory purpose. A law that has another purpose, but incidentally takes property, is not a law with an expropriatory purpose and one cannot demand compensation for the taking.¹²¹³ A common example is a law that allows the taking of property as punishment for crime.

Property may be expropriated only in terms of law of general application for a public purpose or in the public interest.¹²¹⁴ Du Plessis¹²¹⁵ explains that "public purpose" means

1204 *Mineral and Petroleum Resources Development Act* 28 of 2002.

1205 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 81 and para 82.

1206 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 82.

1207 *Mineral and Petroleum Resources Development Act* 28 of 2002.

1208 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 66 and para 67.

1209 *Constitution* of 1996.

1210 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 83.

1211 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 85. See para 4.6.4 for the distinction between the *Mineral and Petroleum Resources Development Act* 28 of 2002 and the *National Water Act* 36 of 1998.

1212 *Bill of Rights Handbook* 554.

1213 Currie and De Waal *Bill of Rights Handbook* 554.

1214 S 25(2)(a) of the *Constitution*. Du Plessis *Compensation for Expropriation* 95 explains that s 25(2) serves as the traditional justification and authority for expropriation, but also ensures that the normal functioning of expropriation does not impede land reform. See para 4.5 for more on water reform.

1215 Du Plessis *Compensation for Expropriation* 39.

that the expropriation should benefit the community as a whole (and not just a particular person.)¹²¹⁶ A law that is not for a public purpose, is not likely to provide sufficient reason for the deprivation and will be arbitrary in terms of section 25(1). Public interest was described in section 25(4) of the *Constitution*¹²¹⁷ as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" to ensure that land reform is included in the concept. An expropriation to benefit an individual for the purpose of land reform is permissible.¹²¹⁸ Du Plessis¹²¹⁹ is of the opinion that an expropriation that passed the deprivation test of section 25(1) is unlikely to be tested separately for the public purpose requirement. Laws that are not arbitrary will not be set aside in terms of section 25(2)(a) because the state has broad powers to expropriate for a public purpose or in the public interest.

"Public purpose" in the broad sense of the word is a purpose affecting the whole or local population, as opposed to one that is private or personal and affects only an individual. "Public purpose" in the narrow sense of the word, is restricted to government purposes. Public purpose was distinguished from public interest in *Administrator, Transvaal v Van Streepen (Kempton Park)*.¹²²⁰ In this case the court ruled that an expropriation for the benefit of a third cannot be for a public purpose, but in certain circumstances it might be possible that it is in the public interest.¹²²¹ However, in the *Offit Enterprises (Pty) Ltd v Coega Development Corporation*¹²²² case the court held that in the light of the *Constitution*¹²²³ the reference to "public purposes" in section 2(1) of the *Expropriation Act*¹²²⁴ had to be construed as including both "public purpose" and "in the public interest". Having regard to the *Constitution* and the importance of public private partnerships in many major development initiatives, it could not be said that expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company.¹²²⁵

Property may also only be expropriated in terms of law of general application subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.¹²²⁶ Pienaar and Van der Schyff¹²²⁷ explain that the Act empowering the expropriation should set out the

1216 Du Plessis *Compensation for Expropriation* 39.

1217 *Constitution* of 1996.

1218 Du Plessis *Compensation for Expropriation* 94.

1219 *Compensation for Expropriation* 95.

1220 *Administrator, Transvaal v Van Streepen (Kempton Park)* 1990 4 SA 644 (A) 601.

1221 Du Plessis *Compensation for Expropriation* 40.

1222 *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 4 SA 242 (SCA) para 11.

1223 *Constitution* of 1996.

1224 *Expropriation Act* 63 of 1975.

1225 *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 4 SA 242 (SCA) para 15.

1226 S 25(2)(b) *Constitution* of 1996.

1227 2003 *Obiter* 147.

correct administrative procedure or should stipulate that the *Expropriation Act*¹²²⁸ is applicable. If the correct administrative procedures have not been followed, the expropriation is unconstitutional. Du Plessis¹²²⁹ points out that expropriation is subject to section 33 of the *Constitution*.¹²³⁰ In terms of the *Promotion of Administrative Justice Act*¹²³¹ a court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the information before the administrator. It implies that the administrator must take the information before her into account when making the decision. Section 33 of the *Constitution*¹²³² plays a peripheral part in the role of the concept "beneficial use" in South African water law reform investigated in this thesis and has been excluded from the scope thereof.¹²³³

Section 25(3) states that the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.¹²³⁴ Circumstances relevant to the payment of compensation in terms of section 25(3) include *inter alia* the current use¹²³⁵ of the property and the market value¹²³⁶ of the property. The *Expropriation Act*¹²³⁷ used to set the sole standard in terms of which compensation was determined. The amount of compensation to be paid to an owner in respect of property shall not exceed the aggregate of the amount that the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer and an amount to make good any actual financial loss caused by the expropriation.¹²³⁸ Du Plessis¹²³⁹ states that the phrase "which the property would have realised" in section 12(1)(a)(i) of the *Expropriation Act*¹²⁴⁰ shows that the property must be valued with all its potential included. Compensation must be paid for the property and all its potential value-enhancing uses.¹²⁴¹ When the court considers the potential of the property, it should

1228 *Expropriation Act* 63 of 1975.

1229 *Compensation for Expropriation* 97.

1230 33 Just administrative action

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

1231 S 6(2)(f) *Promotion of Administrative Justice Act* 3 of 2000

1232 S 33 of the *Constitution* of 1996.

1233 Du Plessis *Compensation for Expropriation* 97 may be consulted for more on section 33 of the *Constitution* of 1996.

1234 S 25(3) of the *Constitution* of 1996. See para 4.2.2.

1235 S 25(3)(a) *Constitution* of 1996.

1236 S 25(3)(c) *Constitution* of 1996.

1237 S 12(1)(a) *Expropriation Act* 63 of 1975.

1238 See the discussion of the basis for the determination of compensation by Couzens "Expropriation" in 2009 *LAWSA Supp* para 12.

1239 *Compensation for Expropriation* 47.

1240 *Expropriation Act* 63 of 1975.

1241 *Compensation for Expropriation* 47.

consider that foreseen and unforeseen risks could affect the realisation of such potential. Changes could occur in the profitability of the property and the feasibility of developing its potential. The development costs to achieve such potential are not easily determinable.¹²⁴²

However, the Constitutional Court has moved the focus in determining compensation from market value to an equitable balance between the public interest and private interests. In *Du Toit v Minister of Transport*¹²⁴³ the Cape High Court considered the constitutional injunction to establish an amount of compensation that would reflect an equitable balance between the public interest and the interests of those affected.¹²⁴⁴ In this case section 25(3) was used as the basis for an argument that property owners should receive less than market value for expropriated property that is to be used for maintenance of a national asset, because that would reflect a fairer balance between the public interest and the interest of the expropriated owner than would paying full market price.¹²⁴⁵ The Constitutional Court held that if, after having regard to all relevant factors, the compensation awarded is just and equitable and reflects an equitable balance between the public and private interests, the constitutional standards in section 25(3) would have been adhered to.¹²⁴⁶ Market value does not play a central role in the interpretation of section 25(3).¹²⁴⁷ Questions of expropriation and compensation are matters of acute socio-economic concern in the context of South Africa's social and political history. These matters could not be left to be determined solely by market forces.

Relevant circumstances as stated in section 25(3) of the *Constitution*¹²⁴⁸ also include the history of the acquisition and use¹²⁴⁹ of the property and the extent of direct state investment and subsidy¹²⁵⁰ in the acquisition and beneficial capital improvement of the property. The reference to the current use, history and extent of state involvement in section 25(3) focuses on reform as a purpose of the expropriation.¹²⁵¹ The purpose of the expropriation is also relevant.¹²⁵² Du Plessis¹²⁵³ suggests that the purpose of the

1242 Du Plessis *Compensation for expropriation* 48-50.

1243 *Du Toit v Minister of Transport* 2003 1 SA 586 (C).

1244 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf 9 states that there is a role for the 5th stage of the *Constitutional* property inquiry where it is common cause that the object of the law is to appropriate and where compensation is payable. In such a case the courts will go directly to the 5th enquiry and determine whether the compensation was just and equitable. Where the stated intention is to regulate, the state will probably merely aver that there has been a deprivation, but not an arbitrary one. The court will then have to apply the test for arbitrary deprivation. See para 4.3.2.

1245 See *Du Toit v Minister of Transport* 2003 1 SA 586 (C) paras 46, 50, 51 and 52.

1246 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 34. See discussion of the case by Couzens "Expropriation" in 2009 *LAWSA Supp* para 2.

1247 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 37.

1248 See para 4.2.2.

1249 S 25(3)(b) *Constitution* of 1996.

1250 S 25(3)(d) *Constitution* of 1996.

1251 See s 25(4) *Constitution* of 1996.

1252 S 25(3)(e) *Constitution* of 1996.

1253 *Compensation for Expropriation* 115.

expropriation¹²⁵⁴ should only be applicable in the case of a unique purpose or value in the *Constitution*. The public purpose and interest should only have an influence on the compensation amount in exceptional circumstances.¹²⁵⁵ Van der Walt¹²⁵⁶ poses the question whether compensation can be reduced to lower than market value purely because the public interest in the property is higher than the individual owner's interest.

Public purpose legitimising the expropriation should be distinguished from public purpose as a factor that should be taken into account when calculating compensation.¹²⁵⁷ Just because an expropriation can be justified because it serves a public purpose, as required in section 25(2), does not mean public purpose is a factor that justifies lower compensation when determining compensation as per section 25(3)(e).¹²⁵⁸ Du Plessis¹²⁵⁹ states that an interpretation of section 25(3)(e) should be sensitive to the context and have due regard to the just and equitable compensation requirement.

4.3.7 *Constructive expropriation*

Pienaar and Van der Schyff¹²⁶⁰ explain that the doctrine of constructive expropriation normally arises where a regulation exerts such an extensive restriction on the rights in the property of the rights holder, that he is deprived of the ability to exercise any or a substantive portion of his entitlements. It also arises where rights are merely extinguished. Even if no rights are acquired by or transferred to the state, the right holder suffers extensive damage. Mostert¹²⁶¹ provides the following definition:

'Constructive expropriation' refers to the protection of individual property holders against detrimental consequences of state regulation of private property in two distinct ways, by either affording compensation to the aggrieved right holder, or by striking down the imposition.

Van der Schyff¹²⁶² explains that pre-constitutional case law exists that provided compensation for what can be referred to as constructive expropriation. She refers to *Minister van Waterwese v Mostert*¹²⁶³ where the then appellate division held that "the extinction of rights amounted to their 'expropriation'". The holders thereof were entitled to

1254 S 25(3)(e) *Constitution of 1996*.

1255 Van der Walt 2005 SALJ 772–773.

1256 2005 SALJ 773.

1257 Du Plessis *Compensation for Expropriation* 107.

1258 Du Plessis *Compensation for Expropriation* 115.

1259 *Compensation for Expropriation* 115. See Du Plessis *Compensation for Expropriation* for a full discussion of the elements of expropriation, as this thesis centres around regulatory deprivations.

1260 2007 LEAD J 193.

1261 2003 SAJHR 567.

1262 *Constitutionality of the MPRDA* 162.

1263 *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 669.

be compensated directly by the expropriator. In *Pretoria City Council v Blom*¹²⁶⁴ the court drew an analogy between the power to override private rights by laying pipes over private property and a form of expropriation. In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*¹²⁶⁵ Justice Hoexter was of the opinion that the ordinance empowering a local authority to lay storm water pipes over private property, brought about a taking akin to expropriation. Van der Schyff¹²⁶⁶ regards these cases to be evidence of the existence of a grey middle ground of regulatory expropriations that existed before section 25 of the *Constitution*¹²⁶⁷ was enacted.

After section 25 of the *Constitution*¹²⁶⁸ had been adopted, the Supreme Court of Appeal mentioned the possibility of a notion of constructive expropriation *obiter*. The court in *Steinberg v South Peninsula Municipality*¹²⁶⁹ held that there may be room in South African law — despite the clear distinction made in section 25 — for this notion to apply when a regulatory deprivation has the effect, albeit indirectly, of transferring rights to the state.¹²⁷⁰ The court immediately indicated that such a development might be undesirable because it could create confusion and because it could adversely affect land reform.¹²⁷¹ Mostert¹²⁷² notes that the court in *Steinberg v South Peninsula Municipality*¹²⁷³ treated deprivation and expropriation as discrete categories. *In casu* the effect of the road scheme, while allegedly preventing the applicant from selling or properly using her land, would still not have established either an expropriation or a constructive expropriation.¹²⁷⁴

Van der Walt¹²⁷⁵ argues that, although the earlier *Harksen*¹²⁷⁶ case portrayed deprivation and expropriation as discrete categories that could be distinguished on the basis of conceptual grounds and the later *FNB* case made a hierarchical distinction, both descriptions weigh against the development of a doctrine of constructive expropriation in South African law.¹²⁷⁷ The ‘telescoping’ effect in the *FNB* case might exclude the possibility of arguing constructive expropriation. However, in situations where the deprivation satisfies the requirements of section 25(1), the applicant may still need the

1264 *Pretoria City Council v Blom* 1966 2 SA 139 (T) 144 A.

1265 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 3 SA 122 (A) 129.

1266 *Constitutionality of the MPRDA* 162-163.

1267 *Constitution of 1996*.

1268 *Constitution of 1996*.

1269 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

1270 Van der Walt 2002 *THRHR* 469 argues that the new constitutional order demands an approach to interpretation that is context sensitive and more flexible, instead of an abstract definitional approach in terms of which the effects of the state's action are deduced from the characteristics of a classification.

1271 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) para 8. Van der Walt 2002 *THRHR* 470 states that although a theory of constructive expropriation may be used to extract compensation or to invalidate a deprivation, it does not inevitably mean that owners of land or water rights will always succeed with their claims against reform laws. Courts have to look at the reform context of each case. See discussion in Mostert 2003 *SAJHR* 570- 571.

1272 2003 *SAJHR* 581.

1273 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

1274 Van der Walt 2004 *SAPL* 78.

1275 2004 *SAPL* 77.

1276 *Harksen v Lane* 1998 1 SA 300 (CC).

1277 Van der Walt 2004 *SAPL* 77.

opportunity to argue that the deprivation is so unreasonably disproportionate or unfair that it amounts to an expropriation that requires compensation, even though it was intended and set up as a regulatory deprivation and not as an expropriation.¹²⁷⁸ He cautions that the development of a doctrine of constructive expropriation is unlikely because such an unreasonable and disproportionate deprivation of property will more often than not be struck down as arbitrary during the deprivation analysis. This means that some impositions on property could be arbitrary and thus struck down, but that payment of compensation would then not be an option.¹²⁷⁹ Du Plessis¹²⁸⁰ argues that a regulation that has a disproportionate burdensome effect on the individual should be attacked for constitutional validity, either in order to bring the regulation in line with the *Constitution* or to declare it invalid, but not to found a claim for compensation.

Roux¹²⁸¹ points out that a possible way in which a balance between an individual's interest in property and the state's interest in acquiring it may be achieved, is by the state paying compensation to the individual.¹²⁸² Compensation is the mechanism through which the burden of expropriatees to enlist their property for the public good, is shared by society.¹²⁸³ He argues that an otherwise arbitrary law may be perfectly rational, and indeed proportional, if it provides for the payment of just and equitable compensation. When a court applies the test for arbitrariness, it would also have to inquire about the amount, time and manner of the payment of compensation.¹²⁸⁴ Roux's¹²⁸⁵ argument should perhaps be developed by a court reading in a clause providing for compensation, where a law that is needed for reform, goes too far and becomes a "taking"¹²⁸⁶ in the sense that it severely prejudices individuals without culminating in compensable expropriation. According to Roux,¹²⁸⁷ an order for constitutional damages in terms of section 25(1) is not the same as an order for just and equitable compensation in terms of section 25(3). The compensation would be to make good any loss above the one that the claimant is expected to bear under the test for arbitrary deprivation. This would be similar to the equalisation payment for disproportionate regulation in German law.

The real question is what should be done when the regulation is necessary and not arbitrary, but the burden on the individual is disproportionate. The burden on the individual would be disproportionate where the individual has to bear a higher burden than other

1278 Van der Walt 2004 *SAPL* 79.

1279 See Du Plessis *Compensation for expropriation* 286 and Roux "Property" 46-32.

1280 See Du Plessis *Compensation for expropriation* 286.

1281 "Property" 46-19 in Woolman *et al Constitutional Law of South Africa*.

1282 See para 5.8 on property protection in the US.

1283 See also *Armstrong v US* 364 US 40, 49 (1960) and Van der Schyff *Constitutionality of the MPRDA* 158.

1284 Roux "Property" 46-20.

1285 "Property" 46-19.

1286 See para 5.8 on regulatory takings.

1287 http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf 10.

right holders. In such a case section 9(1) of the *Constitution* of 1996, the equality clause, would be breached as everyone "has the right to equal protection and benefit of the law". Van der Schyff¹²⁸⁸ proposes that the scope of expropriation can be extended if courts were to focus on the consequences brought about by the depriving act. In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*¹²⁸⁹ the Supreme Court of Appeal held that the Court *a quo* correctly found that, in violation of sections 9(1) and (2) of the *Constitution*, the applicant had not been treated equally because it had been forced, as an individual and without compensation, to bear the state's burden of providing land to some 40 000 people.¹²⁹⁰ The courts had a duty to mould an order providing effective relief to those aggrieved by a constitutional breach. The order had to ensure that the constitutional rights were effectively protected and enforced, and had to fashion new remedies.¹²⁹¹ *In casu* the only appropriate relief was constitutional damages. The court ordering the state to pay damages to the applicant allowed the occupiers to stay where they were, compensated the applicant for its loss, and allowed the State to gain by not having to provide alternative land. The appropriate procedure thus appeared to be an order for an enquiry into damages.¹²⁹²

The court in the *Modderklip Boerdery*¹²⁹³ case provided compensation for what in effect was a taking of property, caused by a land grab in circumstances where the state had breached its obligation to take the available reasonable steps (expropriating the property or providing other land) to ensure effective relief for the respondent. *In casu* it was the state's inaction to address the "grabbing" of the respondent's property that caused the taking of property. There was no expropriation by the state but the respondent was denied equal protection of the law by the state.¹²⁹⁴

1288 *Constitutionality of the MPRDA* 172.

1289 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA).

1290 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) in para 31. Currie and De Waal *Bill of Rights Handbook* 561 explain that the constitutional damages were an entitlement to compensation calculated in terms of the *Expropriation Act* for the loss of use of the relevant land during the time of occupation. See Van der Walt 2005 *TSAR* 679 and Mostert and Badenhorst "Property and the Bill of Rights" *Bill of Rights Compendium* 3FB-70.

1291 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 42.

1292 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 43 and para 44. In *MEC v Kate* 2006 4 SA 478 (SCA) the Supreme Court of Appeal held that the courts have to devise means of protecting and enforcing fundamental rights not recognised under common law. Remedies include the financial redress of wrongs flowing from the improper exercise of public powers by State officials, and the enforcement of court orders. (*MEC v Kate* 2006 4 SA 478 (SCA) at para 16 and 17.) The court held that the relief permitted by s 38 of the *Constitution* is not a remedy of last resort. (*MEC v Kate* 2006 4 SA 478 (SCA) at para 27).

1293 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 50 - para 51.

1294 The court's use of the language of the equality clause where the complainant's property was invaded by strangers and government failed to uphold the rule of law is in harmony with the point of view of the American Supreme Court in *Armstrong v United States* 364 US 40, 49 (1960) where the court held that the *Fifth Amendment's* guarantee that private property shall not be taken for a public use without just compensation was designed to stop government from forcing individuals to bear public burdens that in all fairness and justice is that of the public as a whole. See para 5.8. In *Modderklip Boerdery* an individual's property was taken for use by members of the public and the individual had to bear the state's responsibility to provide accommodation to the land invaders.

The court did not use the language of the notion of constructive expropriation, but as the individual in the *Modderklip* case shouldered an unequal burden on behalf of society and was thus treated unequally, the judgment opened the door for the notion of constructive expropriation.¹²⁹⁵ According to Van der Schyff,¹²⁹⁶ the property clause protects a property holder's rights by prescribing the limits of state interference. She reasons that it is illogical not to take the effect of state actions on the property rights holder into consideration when considering the constitutionality of state action. An additional argument that should be made is that the fact that the regulation was not arbitrary because there existed sufficient reason for the regulation, does not mitigate the impact on the individual when his property rights are cancelled.¹²⁹⁷ Van der Schyff¹²⁹⁸ argues that the protection of section 9 of the *Constitution*¹²⁹⁹ might ensure that individuals are not stripped of their entitlements to their property by excessive regulatory burdens.

Regulatory action that serves a legitimate public purpose rationally and does not impose an unfair burden on anybody, and has a more or less equal impact on everybody, does not normally attract a liability for the state to pay compensation.¹³⁰⁰ Compensation is paid from taxes paid by the people, and should spread the burden of regulation that is in fact unfair and excessive more equally. Van der Walt¹³⁰¹ suggests a situation where the notion of constructive expropriation might be applicable that will have the following characteristics: *Firstly*, the deprivation in issue must be set up and employed as a regulatory measure and not as an expropriation. *Secondly*, the effects of the deprivation on the affected property holder must be so serious and so unfair or disproportionate (e.g. compared to others in a similar position) that a court would be tempted to strike it down for being arbitrary in the sense developed in *FNB* (i.e. that there is insufficient reason for that effect under those circumstances). *Thirdly*, the deprivation and the regulatory scheme that it forms part of, namely sections 32 and 33 in the *National Water Act*, must be authorised by a legitimate and important - and preferably reform-related - state purpose. In the circumstances the court must be unwilling to strike down the legislation or the deprivation involved. This would be a situation where the idea of constructive expropriation could be used by a court not to frustrate reform, but rather to facilitate it. It would do so by saving a necessarily harsh regulatory measure from being struck down.¹³⁰² The notion of constructive expropriation is a method to prevent an overly rigid or literal interpretation of

1295 See para 5.8. It is likely to appear from the next chapter that many characteristics of constructive expropriation and regulatory takings are similar, if not the same.

1296 Van der Schyff *Constitutionality of the MPRDA* 176.

1297 See para 4.6.5 and para 5.8.

1298 *Constitutionality of the MPRDA* 175.

1299 *Constitution of 1996*.

1300 See para 4.3.1 and para 4.3.6.2.

1301 Van der Walt 2004 *SAPL* 79.

1302 Van der Walt 2004 *SAPL* 80. See also Soltau 1999 *Acta Jur* 250.

the property clause from forcing individuals to bear the cost of reform that society as a collective is in a better position to bear. Individual taxpayers will not even feel the burden of compensation to be paid in those cases where a regulation for reform purposes ends up being perceived as a taking of property.¹³⁰³

In this chapter the objective is to determine whether the definition of an existing lawful water use in section 32 of the *National Water Act* 36 of 1998 led to an arbitrary deprivation or an expropriation of unexercised water use rights in terms of the property clause of the *Constitution* of 1996. The stipulations of the property clause will be applied to the old order water use right or the current statutory water entitlement in the following paragraphs of the current chapter. However, one first needs to determine whether the concept "beneficial use" that underlies the term existing lawful water use in fact limited the water use right in terms of the previous or current water law dispensation. If the term beneficial use was a condition for the existence of the water use right, then section 32 would only have been stating the obvious. If beneficial use was not a condition for the existence of a water use right, then it needs to be determined whether the cancellation of the unexercised water use right is an arbitrary deprivation or an expropriation of property and whether compensation is payable for the cancellation of the unexercised water use right. In the next section the effect of the concept "beneficial use" on the concept "water use right" in terms of the former and current water law dispensations will be discussed before water law reform is discussed.

4.4 The right to use water

The characteristics of the right to use water depend on the water law system that is followed. The water law system that is followed determines the concepts that are used by the law, for example whether water needs to be used "reasonably" or "beneficially". It also determines whether one has a right to use water because of ownership of riparian land in terms of the riparian system or whether one needs to appropriate and use water in order to establish a water use right in terms of the system of prior appropriation. The water law system that was followed thus determined whether one had a water use right that the law was going to protect. The *National Water Act*¹³⁰⁴ reformed the water law dispensation that existed in terms of the *Water Act*.¹³⁰⁵

1303 See also para 5.8.

1304 *National Water Act* 36 of 1998.

1305 *Water Act* 54 of 1956.

Before the *National Water Act*¹³⁰⁶ was promulgated, the regulation of water use rights in terms of the *Water Act*¹³⁰⁷ of 1956 took place against the background of the property clause in the *Constitution* of 1996. The reason is that old order water use rights were already protected as rights in property when the *Constitution* of 1996 was promulgated.¹³⁰⁸ When the previous water law dispensation was reformed by the *National Water Act*¹³⁰⁹ the *Constitution* set the boundaries within which water use rights could be reformed. A major method in terms of which the water law dispensation was reformed was that a water use was only protected as an existing lawful water use if it had been exercised in the two years before the promulgation of the Act in terms of the definition in section 32 of the *National Water Act*.¹³¹⁰ Before one can establish whether the forfeiture of unexercised water uses was contrary to the terms of section 25 of the *Constitution*,¹³¹¹ one needs to establish whether the exercise of a water use was a condition that determined whether a right to use water was protected in terms of the *Water Act*¹³¹² of 1956 or not. The role of the concept "beneficial use" in the regulation of water use rights in terms of the *Water Act*¹³¹³ of 1956 will be discussed next to determine the answer to this question.

4.4.1 The Water Act of 1956

South African water regulators in 1950 had already been concerned about the fact that there existed more rights to use riparian water than there was water in the resource. The Hall Commission was appointed in 1950 to investigate the possible amendment and consolidation of the water laws of South Africa.¹³¹⁴ The objective of the amendment was to provide for the use of water resources in the best interest of the nation. At that time, the system of riparian rights was contained in section 12 of the *Irrigation and Conservation of Waters Act*¹³¹⁵ which provided that every riparian owner was entitled to the reasonable use of the normal flow of a public stream to which his land was riparian. By the time the commission published its report in 1952, almost all available water adjoining riparian land was being used where the riparian owners had not exercised their riparian water use rights previously.¹³¹⁶ Some (unexercised) riparian rights only existed in theory because sufficient water did not exist to enable the exercise of all the riparian water use rights.¹³¹⁷ It exposed a serious deficiency in the riparian system of governing water use rights in South

1306 *National Water Act* 36 of 1998.

1307 *Water Act* 54 of 1956.

1308 See para 4.2.2.

1309 *National Water Act* 36 of 1998.

1310 *National Water Act* 36 of 1998.

1311 *Constitution* of 1996.

1312 *Water Act* 54 of 1956.

1313 *Water Act* 54 of 1956.

1314 GN 873 in GG 4363 of 21 April 1950. *Uys Structural analysis of water allocation* 284.

1315 S 12 *Irrigation and Conservation of Waters Act* 8 of 1912.

1316 Hall *Waterwette van die Unie* para 20.

1317 See Hall *Waterwette van die Unie* para 20.

Africa. Parliament had to amend the water law dispensation to determine which water use rights had to be protected in the public interest. The Hall commission¹³¹⁸ found that the rights of riparian owners were so strongly protected by the then water law that any reform of the water law system had to recognise the existing water use rights of riparian owners. The existing water use rights of riparian owners, however, only had to be recognised where they were being used beneficially at the time.

The 1956 *Water Act*¹³¹⁹ was adopted following the recommendations of the commission of enquiry.¹³²⁰ As the commission¹³²¹ predicted, the *Water Act*¹³²² did not derogate from pre-existing water use rights that had been *beneficially used*. It was stated in the *Water Act*¹³²³ that the *Water Act*¹³²⁴ should not have been construed as affecting or derogating from any right to water which at the commencement of the Act had been lawfully acquired, was possessed and was *being beneficially exercised* by any person.¹³²⁵ The legislature in effect decided to reform the water law dispensation by utilising a mechanism that protected water use rights that were being beneficially exercised, which reminds of the system of prior appropriation in America. Making use of the concept "beneficial exercise" was a perfectly reasonable thing to do as there was not enough water left in many rivers to back up unexercised riparian rights to normal flow.¹³²⁶ Beneficial use was the tool that was used to determine that water use rights that were exercised, were to be preferred to those that were not exercised when the *Water Act*¹³²⁷ was adopted. However, the fact that water use rights were not exercised did not lead to them being cancelled.

Unexercised riparian rights continued to exist, but in a limited form. The holders of riparian rights that had not been exercised were still entitled to use flood water, otherwise known as surplus water. The main difference between riparian and surplus water was that surplus water could not be used every day, but only when there was a flood. The *Water Act*¹³²⁸ stated that every riparian owner was entitled to the use of as much of the surplus¹³²⁹ water of a public stream to which his land was riparian as he could *beneficially use* for domestic purposes, for the watering of his stock, and for agricultural and urban purposes. Beneficially exercised riparian rights that survived as rights to the normal flow of

1318 Hall *Waterwette van die Unie* para 19.

1319 *Water Act* 54 of 1956.

1320 Hall *Waterwette van die Unie* para 19.

1321 Hall *Waterwette van die Unie* para 19.

1322 *Water Act* 54 of 1956.

1323 S 4(1)(a) of the *Water Act* 54 of 1956.

1324 *Water Act* 54 of 1956.

1325 S 9 *Water Act* 54 of 1956 made the exercise of riparian water use rights on public streams subject to the provisions of the Act.

1326 Uys *Structural analysis of water allocation* 286 comments that the same protection could have been obtained by subjecting a new allocation mechanism that was *not* based on riparian ownership to existing beneficial irrigation rights as far as normal (see para 2.6.3.) flow was concerned. The idea might perhaps have been ahead of its time.

1327 S 4(1)(a) of the *Water Act* 54 of 1956. Section 62 was *inter alia* excluded from the operation of this section.

1328 S 10(1) *Water Act* 54 of 1956.

1329 Thompson *Water Law* 71 explains that describing surplus water as flood water was a fair description, although it was technically not entirely correct.

a river thus had a higher priority¹³³⁰ after the promulgation of the *Water Act*¹³³¹ than riparian rights that had been unexercised, as the latter could only be exercised when there was surplus water. In *De Villiers v Barnard*¹³³² the Appellate Division stated that it was an established principle of law that "no person possesses a greater right to the use of public water than he is able to exercise beneficially". It is the capacity to use water beneficially that was the measure of rights to use public water. The capacity for beneficial use was the tool that was used to determine the quantity of public water that the water right holder was entitled to use after the promulgation of the *Water Act*.¹³³³

Some of the water in the rivers of South Africa at the time was flowing fruitlessly to the oceans.¹³³⁴ The reform of the water law dispensation had to ensure that water that was not being beneficially used then, would be used in South Africa's interests.¹³³⁵ The commission investigated a statutory system of water allocation to solve the problem of water flowing fruitlessly to the oceans. The commission recommended that only water that was not utilised beneficially by riparian owners for irrigation, could be subjected to a statutory system of water allocation in terms of which state control replaced riparian ownership.¹³³⁶ By implication this would have been the case in those areas where there was water left that could still be allocated. According to the commission,¹³³⁷ riparian owners would in terms of the bill be allowed to use surplus¹³³⁸ water pending the establishment of a state irrigation scheme. The commission report¹³³⁹ explained that permission would be needed for smaller irrigation works to prevent smaller schemes thwarting the most beneficial use of water in the country's interest.¹³⁴⁰ Backeberg¹³⁴¹ states that the primary objective in a Government Water Control Area established in terms of the *Water Act*¹³⁴² was to obtain absolute control over all public water that was not being used. There was no appeal against a decision of the Minister to declare an area a Government

1330 See the discussion of the forfeiture of unused riparian rights in America in para 5.9.3.1. In the case of *Determination of Rights to Waters of Long Valley Creek Stream System* Sys 25 Cal 3d 339, 359 (1979) unused riparian rights in effect lost their priority.

1331 *Water Act* 54 of 1956.

1332 *De Villiers v Barnard* 1958 3 SA 167 (A) 217 A-B. See s 52(3) of the *Water Act* 54 of 1956. Capacity likely does not mean that one had to exercise the use but that one had to have the ability to use the water. S 138 of the *Irrigation and Conservation of Waters Act* 8 of 1912 stated that nothing in the Act should be construed as affecting any right which at the commencement of the Act any person possessed and *was able to exercise beneficially* in relation to the taking or use of water from a public stream or perennial stream.

1333 *Water Act* 54 of 1956.

1334 See Hall *Waterwette van die Unie* para 19.

1335 Soltau 1999 *Acta Jur* 237 writes that the move towards greater state control was necessitated by the needs of industrialisation and urbanisation. Kidd "Development of Water Law" 90 describes this as a move away from riparian rights to the old principle of state control of the use and disposal of water. Although the state had the power to restrict riparian owners' rights, its powers were not as extensive as the state's powers were in other states that experienced similar problems with water scarcity. Kidd "Development of Water Law" 91.

1336 Uys *Structural analysis of water allocation* 286.

1337 Hall *Waterwette van die Unie* para 20.

1338 See s 10 of the *Water Act* 54 of 1956.

1339 Hall *Waterwette van die Unie* para 20.

1340 Hall *Waterwette van die Unie* para 20.

1341 *Politieke ekonomie* 86.

1342 See s 59 *Water Act* 54 of 1956.

Water Control Area.¹³⁴³ It illustrates that the state was indeed *dominis fluminis*. An area could have been declared a Government Water Control Area in terms of section 59 of the Act if *inter alia* the distribution of water from a public stream in that area had to be controlled in the public interest.¹³⁴⁴ Although the Minister controlled the water, he recognised rights (to *inter alia* divert and use water) to use not more than the quantity of public water than had actually been used for irrigation during the qualifying period.¹³⁴⁵ Water use rights granted when an allocation list was published in terms of section 62(2F)(a), replaced existing water use rights to use water and are prime examples of statutory entitlements.

The classification of water into public or private water determined what rights to use water existed in terms of the Act. The major distinction between the two forms of water was that public water was suitable for common use for the purposes of irrigation and private water was not.¹³⁴⁶ The result was that the public and the government had a greater interest in the regulation of public water.¹³⁴⁷ It is important to understand the concepts "public" and "private" water, as they determine the background law to which water use rights were subject when the *National Water Act*¹³⁴⁸ was promulgated. The main question investigated in the next section is whether there existed a stipulation that water use rights had to be exercised, or the water use right holder had to risk the water use right being forfeited after the *Water Act*¹³⁴⁹ had been promulgated. In particular, the effect of the requirement of beneficial use on public and private water use rights and rights to use groundwater will be discussed next.

4.4.1.1 Public water and the requirement of beneficial use

A stream was public when the water it contained could be applied to common use for the purposes of irrigation on two or more pieces of land riparian to the stream.¹³⁵⁰ When surface water was flowing or was found in the bed of a public stream, it was classified as public water.¹³⁵¹ A right to use public water was a right in property¹³⁵² because it was a

1343 Backeberg *Politieke ekonomie* 86.

1344 S 59(1)(b) *Water Act* 54 of 1956 and Thompson *Water Law* 94.

1345 S 62(2A)(a) *Water Act* 54 of 1956.

1346 The suitability of water for common use also played a role in influencing the courts at the Cape in the nineteenth century. The court in *Van Heerden v Weise* 1 Buch A.C. 5 (1880) held that the general rule that a person may do what he likes with water rising on his own land, is subject to the limitation that the water is not the source of a public stream. Once it is established that the stream is public water, the rights of each proprietor, at its source or along its course, are limited by the rights of the public and by the common rights of other riparian owners. See para 2.6.2; *Hall on water rights in South Africa* 21 and s 5 of the 1956 *Water Act*.

1347 Uys *Structural analysis of water allocation* 168 was of the opinion that nowhere in Roman law were private rivers ever said to be *res privatae*. Due to their negligible common value they could be used by private persons exclusively, but they were still seen as common to all for purposes of the classification of things. See para 2.3.2.

1348 *National Water Act* 36 of 1998.

1349 *Water Act* 54 of 1956.

1350 *Le Roux v Kruger* 1986 1 SA 327 (C).

1351 Thompson *Water Law* 76.

1352 See para 4.2.2.

vested right that accrued to the claimant in terms of a statute.¹³⁵³ It was explained above¹³⁵⁴ that water use rights¹³⁵⁵ in respect of public water were recognised by the courts as rights in property for which the rights holder had to be compensated when the water use rights were expropriated.¹³⁵⁶

Legislation restricted public water to protect the public interest, for example a riparian owner was not allowed to use water wastefully.¹³⁵⁷ The concept "beneficial use" also delimited rights to use the normal flow of a public stream. The *Water Act*¹³⁵⁸ defined normal flow in relation to a public stream to mean the quantity of public water actually and visibly flowing in that public stream which, under a system of direct irrigation from that stream, could be *beneficially used* for the irrigation of land riparian to such stream. *Beneficially used* meant used in a manner which could reasonably be expected to produce a financial advantage to the occupier of the land.¹³⁵⁹ The concepts "reasonable use" and "beneficial use" seem to have been intertwined to some extent. Earlier on it was explained¹³⁶⁰ that the Appellate Division in 1958 held that the water that a riparian owner requires for the efficient and economical irrigation of his land is the same as the water needed for his reasonable requirements and is also the same as beneficial use of the water without waste.¹³⁶¹ The fact that the requirement of the reasonable use of water is the same requirement as the beneficial use of the water without waste also appears from the fact that the non-beneficial irrigation of veld by frequent and excessive flooding or the leading of public water into places where no advantage will be derived, would have been deemed to be the unreasonable use of water.¹³⁶² It is because of the requirement of beneficial use that in terms of the *Water Act*¹³⁶³ no riparian owner was entitled to divert or impound and store more water for agricultural and urban use than he could reasonably be expected to use for such purposes. The quantity impounded and stored was not supposed to be greater than what was required to apply the water economically and efficiently to these purposes.¹³⁶⁴ The production of a maximum crop, with its implication of being an excessive objective, also did not fall within the requirements of reasonable use.¹³⁶⁵

1353 See Currie and De Waal *Bill of Rights Handbook* 540.

1354 See para 4.2.2.

1355 See para 5.5 on the concept "water use right" in the US and para 6.6 on the property concept and para 6.7 on the concept "water entitlement" in Australia.

1356 See *GJO Boerdery Ondernemings Edms (Bpk) v Bloemfontein Municipality* (2) 1988 Uys WLC 373 (A). See also *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) and para 4.2.2.

1357 S 9(1)(a) *Water Act* 54 of 1956. Thompson *Water Law* 85.

1358 S 1 *Water Act* 54 of 1956.

1359 *Hall on water rights in South Africa* 15.

1360 See para 3.8.1 and *De Villiers v Barnard* 1958 (3) SA 167 (A) 219.

1361 In this thesis the economic viability of an undertaking for which water is used, is regarded to be a condition for the use of water for economic purposes. See para 3.8.1.

1362 S 52(4) *Water Act* 54 of 1956. See para 3.8.

1363 S 52(3) *Water Act* 54 of 1956.

1364 S 52(3) *Water Act* 54 of 1956.

1365 *Hall on water rights in South Africa* 150.

The concept "beneficial use" played an important role in determining the quantity of water to which a right holder was entitled in a Government Water Control Area. The Minister had the right to determine, with due regard to any existing piece of land that was lawfully irrigated during the qualifying period, *inter alia* the extent of the land to be irrigated and the quantity of the water to be abstracted.¹³⁶⁶ In this instance the beneficial exercise of the right ensured that the Minister had to have regard to one's water use when determining one's water allocation. The Minister was obliged only to recognise existing irrigation that had been lawfully done in the qualifying period. In the *Mader*¹³⁶⁷ case the court held that an existing lawful user is on application entitled as of right to a permit for such user. However, when one had a permit to use water the use had to be beneficial.¹³⁶⁸ Uys¹³⁶⁹ states that beneficial use was a qualification for a water allocation in control areas. The next matter that will be addressed is whether the concept "beneficial use" had any effect on the right to use and enjoy private water.

4.4.1.2 Private water and the concept "beneficial use"

One could explain the concept "private water" thus: if surface water was not flowing or found in or had its origin in the bed of a public stream, it was classified as private water.¹³⁷⁰ Spring water, rain water, drainage water, private streams, and sometimes underground water, were all classified as private water.¹³⁷¹ The *Water Act*¹³⁷² stated that 'private water' meant all water which had risen or fallen naturally on any land or had drained naturally or had been led onto a piece of land, but was not capable of common use for irrigation purposes. Per implication the quantity of water in a private stream had to have been relatively small and had little value for common use. Uys¹³⁷³ is of the opinion that the term "ownership" was intentionally abolished in favour of a classification of all water as being *res omnium communes*. In terms of the *Water Act*¹³⁷⁴ the sole, exclusive and unlimited use and enjoyment of private water belonged to the owner of the land on which the water was found. The right to use private water was a right in property¹³⁷⁵ as it was a vested right that

1366 S 62(2E)(c) of the *Water Act* 54 of 1956.

1367 See *Mader v Minister of Water Affairs* 1969 Uys WLC 330 WC para 9:

An owner having existing user rights is deemed to be lawfully using water if the quantity does not exceed the amount which a water court has apportioned or, if no such award has been made, the quantity a water court would apportion. An existing user who has complied with the above is, on application, entitled as of right to a permit for such user.

1368 S 62(3) *Water Act* 54 of 1956 reads that if at any time the Minister is of the opinion that public water abstracted or stored in a Government Water Control Area is not being beneficially used, he may withdraw permissions given by him.

1369 "Synopses" para 3.4. See Thompson *Water Law* 98.

1370 Thompson *Water Law* 76.

1371 Soltau 1999 *Acta Jur* 237.

1372 S 1 of the *Water Act* 54 of 1956.

1373 *Structural analysis of water allocation* 303-304. Compare Pienaar and Van der Schyff 2003 *Obiter* 135.

1374 S 5 *Water Act* 54 of 1956.

1375 See para 4.2.2.

accrued to the claimant in terms of a statute.¹³⁷⁶ The proviso to section 5 states that the sole, exclusive and unlimited use and enjoyment of private water belongs to the owner of the land on which such water is found. However, there existed an exception where the water flowed in a known and defined channel on land situated beyond the place of origin and had for a period of not less than thirty years been beneficially used by the owner of the lower land.¹³⁷⁷ In such a case the owner of the lower land had a reasonable share of the water. It is the use for the purposes of acquiring the statutory right to the reasonable share that had to be beneficial, not the use of private water. No requirement of reasonable or beneficial use of private water was found in the *Water Act*¹³⁷⁸ or case law. The *Water Act*¹³⁷⁹ stated that whenever a riparian owner obtained, by artificial means on his own land, a supply of water that was not derived from a public stream, such water should also be deemed to be private water. A servitude that one neighbour had to obtaining the water of a fountain of another by laying a pipeline would have been regarded as private water. The acquisition of a servitude to private water by way of prescription by the laying of pipes from a fountain, which involved going further than the requirements of section 5(1) of the Act, vested a real right in the owner of the dominant tenement that was not dependent on registration.¹³⁸⁰ The real right was valid against the world.¹³⁸¹ These servitudes, being real rights, were also rights in property that were later to be recognised as vested rights by the *National Water Act* 36 of 1998.¹³⁸²

The right of the exclusive use of private water was severely restricted. In terms of section 24(2) of the *Water Act*,¹³⁸³ the Minister could reduce or suspend a user's rights in respect of water, if the pollution control measures of sections 21 and 22 were not complied with.¹³⁸⁴ This provision vested extensive power of control in respect of private water in the Minister. Uys¹³⁸⁵ argues that the right to use private water is a statutory preferential right of beneficial use. She argues that section 26, which empowers the minister to make regulations aimed at *inter alia* regulating pollution, implies that the right of exclusive use is merely a right of beneficial use, far removed from ownership, where wastage, damage to or destruction of the object is allowed.¹³⁸⁶ However, one should not draw an inference from the requirement that use had to be non-polluting that the use of private water was subject

1376 See Currie and De Waal *Bill of Rights Handbook* 540.

1377 S 5(1) *Water Act* 54 of 1956.

1378 *Water Act* 54 of 1956.

1379 S 6(2) *Water Act* 54 of 1956.

1380 *Cillie v Geldenhuys* 2009 2 SA 325 (SCA) para 12 and para 13. In this case a previous owner of Geldenhuys' property, Matjiesrivier, had laid pipes from the fountain to his farm. Cillie in 1998 drilled a borehole that caused the flow of water from the fountain to Matjiesrivier to decrease.

1381 *Cillie v Geldenhuys* 2009 2 SA 325 (SCA) para 12 and para 13.

1382 *Cillie v Geldenhuys* 2009 2 SA 325 (SCA) para 4.

1383 *Water Act* 54 of 1956.

1384 Uys *Structural analysis of water allocation* 310.

1385 Uys *Structural analysis of water allocation* 323.

1386 Uys *Structural analysis of water allocation* 316.

to the same requirement of beneficial use applicable to public water in a Government Water Control Area, for example.

Uys¹³⁸⁷ doubted whether much remained of the right of exclusive use. She argues that if the legislature had intended to classify private water under *res privatae*, it would have used statutory limitations on the right of use in moderation. Allocating certain water sources to private property would have been contrary to the policy to submit the national water sources to stricter state control. Uys¹³⁸⁸ argues that there was little difference between public and private water as far as potential state control was concerned, except for the question of whether the water was suitable for common use.

Groundwater, which will be discussed next, was sometimes classified as public water and sometimes as private water. The next section will show that the exercise of a water use sometimes affected the continued existence of a water use right to what used to be private groundwater.

4.4.1.3 Groundwater

Groundwater found in subterranean water control areas and groundwater flowing or found in public streams was also regulated by the *Water Act*.¹³⁸⁹ The right to use and control groundwater that had been allocated and used immediately prior to the declaration of a subterranean water control area vested in the land owner to which the right was allocated.¹³⁹⁰ The right to the use and control of ground water vested in the Minister if the water was unallocated or unused immediately prior to the declaration of a subterranean water control area. The fact that the right to use private groundwater was not exercised thus meant that it vested in the Minister once a subterranean water control area was declared. Other groundwater was governed by the common law and was private water.¹³⁹¹ In terms of South African common law the owner of the land was allowed to use all the private underground water that is not the source of a public river, unless the right to the water was granted to another by a servitude.¹³⁹² The right to use groundwater, whether it was private water or public water, was a right in property,¹³⁹³ as it was a vested right that accrued to the claimant in terms of a statute.¹³⁹⁴

1387 Uys *Structural analysis of water allocation* 304.

1388 Uys *Structural analysis of water allocation* 304.

1389 See s 29 *Water Act* 54 of 1956. See Thompson *Water Law* 76-77.

1390 Lazarus *Regulatory Framework for Groundwater* 10. See s 30 *Water Act* 54 of 1956.

1391 See Thompson *Water Law* 76-77.

1392 *De Witt v Knierim* 1994 1 SA 350 (A) 353 J.

1393 See para 4.2.2.

1394 See Currie and De Waal *Bill of Rights Handbook* 540.

The process of introducing a permit system for water use in order to give more people access to water was completed when the *National Water Act*¹³⁹⁵ was promulgated in 1998. The next section explains the impact of the *National Water Act*¹³⁹⁶ on the water use right that existed as a right in property in terms of the *Water Act*.¹³⁹⁷

4.4.2 The National Water Act

4.4.2.1 Separation of rights in land and rights to use water

The *White Paper*¹³⁹⁸ that preceded the *National Water Act*¹³⁹⁹ stated that all water, wherever it occurs in the water cycle, is a resource common to all. It affirmed the principle of water being a *res omnium communes*.¹⁴⁰⁰ It stated that "there shall be no ownership of water" as a resource.¹⁴⁰¹ This principle reaffirmed the abolishment of the concept "ownership" of the water resource by the *Water Act*.¹⁴⁰² The *White Paper on a National Water Policy for South Africa*¹⁴⁰³ stated that the location of the water resource in relation to land shall not in itself confer preferential rights to usage. The *White Paper*¹⁴⁰⁴ moreover stated that the riparian principle shall not apply anymore.¹⁴⁰⁵ In *Mostert v The State*¹⁴⁰⁶ the Supreme Court of Appeal confirmed that the common law distinction between public water and private water is no longer recognised as a basis for an entitlement to the use of water.¹⁴⁰⁷

A right to use water is not an incident of the possession of land anymore, and the *National Water Act*¹⁴⁰⁸ confirms that the entitlement to water attaches to a person and not to the land on the banks of the river. Ownership of land and water use rights have been separated.¹⁴⁰⁹ Gabru¹⁴¹⁰ writes that because property is not limited to land for the purposes of section 25,¹⁴¹¹ it implies that a water use right could be regarded as an incorporeal property right.¹⁴¹² The Supreme Court of Appeal in 2008, however, held in *Impala Water*

1395 *National Water Act* 36 of 1998.

1396 *National Water Act* 36 of 1998.

1397 *Water Act* 54 of 1956.

1398 Principle 2 DWA 1997 *White Paper on a National Water Policy* 60 para 2.3.

1399 *National Water Act* 36 of 1998.

1400 See para 2.2 and para 2.3.

1401 Principle 3 DWA 1997 *White Paper on a National Water Policy* 60.

1402 See s 5(1) and s 6(1) of the *Water Act* 64 of 1956. See para 4.4.1.

1403 Principle 4 DWA 1997 *White Paper on a National Water Policy* 60 para 2.3.

1404 Principle 4 DWA 1997 *White Paper on a National Water Policy* 60 para 2.3.

1405 See Lazarus & Currie 1996 *Hum Rts and Const LJ of Southern Africa* 11.

1406 *Mostert v The State* [2009] ZASCA 171 para 10. See Pienaar and Van der Schyff 2003 *Obiter* 136.

1407 The process of abolishing the concept "private water" reached a turning point in 1880 when Justice De Villiers held in *Van Heerden v Weise* 1 Buch A.C. 5 (1880) that the rule that a person may do what he likes with water rising on his own land, is subject to the limitation that the water is not the source of a public stream. See para 2.6.2.

1408 Act 36 of 1998.

1409 For the implications of this, see para 6.8 where the separation of land and water rights in Australia is discussed.

1410 Gabru 2005 *PER* 13.

1411 S 25(4)(b) of the *Constitution* of 1996. See Currie and De Waal *Bill of Rights Handbook* 540.

1412 According to Gaius, *aqua ductus* was a vested right on rural land. It was an incorporeal right and called a praedial servitude. "Commentarii Quattuor" II.14 in Muirhead *Institutes of Gaius and Rules of Ulpian* 78-79 fn 14a.

*Users Association v Lourens*¹⁴¹³ that the rights to water which belonged to the respondents, insofar as they were subsumed into rights under the 1998 *National Water Act*, could not be described as mere personal rights resulting from contracts with the appellant. The water rights interfered with were linked to and registered in respect of a certain portion of each farm used for farming, which was dependent on the supply of the water forming the subject-matter of the right.¹⁴¹⁴ A contentious remark made by the court was that the use of the water was accordingly an incident of possession of each farm that was interfered with by the actions of the Impala Water Users Association. The court held that the rights to water enjoyed by the respondents were capable of protection by the *mandament van spolie*.¹⁴¹⁵ However, the right to use water now exists in terms of section 4(4) of the *National Water Act*,¹⁴¹⁶ and the right to use water is arguably not an incident of the possession of a farm anymore. It might have been more correct to have allowed the applicant to apply for an interdict.¹⁴¹⁷

When land owned by a person to whom a licence has been issued, is transferred, section 51 of the *National Water Act*¹⁴¹⁸ permits the successor-in-title to continue with the water use under the conditions attached to the licence, provided the responsible authority is promptly informed of the new licensee's name. Although practical, this section might lead to much confusion when the terms of the contract are not clear. It should be clear that the nexus between land and water has been severed and water use rights should be dealt with separately in the contract of sale. In the next section the entitlement to use water will be discussed in detail in order to explain what the characteristics of the now separated entitlement are.

1413 *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) para 18.

1414 *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) para 19.

1415 The court held in *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) para 23 that s 59(3) of the *National Water Act* 36 of 1998 can only be invoked when the water use charge is legally payable. The non-payment of the water use charge triggers the power to restrict the supply of water to a user.

1416 S 34(1)(a) of the *National Water Act* 36 of 1998 creates confusion when it states that a person may continue with an existing lawful water use, subject to any existing conditions or obligations attaching to that use. S 34(1)(c), however, states that the use is subject to any other limitation or prohibition by the *National Water Act*. S 4(4) of the Act removes the link between water and land by stating that any entitlement granted to a person by the Act replaces any right to use water which that person might otherwise have been able to enjoy under any other law.

1417 In terms of Roman law the right to use water is a personal servitude (being *usus* in terms of Roman law). One was entitled to make use of the *vindicatio servitutis*. Muirhead *Institutes of Gaius and the Rules of Ulpian* 627 explains that vindication was the generic name for an *actio in rem*. Specific forms were *inter alia* the *rei vindicatio* and the *vindicatio servitutis*. The latter is an *actio confessoria in rem* (Van der Merwe *Sakereg* 325). The requirements are that the right holder proves (i) that he is the holder of a servitude and (ii) that the defendant is infringing his right to the servitude. (See Van der Merwe and De Waal *Law of Things and Servitudes* para 284; Sonnekus *Sakereg Vonnisbundel* 423 and Sonnekus and Neels *Sakereg Vonnisbundel* 699. See also Pieterse *v Du Plessis* 1972 2 SA 597 (A) 599 E – 601 A, where the servitude of *aqua ductus* was considered, in Sonnekus *Sakereg Vonnisbundel* 426 and Sonnekus and Neels *Sakereg Vonnisbundel* 701. According to Van Zyl *Geskiedenis en Beginsels* 187, holders of servitudes may make use of the *actio confessoria* when anybody infringes on their right to exercise a servitude. Servitudes also could be protected by the obtaining of an interdict. Justinian gave them the same protection as the ordinary protected possessor.

1418 S 51 *National Water Act* 36 of 1998.

4.4.2.2 The concept "water entitlement"

Although the *White Paper*¹⁴¹⁹ stated that there shall only be a right to water for environmental and basic human needs or an authorisation to use water, these concepts were not utilised in this manner in the *National Water Act*.¹⁴²⁰ The *National Water Act*¹⁴²¹ defines "entitlement" to mean a right to use water in terms of any provision of the Act or in terms of an instrument issued under the Act. However, it remains a right to use water and is not a mere authorisation as stated in the *White Paper*. In terms of the Act the national government has the overall responsibility for and authority over water resource management, including the equitable allocation and beneficial use of water in the public interest.¹⁴²² As a result a person can only be entitled to use water if the use is permissible under the Act. The *National Water Act*¹⁴²³ sets the conditions in terms of which the entitlement exists. The Act also states that an entitlement granted to a person by the Act replaces a right to use water which that person might otherwise have been able to enjoy or enforce under another law.¹⁴²⁴ In general a water use must be licensed unless it is listed in *Schedule I*, is an existing lawful use, is permissible under a general authorisation, or if a responsible authority waives the need for a licence.¹⁴²⁵ In *Van Staden v Raath*¹⁴²⁶ the court held that even if there exists a servitude entitling usage of water which had been acquired within the constraints of the *National Water Act*, for example as an existing lawful water use, the servitude alone would not *per se* entitle any person to the use of water without it being authorised in terms of the Act. The *National Water Act*¹⁴²⁷ states that a person who is authorised under the Act to use water may claim *inter alia* a servitude of aqueduct or submersion. He may also obtain an amendment to any such existing servitude to the extent that it is necessary to give effect to the authorisation. The claimed servitude may be a personal servitude in favour of the claimant, or a praedial servitude in favour of the claimant in the claimant's capacity as owner of property on which the claimant may use the water.¹⁴²⁸

The Supreme Court of Appeal in *Hexvallei Besproeiingsraad v Geldenhuys*¹⁴²⁹ held that the *National Water Act*¹⁴³⁰ contains another philosophy with regard to the water resource than the historical principles of water law which have been contained in the *Irrigation and*

1419 Principle 3 DWA 1997 *White Paper on a National Water Policy* 60.

1420 Act 36 of 1998.

1421 S 1 *National Water Act* 36 of 1998.

1422 Introduction to Chapter 4 *National Water Act* 36 of 1998.

1423 Act 36 of 1998.

1424 S 4(4) *National Water Act* 36 of 1998.

1425 Part 1 Introduction to Chapter 4. Licences to use water in the *National Water Act* 36 of 1998 are similar to Roman law grants. See para 2.2.3.

1426 *Van Staden v Raath* [2005] ZANWHC 50 para 5.7

1427 S127(1) *National Water Act* 36 of 1998.

1428 S127(2).

1429 *Hexvallei Besproeiingsraad v Geldenhuys* [2008] ZASCA 69 para 5.

1430 Act 36 of 1998.

Water Conservation Act 8 of 1912 and the *Water Act* 54 of 1956. However, the *National Water Act*¹⁴³¹ does recognise existing use rights. Existing lawful water use rights will eventually be converted into water use licences. In the case of compulsory licences for water use in respect of a specific resource, a responsible authority may prepare schedules for allocating quantities of water to existing and new users.¹⁴³² The procedure is intended to be used in areas which are, or are soon likely to be, experiencing "water stress," or where it is necessary to review prevailing water use to achieve equity of access to water. These licences replace previous entitlements to any existing lawful water use by the applicant.¹⁴³³ Soltau¹⁴³⁴ is of the opinion that the system of statutory entitlements and eventually licensing represent a redefinition and regulation of the right to use water, not its extinction. The regulation of the right to use water is justifiable due to the importance of the resource and the necessity of its sustainable management. The need to manage the water resource sustainably has led to the *National Water Act*¹⁴³⁵ stipulating that the Minister of Water Affairs, acting on behalf of the national government, is the custodian of the nation's water resources, which is an indivisible national asset. The concept of "custodianship" or "public trusteeship" of the water resources will be discussed next.

4.4.2.3 Water entitlements and the concept of "public trusteeship"

The concept of "custodianship" or "public trusteeship" of the water resources, as contained in the *National Water Act*,¹⁴³⁶ is nothing new to South African law. It confirms the view that has existed in South Africa's Roman common law that running water was regarded to have been common to mankind, or *res omnium communes*.¹⁴³⁷ All rivers were regarded to be public property and as public property was subject to the guardianship or custodianship of the Roman people.¹⁴³⁸ One of the principles contained in the *White Paper on a National Water Policy for South Africa*¹⁴³⁹ that preceded the *National Water Act*,¹⁴⁴⁰ was that water is a *res omnium communes* and is a resource common to all, the use of which shall be subject to national control. As stated above one of the major principles in the *White Paper* is that the Minister of Water Affairs acting on behalf of the national government is the custodian of the nation's water resources, as an indivisible national

1431 Act 36 of 1998.

1432 S 43 - s 48 in part 8 of the *National Water Act* 36 of 1998.

1433 S 48(1) of the *National Water Act* 36 of 1998.

1434 1999 *Acta Jur* 247.

1435 Principle 12 DWA 1997 *White Paper on a National Water Policy* 61. See para 4.4.2.3.

1436 See S 3(1) of the *National Water Act* 36 of 1998, para 4.4.2.3 and para 5.4.

1437 *Iust* 2.1.1.

Et quidem naturali iuria communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris.

See para 2.2.3.

1438 Sandars *Institutes of Justinian* 91. We get the first inkling of the concept of the "public trust" that appears in s 3(1) of the *National Water Act* 36 of 1998.

1439 Principle 2 DWA 1997 *White Paper on a National Water Policy* 60.

1440 *National Water Act* 36 of 1998.

asset.¹⁴⁴¹ The appointment of the Minister on behalf of the national government as the public trustee or custodian of the nation's water resources in terms of the *National Water Act*¹⁴⁴² is therefore an affirmation of a centuries old principle by clothing it in a modern guise.

The right holder holds the right to use water subject to the Minister's pre-existing custodianship of the water resource.¹⁴⁴³ Van der Schyff¹⁴⁴⁴ opines that custodianship of water resources involves that water resources are held in trust for the people of the state. The public trust concept involves that the water resources are held in the public trust exclusively for the benefit of, and use by, the general public.¹⁴⁴⁵ The Minister acting on behalf of the government is obliged to protect both the resource and the established uses associated with the resource.¹⁴⁴⁶ It follows that the right to use water is subject to the regulation of the Minister as the custodian of the water resource.¹⁴⁴⁷ The requirements of the public trust empower the custodian or regulator of the water resource to set limits within which the right holder must exercise the right to use water. As property rights, water use rights are more limited than other forms of private property, such as land ownership.¹⁴⁴⁸ Their exercise may intrude on something that has been classified as *res omnium communes*, or the property of the community. For this reason water use rights are subject to prior public claims such as public custodianship and to the laws protecting the water from pollution.¹⁴⁴⁹

The Minister, as regulator, is responsible to ensure that water in the resource is "allocated equitably and *used beneficially* in the public interest, while promoting environmental values".¹⁴⁵⁰ The Minister must ensure that the water resource is *inter alia* managed for the *benefit* of all persons.¹⁴⁵¹ The Minister should ensure that basic domestic needs, the requirements of the environment and international obligations are met.¹⁴⁵² The concept of "stewardship" that underlies the concepts "custodianship" and "public trust" means that a water use right holder is in the position of a caretaker when using his water entitlement.

1441 Principle 12 DWA 1997 *White Paper on a National Water Policy* 61.

1442 See s 3(1) of the *National Water Act* 36 of 1998, para 4.4.2.3. and para 5.4.

1443 See Van der Schyff *Constitutionality of the MPRDA* 140.

1444 See Van der Schyff *Constitutionality of the MPRDA* 148.

1445 See Van der Schyff *Constitutionality of the MPRDA* 148.

1446 See Van der Schyff *Constitutionality of the MPRDA* 148.

1447 See s 3(3); s 4(4); s 22(1) and s 22(2) *National Water Act* 36 of 1998.

1448 Soltau 1999 *Acta Jur* 247.

1449 See *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) and *Sax* 1993 *Loy LA L Rev* 944-945; *Sax* 1990 *U Colo L Rev* 257 on 259 at fn 4. Compare *Florida Rock Industries, Inc. v United States* 45 Fed Cl 21, 24 (1999) and *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313 (2001); Anderson 2007 *McGeorge L Rev* 461 (*Tulare* was heavily criticized in *Klamath Irrigation District v The US* 67 Fed Cl 504 (2005) at 538.)

1450 S 3(2) of the *National Water Act* 36 of 1998. See principles 12 and 13 in the DWA 1997 *White Paper on a National Water Policy* 61. According to Bronstein 2002 *SALJ* 472 public trusteeship has been referred to as 'soft nationalisation'. She seems to have lost sight of the fact that water was in state control in terms of the *Water Act* 54 of 1956.

1451 S 3(1) *National Water Act* 36 of 1998.

1452 Principle 13 DWA 1997 *White Paper on a National Water Policy* 61.

He has duties to conserve the water. These duties exist towards the government, the water resource and other water users.¹⁴⁵³

The water user's use of the resource may not be wasteful.¹⁴⁵⁴ The use is not wasteful if the utilisation of water for a water use is roughly in proportion to that of other water users making use of water for similar purposes.¹⁴⁵⁵ The result is that a standard of proportionality is applied when water uses are judged. It also means that *uses* that are *not beneficial*¹⁴⁵⁶ are not protected in the sense that a licence to use water may be revoked should the water use be contrary to the conditions of use.¹⁴⁵⁷ A manifestation of the concept "public trusteeship"¹⁴⁵⁸ or "custodianship" is that one of the purposes of the *National Water Act*¹⁴⁵⁹ is *inter alia* to ensure that the nation's water resources are protected, used and developed in ways which take into account the basic human needs of present and future generations.¹⁴⁶⁰ The *National Environmental Management Act*¹⁴⁶¹ also states that the environment is held in public trust for the people. The *beneficial use*¹⁴⁶² of environmental resources must serve the public interest and the environment must be protected as the people's common heritage. The court in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*¹⁴⁶³ held that a stewardship¹⁴⁶⁴ has been conferred on the authorities whereby the present generation is the custodian or trustee of the environment for future generations.

1453 See the discussion of the concept "stewardship" in para 2.3.3 and the discussion of the public trust doctrine in para 5.4.

1454 See s 22(2)(d) *National Water Act* 36 of 1998.

1455 See para 4.2.2.

1456 See para 4.4.2.4. When s 4(1)(a) of the *Water Act* 54 of 1956 was promulgated, it only protected pre-existing water rights which had been beneficially used. The *Preamble* to the *National Water Act* 36 of 1998 acknowledges the national government's overall responsibility for the nation's water resources and their use, including the equitable allocation of water for beneficial use.

1457 See s 29 and s 54 *National Water Act* 36 of 1998. S 53 and s 54 *National Water Act* 36 of 1998 prescribes the procedure that must be followed before the right can be revoked. The right is not revoked automatically.

1458 DWA in the 1997 *White Paper on a National Water Policy* in para 5.1.2 recognises that the public trust is an internationally accepted concept. In America the courts have overturned private water rights in order to protect water resources on the grounds that rights to use water remain subject to the public trust." This confirms the development of the Roman law principle of the public trust," that the public trust does is not only concerned with the state's power to use public property for public purposes, but also with the state's duty to protect the people's common heritage of rivers.

1459 S 2 *National Water Act* 36 of 1998.

1460 See para 2.7.1.

1461 S 2(4)(o) of the *National Environmental Management Act* 107 of 1998 reads:

The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

1462 The *National Water Act* 36 of 1998 uses concepts like the "public trust" (s 3(1) of the *NWA*) and "beneficial use". (See para 4.4.2.4). These concepts were developed in America. See chapter 5 for a comprehensive discussion of these concepts in America. The concept of "public trusteeship" forms a part of the background principles that define the concept "water right".

1463 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T).

1464 See para 2.3.3 and the discussion of Aquino and Grotius' thoughts on stewardship. Arnold 2002 *Harv Envtl L Rev* 305-306 states that stewardship means responsibility for a thing. The duties of stewardship may arise out of membership in the ecological community and be owed to nature. The source of the duty may be ethical values or religious beliefs and the duty may be owed to either God or a system of ethics. The duties might include caring for natural creation, taking responsibility for one's ideas and expressions, and using one's land, money, and business enterprises for good. A property concept built on responsibilities (or obligations), not only rights, has to cover the ethical and spiritual development resulting from person-thing relationships. A solely "social relations" concept of duty, like the bundle of sticks, is incomplete.

A concept that is used in tandem with the public trust doctrine in particularly the area to the West of the 100th Meridian in America,¹⁴⁶⁵ is the concept "beneficial use". Although the concept "beneficial use" was discussed in para 3.8 above, its impact on the concept "water use right" will be discussed next.

4.4.2.4 Beneficial use as a restriction in the *National Water Act*¹⁴⁶⁶

The essence of a water use right is that it is a right to make use of a resource that is held in common. The object of the right, therefore, is the "use" of the resource. The discussion of the historical development of the concept "use" showed that it played a significant role in the existence of the water use right in Rome. Sandars¹⁴⁶⁷ explained, with regard to common things like running water in post classical Roman law, that as long as somebody occupied any portion, his occupation was respected, but directly when his occupation ceased, the thing occupied again became common to all. Water use rights were, in the days of the Roman jurist Julius Paulus,¹⁴⁶⁸ limited by the requirement that the use had to be exercised.¹⁴⁶⁹ Justinian's *Digest* contains several passages explaining that a servitude to take water had to be exercised in accordance with its terms, or it would be lost.¹⁴⁷⁰ When one exceeded one's quota, one also contravened a condition of the servitude that would lead to the servitude being lost.¹⁴⁷¹ No evidence was found that these strict conditions were received into Roman Dutch or South African water law. In Holland, where water was not as scarce and conditions of water use not as strict, the principle that users of rivers or river banks were not allowed to do harm to their neighbours was received into Roman-Dutch law. Roman-Dutch law allowed riparian owners to build on river banks, provided they did no harm to upper or lower neighbours.¹⁴⁷² It meant that the use of rivers or river banks had to be beneficial in the sense of not being harmful. The understanding that the use of rivers was not allowed to be harmful was received into the water law of the Cape.¹⁴⁷³

Where water is scarcer, there tends to be a hierarchy of water uses. From the earliest days in South Africa there existed a hierarchy of water uses, with use by the Dutch East India Company taking precedence over use by the inhabitants of the settlement.¹⁴⁷⁴ Even

1465 See para 5.6.

1466 *National Water Act* 36 of 1998.

1467 Sandars *Institutes of Justinian* 91. See para 2.2.3.

1468 "Uitspraken van Paulus" I.16.1; XVII.2 and XVII.3 in Spruit and Bongenaar *Gaius en Paulus* 97. See para 2.2.2.

1469 "Uitspraken van Paulus" V.6.9 in Spruit and Bongenaar *Gaius en Paulus* 181.

1470 D 8.6.7; D 8.6.10 and D 8.6.17 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson. See para 2.2.3.

1471 D 8.6.18 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

1472 See para 2.3.2.

1473 See para 2.4.6.

1474 The Dutch East India Company, for example, prohibited Free Burghers to divert water from the streams in Table Valley for the irrigation of land when it would be to the detriment of the company's requirements. See Hall *Origin and Development of Water Rights* 11; Hall *Maasdorp's Institutes* 82; Hall 1938 *THRHR* 245 and para 2.4.7.

in the later case of *Hough v Van der Merwe*¹⁴⁷⁵ it was held that the right to the ordinary use of water or use for the support of animal life and domestic purposes, is derived from “necessity” and the right to extraordinary use or use for any other purpose, is derived from “convenience”. The right to use water was thus also limited by the purpose of the use. Some uses and the rights of some users were more strongly protected than others.

Even water allocated in terms of the *National Water Act*¹⁴⁷⁶ should be allocated only when the proposed use of the water passes the test of beneficial use set by the Act and implied by the *Constitution*.¹⁴⁷⁷ In the previous chapter it was explained that section 27 of the *National Water Act*¹⁴⁷⁸ applies when an authority wishes to issue a general authorisation or a licence.¹⁴⁷⁹ The factors a responsible authority must take into account when issuing general authorisations and licences include *inter alia* the existing lawful water uses and the efficient and beneficial use of water in the public interest. It was explained that whenever water is allocated, whether for purposes of equity or not, the water should be used beneficially. It was argued that the constraint of beneficial use is required by section 195(1) of the *Constitution* of 1996, which states clearly that the efficient, economic and effective use of resources must be promoted.¹⁴⁸⁰

The close relationship between beneficial use and economic activity is also recognised when the Act allows for compensation for consequential financial loss where an application for a licence has been refused. Section 22(6) of the *National Water Act*¹⁴⁸¹ states that any person who has applied for a licence in terms of section 43 in respect of an existing lawful water use, and whose application has been refused, resulting in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may claim compensation for any financial loss suffered in consequence. For example, if the water was used for the irrigation of mango trees in 1997 an existing lawful water use would be established. If the government wished to use the water for social upliftment, the refusal of a licence to use the water for irrigation would lead to financial loss because of the severe prejudice to the economic viability of the farming operation if it still existed. The implication of this section is that if an existing lawful water use had taken place in the two years before the promulgation of the Act, but the use had since been discontinued, no loss would be suffered when the application for a licence is refused. It appears as though the exercise of a water use is a requirement for a payment

1475 *Hough v Van der Merwe* 1874 Buch 154.

1476 S 27(1) *National Water Act* 36 of 1998. See para 3.8.3.

1477 S 195(1) *Constitution* of 1996.

1478 S 27(1) *National Water Act* 36 of 1998. See para 3.8.3.

1479 It also applies when an irrigator wishes to transfer water to another user by way of trading the water to him. See discussion of water trading in para 7.6.4.

1480 See para 3.8.3.

1481 Act 36 of 1998.

of compensation in terms of section 22(6) of the *National Water Act*. The same argument that the exercise of a water use is a requirement for a payment of compensation applies in the case of section 49(4), where an amendment of a licence condition on review has to result in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used before compensation is payable.

When the value of water use right is determined for the purposes of section 22(6) of the *National Water Act*¹⁴⁸² the concept "beneficial use" makes its appearance in a number of guises. The payment of compensation is subject to section 22(7) of the *National Water Act*¹⁴⁸³ which states that the amount of the compensation must be determined in accordance with section 25 (3) of the *Constitution*. In terms of section 25(3)¹⁴⁸⁴ the compensation that is payable should reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances. The first circumstance mentioned is the current use of the property.¹⁴⁸⁵ The current use arguably has to be a beneficial use as one of the purposes of the *National Water Act* is to ensure that the nation's water resources are used in ways which promote the beneficial use of water in the public interest.¹⁴⁸⁶ Another circumstance that must be taken into account when the amount of the compensation is calculated is the history of the acquisition and use of the property.¹⁴⁸⁷ The phrase "history of the use of the property" in the light of section 32 probably refers to the question whether a water use right was exercised beneficially historically. The amount of compensation must also be calculated by disregarding any reduction in the existing lawful water use made in order to rectify an over-allocation of water use from the resource in question.¹⁴⁸⁸ An over-allocation may for example refer to a grant of more water by the Minister than the right holder had the capacity to use beneficially.¹⁴⁸⁹ Any reduction in the existing lawful water use made in order to rectify an unfair or disproportionate water use must be disregarded when the compensation is calculated.¹⁴⁹⁰ An excessive or even wasteful water use,¹⁴⁹¹ when compared to other water users of the same water resource, will probably meet the criterion of a disproportionate water use. The fact of the matter is that compensation is not paid for the refusal to grant a licence for an existing lawful water use or for the amendment of an existing licence in the above cases because water uses that have not

1482 Act 36 of 1998.

1483 S 22(7)(a) *National Water Act* 36 of 1998.

1484 S 25(3) *Constitution* of 1996. See the discussion of section 25(3) of the *Constitution* of 1996 in para 4.3.6.3 and para 4.2.2.

1485 S 25(3)(a) *Constitution* of 1996.

1486 S 2(d) *National Water Act* 36 of 1998.

1487 S 25(3)(b) *Constitution* of 1996.

1488 S 22(7)(b) *National Water Act* 36 of 1998.

1489 See para 4.4.1.1.

1490 S 22(7)(b) *National Water Act* 36 of 1998.

1491 See s 22(2)(d) *National Water Act* 36 of 1998.

been beneficially exercised or that were disproportionate do not meet the condition of beneficial use to which all water use entitlements are subject.

4.4.2.5 Water as a commodity

In the above section it was argued that water use entitlements currently are property rights for which compensation is paid when they are curtailed, as long as the water use entitlement is exercised. The purpose of the *National Water Act*¹⁴⁹² is to protect, control and use the water resources in a way that takes into account promoting the efficient, sustainable and beneficial use of water in the public interest. A water user who does not exercise the water use entitlement beneficially, either because of market conditions or because a new irrigation method has conserved a significant quantity of water, is at risk of losing his water use entitlement without compensation. It would happen either when the regulator refuses to grant a licence for an existing lawful water use or elects to amend a licence condition.¹⁴⁹³ The water use entitlement holder, who wants to protect the value of his water use entitlement when market conditions are not right or when his irrigation methods have become more efficient, might elect to lease or sell his water use entitlement to other water users in terms of section 25 of the *National Water Act*.¹⁴⁹⁴ The development of water law systems to allow for water entitlement or water allocation trading is in response to circumstances where the regulator does not have sufficient unallocated water available in the resource to award to all applicants for water licences.

Soltau¹⁴⁹⁵ argues that historically when a natural resource, like water, was abundant, there was no need for property rights because of an absence of competition for the resource. As scarcity arises, competition sets in and becomes significant. If a scheme is instituted to allocate property rights, there may be beneficial results. Resources cannot be appropriated by just anyone any more. Soltau¹⁴⁹⁶ notes that security encourages investment, with the result that the resource becomes more valuable for all.¹⁴⁹⁷ In addition a property regime, by specifying who controls what, replaces conflict with trade. There is evidence that regulation of a resource may actually foster the development of property rights through the allocation of privileges which eventually harden into property rights.¹⁴⁹⁸

1492 S 2(d) *National Water Act* 36 of 1998.

1493 See s 22(6) and s 49(4) of the *National Water Act* 36 of 1998. One should rather not argue that it is the capacity to use the water beneficially that is the measure of the entitlement to use water as was the case in terms of the *Water Act* 54 of 1956. (See para 4.4.1) The *Water Act* 54 of 1956 to a certain extent still made use of concepts typical of the riparian system of water law. S 4 of the *National Water Act* sets out the extent of water use entitlements in terms of the Act. When they are constrained, s 22(6) and s 49(4) of the Act applies.

1494 S 25 *National Water Act* 36 of 1998. See para 7.6 on water allocation or entitlement trading in South Africa.

1495 Soltau 1999 *Acta Jur* 232. See para 6.6.5 on the importance of the water use right as a property right for water allocation or entitlement trading.

1496 Soltau 1999 *Acta Jur* 232.

1497 See Ostrom 2000 *Swiss Poli Sci Rev* 33; Ostrom and Gardner 1993 *J of Econ Perspectives* 98 on the advantages of self-organisation of the commons.

1498 Soltau 1999 *Acta Jur* 234-235. See para 6.6.5 for the position in Australia.

It is foreseeable that water scarcity would encourage investment in mechanisms to conserve and obtain water. A water entitlement or allocation market might be a place where people can lease or sell water they have conserved or do not need.¹⁴⁹⁹ The content of the right or entitlement to use water has been set out above. The next paragraph deals with the consequences of state regulation cancelling unexercised water use rights or entitlements. Is the water use right or entitlement holder ever entitled to compensation for unexercised old order water use rights?

4.5 Water reform and the water use right

Lazarus and Currie¹⁵⁰⁰ wrote that the drafters of the *National Water Act*¹⁵⁰¹ were of the view that there was no obligation to compensate where, *firstly*, existing water use rights impinged on the Reserve;¹⁵⁰² *secondly*, the public interest outweighs the interests of the rights holder; and, *thirdly* the water use right that has been diminished was unquantified and unexercised when draft principles for water reform were published. The latter is a contentious view. The non-recognition of unexercised water use rights will be discussed below.

4.5.1 An existing lawful water use

In terms of section 32(1)(a)(i) of the *National Water Act*¹⁵⁰³ an existing lawful water use means a water use that has taken place at any time during a period of two years¹⁵⁰⁴ immediately before the date of commencement of the Act¹⁵⁰⁵ and which was authorised by or under any law which was in force immediately before the date of commencement of the Act. The definition of an existing lawful water use is a redefinition of the old order water uses that the regulator in terms of the *National Water Act*¹⁵⁰⁶ regard to have been beneficial uses of water. A problem arises when there had been permission to use water during a period of two years immediately before the commencement of the NWA, but the water use had not in fact been exercised.¹⁵⁰⁷ In that case it cannot be regarded as an existing lawful water use.¹⁵⁰⁸ The question is whether the regulator's refusal to declare a

1499 See Chapter 7 on water trading. Many people went to the market to buy generators when Eskom had difficulty supplying electricity.

1500 1996 *Hum Rts and Const LJ of Southern Africa* 14.

1501 *National Water Act* 36 of 1998.

1502 See para 3.1.4 for an explanation of the concept "Reserve".

1503 *National Water Act* 36 of 1998.

1504 See Thompson *Water Law* 501. The qualifying period is from 1 October 1996 to 30 September 1998 for ground water and from 1 October 1997 to 30 September 1999 for running water.

1505 The *National Water Act* 36 of 1998 was assented to on 20 August 1998 and commenced on 1 October 1998.

1506 S 32 *National Water Act* 36 of 1998.

1507 See Thompson *Water Law* 497. See para 6.7.4.1 (a) and Freebairn "Principles" 10 for a discussion of dozer and sleeper rights.

1508 Thompson *Water Law* 502. Thompson makes the important point that the extent of an existing lawful water use is not the extent which could have taken place lawfully in terms of the water laws in place when the NWA commenced. The extent is only the part that lawfully took place during the qualifying period (on 505).

water use to be an existing lawful water use, could be a deprivation of property or even an expropriation of property.¹⁵⁰⁹

The *National Water Act*¹⁵¹⁰ has a mechanism to turn unexercised lawful water uses into existing lawful water uses. Section 33(3), read with section 33(1), states that a responsible authority may make a declaration that such a water use is an existing lawful water use, if it is satisfied that the water use took place lawfully more than two years before the date of commencement of the Act and was discontinued for good reason.¹⁵¹¹ Alternatively a responsible authority may make a declaration that such a water use is an existing lawful water use if the use had not yet taken place at any time before the date of commencement of the Act, but would have been lawful had it taken place. Steps towards effecting the use should have been taken in good faith before the date of commencement of the Act. A responsible authority may on its own initiative¹⁵¹² declare such a water use to be an existing lawful water use. Where an Irrigation Board existed and the required rates and charges had been paid to the Irrigation Board or the state for a lawful water use entitlement scheduled in terms of section 62 or section 88 of the 1956 *Water Act*, such a use is regarded as an existing lawful water use under section 33(2).¹⁵¹³ The user does not need to apply for a declaration as an existing lawful use under s 33(1).

Although the authorities declared that there was an existing lawful water use when an Irrigation Board existed and the required rates and charges had been paid, it does not mean that all existing water uses were necessarily lawful. In the case of *Joubert v Benede-Blyderivier Watergebruikersvereniging*¹⁵¹⁴ the appellants, farmed in the Hoedspruit area on riparian land adjacent to the Blyde River. Since the early 1950s the appellants' farmland was irrigated by the Blyde River through the Jonkmansspruit canal.

1509 See also Van der Walt 2004 *SAPL* 77.

1510 *National Water Act* 36 of 1998.

1511 Section 33 Declaration of water use as existing lawful water use

(1) A person may apply to a responsible authority to have a water use which is not one contemplated in section 32(1)(a), declared to be an existing lawful water use.

(2) A responsible authority may, on its own initiative, declare a water use which is not one contemplated in section 32 (1) (a), to be an existing lawful water use.

(3) A responsible authority may only make a declaration under subsections (1) and (2) if it is satisfied that the water use-

(a) took place lawfully more than two years before the date of commencement of this Act and was discontinued for good reason; or

(b) had not yet taken place at any time before the date of commencement of this Act but-

(i) would have been lawful had it so taken place; and

(ii) steps towards effecting the use had been taken in good faith before the date of commencement of this Act.

(4) Section 41 applies to an application in terms of this section as if the application had been made in terms of that section.

1512 S 33(2) of the *National Water Act* 36 of 1998. See Thompson *Water Law* 497.

1513 Conningarth Economists *Facilitation of trade* 77. A general declaration to this effect was issued by the Minister in 1999.

1514 *Joubert v Benede-Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 2. See para 3.8.1.

During 1987 the Deputy Minister of Water Affairs issued a regulation¹⁵¹⁵ that stipulated that the maximum annual amount of water that could, if available, be used for irrigation per allocated hectare of land was 9 900 m³. The appellants maintained that they were entitled, subject to availability, to release of that amount of water from the sluices on their farms. The Jonkmansspruit was a private canal that had become dilapidated over the years. So much water was being wasted that if 9 900 m³ of water per hectare per year were released from the river into the canal, the farmers at the furthest point of the canal would receive no irrigation water whatsoever. The appellants alleged that the exercise of their water use rights complied with the definition of an existing lawful water use¹⁵¹⁶ and that they were entitled to continue with that use.¹⁵¹⁷ The Supreme Court of Appeal held that the notice issued in 1987 by the Minister did not give the farmers the right to use the water. It was not necessary. They already had the right to use a reasonable amount of water. The notice limited their rights by determining the maximum amount of water that they were allowed to use (reasonably) from a state water work.¹⁵¹⁸ The court held that since the earliest days of water use in this country there were measures to ensure that nobody used water unreasonably. This is also a *leitmotiv* in the 1998 Act. Reasonable use is all that the riparian owner was entitled to. In the case of water scarcity the water user's association would determine the reasonableness of the user's extraction, which might be less than the maximum allowed.¹⁵¹⁹ Any entitlement granted to a water user by the *National Water Act* replaces any right to use water which the water user might have been able to enjoy or enforce under any other law to *inter alia* take or use water or to obstruct or divert a flow of water.¹⁵²⁰ The introduction to Part 3¹⁵²¹ of the *National Water Act* explains that one may be permitted to continue with an existing water use derived from *inter alia* the *Water Act* of 1956.¹⁵²² An existing lawful water use, with the attached conditions, is recognised, but it may continue only to the extent that it is not burdened, prohibited or terminated by the *National Water Act*.¹⁵²³ The Supreme Court of Appeal in *Joubert v Benede Blyderivier Watergebruikersvereniging*¹⁵²⁴ held that an existing water use had continued unlawfully when the irrigation board and the water user association contravened the regulation of 1987. This unlawful use ceased when the water user association decided to release only

1515 GN1207 in the Government Gazette of 5 June 1987 issued terms of s 63(1)(b) of the *Water Act* 54 of 1956.

1516 In terms of s 32 of the *National Water Act* 36 of 1998.

1517 In terms of s 4 of the *National Water Act* 36 of 1998. *Joubert v Benede-Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 7.

1518 *Joubert v Benede-Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 9.

1519 *Joubert v Benede-Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 14. See Soltau 1999 *Acta Jur* 247.

1520 S 4(4)(a) and (b) of the *National Water Act* 36 of 1998.

1521 It deals with ss 32-35 which deal with existing lawful water uses.

1522 See s 4(2) of the *National Water Act* 36 of 1998.

1523 See the introduction to Part 3 of the *National Water Act* 36 of 1998. S 4(3) of the *National Water Act* states that a person may use water in terms of a general authorisation or licence.

1524 See *Joubert v Benede Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 13.

the stipulated maximum in the canal. The principle is that unlawfully exercised water use rights have never been protected as property rights.¹⁵²⁵

The existing lawful water use is limited by *inter alia* the fact that the Minister acting on behalf of the national government is the custodian of the nation's water resources, as an indivisible national asset¹⁵²⁶ and by the principle of beneficial use.¹⁵²⁷ The pre-1998 right of a riparian owner was a right to reasonable use of the water. It is now a right that attaches to the person of the water user¹⁵²⁸ because the right to water and ownership of land have been separated.¹⁵²⁹ The water rights holder must use the water beneficially.¹⁵³⁰ Although reasonable use was the principle used to determine the riparian owner's lawful existing water use, the extent of the use became "frozen" in 1998 when the *National Water Act* came into operation. The result is that one may utilise the concept "reasonable use" to determine what the existing lawful water use was prior to the *National Water Act* coming into operation, but the extent of current water use is governed by the principle of beneficial use and the public trust¹⁵³¹ concept under the *National Water Act*. No licence is required to continue with an existing lawful water use until a responsible authority requires the entitlement holder to apply for a licence.¹⁵³² If a licence is issued, it becomes the source of authority for the water use. If a licence is not granted, the use is no longer permissible. The definition of existing lawful water use excludes water rights which had not been used before the Act was promulgated – they would have been existing lawful water uses if only they had been used in the two years before the coming into operation of the *National Water Act*. However, the 1956 *Water Act*¹⁵³³ itself did not derogate only from a right to use the normal flow of a river which at the commencement of the 1956 Act had been lawfully acquired, was possessed and was being beneficially exercised.¹⁵³⁴ Beneficial use thus played the role of determining which water use rights would receive more protection in terms of the 1956 *Water Act*¹⁵³⁵ when conditions of water scarcity prevailed.

The concept "existing lawful water use" is of further importance because section 22(6) of the *National Water Act*¹⁵³⁶ states that any person who has applied for a licence in respect of an *existing lawful water use* and whose application has been refused, or who has been granted a licence for a lesser use than the existing lawful water use, may claim

1525 See Kidd "Development of Water Law" 99 and para 4.2.2.

1526 Principle 12 DWA 1997 *White Paper on a National Water Policy* 61. S 3 of the *National Water Act* 36 of 1998.

1527 See para 4.4.2.4 above.

1528 S 4(4)(a) and (b) of the *National Water Act* 36 of 1998.

1529 See para 6.8 dealing with the separation of rights in water and rights in land in Australia.

1530 See para 4.4.2.4.

1531 See para 4.4.2.3.

1532 See the introduction to Part 3 of the *National Water Act* 36 of 1998.

1533 S 4(1) of the *Water Act* 54 of 1956.

1534 See para 4.4.1.

1535 S 4(1) did not apply to subterranean government water control areas; the modification of precipitation and s 62.

1536 S 22(6) *National Water Act* 36 of 1998. See para 4.2.2 and para 4.4.2.4.

compensation for any financial loss suffered in consequence. Section 22(6) is an example of a case where payment of compensation for loss caused by regulatory action is specifically authorised by the legislation authorising the regulatory measure.¹⁵³⁷ The claim is severely limited by the proviso that the refusal of the application or the reduction in amount of water must have resulted in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used. The principle underlying the above is that compensation may only be claimed for a water use right that had actually been exercised. Only where the right had been exercised can one substantially prove financial loss. Compensation is not payable for the loss of a mere right to use water. The regulator is thus paying compensation for a water use right that was exercised as though there was an expropriation. Kidd¹⁵³⁸ states that in many cases where a water allocation is reduced, users will not suffer severe prejudice to the economic viability of their undertakings, and no compensation will be payable. In other cases, where a water user is disproportionately affected, fairness and equity require that the water user be compensated in terms of the Act.¹⁵³⁹

The claim is also limited by the requirement of beneficial use implied in section 22(7) of the *National Water Act*,¹⁵⁴⁰ read with section 25(3) of the *Constitution* of 1996. The existence of the water use right is thus *inter alia* limited by the conditions that a water use has to be exercised and that the exercising of a water use right has to be beneficial and proportional. The underlying principle is that the *res omnium communes* or the water resource may never be destroyed by the users. The water use right is thus limited by the concept "beneficial use". The water resource should always be in a condition where basic human needs and the needs of the aquatic ecology can be met. No water entitlements can exist to use water in the Reserve and the property clause does not apply to water in the Reserve. It reminds of the view of Grotius that equity demands that in times of scarcity people need to produce their provisions for common use.¹⁵⁴¹ An alternative argument is that the reduction of water use rights to allow water in the resource to be set aside for the requirements of the Reserve may be regarded as a deprivation of property that is not arbitrary.¹⁵⁴² Another possibility is that if the reduction was an uncompensated expropriation, it would be reasonable and justifiable in terms of section 36 of the

1537 See para 4.3.1.

1538 "Development of Water Law" 99-100.

1539 See para 4.6.5.

1540 22(7) *National Water Act* 36 of 1998. See para 4.2.2 and para 4.4.2.4.

1541 See para 2.3.4.

1542 See Soltau 1999 *Acta Jur* 247.

Constitution.¹⁵⁴³ According to Soltau,¹⁵⁴⁴ justification of the reduction of compensation will be easy in the light of the importance of the Reserve.

It must be stated that the harsh effects of the measure in section 32, namely the cancellation of water use rights that were not exercised, are mitigated by the savings clause of good reason in section 33(3). It will be argued that it is the application of the concept "good reason" in section 33 that may lead to an arbitrary deprivation of water use rights, as will be explained in the next paragraph.

4.5.2 Good reason

It can be argued that when "good reason" is determined the existence of objective factors making the exercise of a water use right difficult or impossible should lead to the applicant being given the benefit of the doubt. Thompson¹⁵⁴⁵ makes a distinction between a water use that did not take place because of hydrological conditions - when, for example there did not exist enough water to store the full entitlement in a dam - and a water use that did not take place because of the owner's intention, for example he did not want to store the water. Thompson¹⁵⁴⁶ suggests that the intention of the person using the water during the qualifying period should play a critical role in determining the extent of the existing lawful water use. The test he suggests is whether and how the water use would have been undertaken during the qualifying period, if certain hydrological conditions prevailed during the qualifying period. The application of this test would be of assistance to a tribunal determining whether an unexercised water use right should be declared to be an existing lawful water use in terms of section 33 of the *National Water Act*. Even in Roman law where a servitude of *aqua ductus* that was not exercised was cancelled, the emperor accepted a defence that it was impossible to obtain water.¹⁵⁴⁷ The *Digest*¹⁵⁴⁸ described a case where a spring dried up and later started flowing again and the emperor granted relief to two petitioners for the restoration of their rights. Their defence was that they had lost their rights through no neglect or fault of their own, but because it had been impossible to obtain water.¹⁵⁴⁹ The emperor held that the right, which they had on the first day that it had become impossible to obtain water, should be restored to them.

1543 *Constitution of 1996*.

1544 Soltau 1999 *Acta Jur* 252.

1545 *Water Law* 506.

1546 *Water Law* 506.

1547 See para 2.2.3.

1548 D 8.3.35 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

1549 D 8.3.35 *Mommsen and Krueger's translation of the Digest* English translation edited by Watson.

The dispute in the Water Tribunal appeal of *Christiaan Johannes Louw and the Director General of the Department of Water Affairs and Forestry*¹⁵⁵⁰ (hereafter referred to as *Louw*) centred on the question whether the water use in question was discontinued for good reason. In terms of the *National Water Act*,¹⁵⁵¹ a good reason for the discontinuation would have had the result that the water use would have been declared an *existing lawful water use*. The facts in the *Louw* case were that the farm *Kruys River* was included in the *Duivenhoksrivier*¹⁵⁵² *Government Water Control Area* (GWCA), where water use was prohibited unless under permit in terms of section 62 of the *Water Act* of 1956. In 1974 when these permits were allocated, the owners of portions 21 and 23 *Kruys River* did not apply for permits.¹⁵⁵³ On 23 February 1990 the Deputy Minister made a determination,¹⁵⁵⁴ to the effect that up to 15 hectares of each piece of land within the GWCA “may be” irrigated, depending on the irrigation potential.¹⁵⁵⁵ The tribunal found that Louw, in his application for the section 33 declaration, relied on a water use that took place not later than 1975 and was exercised by his predecessors in title.¹⁵⁵⁶

According to the tribunal, the water use relevant for a section 33 declaration is the most recently exercised water use.¹⁵⁵⁷ The tribunal was of the view that as the life right holder's (Gunther's) use of the farm declined, the administrator of the estate or the potential beneficiaries could have been expected, as an objective measure, to have taken steps to protect the assets and the associated entitlements to water use.¹⁵⁵⁸ The tribunal did state that good reason should be measured objectively and based on what the average person would expect, while taking into account all the circumstances existing at the time the water use was ceased.¹⁵⁵⁹ However, the tribunal held that a purposive interpretation of “good reason” would need to refer to the objects of the *National Water Act*¹⁵⁶⁰ set out in section 2 and particularly to promoting equitable access to water; redressing the results of past racial and gender discrimination; and protecting aquatic and associated ecosystems and their biological diversity.¹⁵⁶¹ This statement is open to criticism because it measures conduct with yardsticks interpreted with reference to the objects of the *National Water*

1550 *Christiaan Johannes Louw and the Director General of the Department of Water Affairs and Forestry* WT 12/L2/01.

1551 *National Water Act* 36 of 1998.

1552 Literally translated: *Pigeon Coop River*.

1553 *CJ Louw* para 2.1.1.2.1

1554 In terms of s 63(2) of the *Water Act* 54 of 1956 read with s 63(2A) of the *Water Act* 54 of 1956.

1555 S 63(2)(a) *Water Act* 54 of 1956.

1556 There was a dispute of fact on whether the building of a dam, the disintegration of the water works; a drought or an earthquake caused the cessation of the water use, but the tribunal found against Louw. *CJ Louw* para 3.2.1 and para 3.2.2.

1557 *CJ Louw* para 3.2.6.

1558 Compare the facts of *In re Manse Spring*, 108 P.2d 311, 314 (Nev. 1940) on 316. The facts resembled Louw's case. The person in possession of the farm died before the period started running during which the water became forfeited. See the discussion of the case in para 5.9.3.3.

1559 *CJ Louw* para 3.2.8.

1560 *National Water Act* 36 of 1998.

1561 *CJ Louw* para 3.2.7.

Act¹⁵⁶² which only came into being when the *National Water Act* commenced in 1998. The objects of the *National Water Act* also have nothing to do with the considerations that would have moved most people to discontinue a water use.

4.5.2.1 Retrospectivity

Section 32 of the *National Water Act*¹⁵⁶³ can be criticised for the reason that it retrospectively¹⁵⁶⁴ determines what the effect of a non-exercise of a water use right would be. One should enquire whether section 32 meets the requirements of the rule of law. *Firstly*, one of the internal qualities of all public law is that it should be certain in the sense of being ascertainable in advance so as to be predictable and not retrospective in its operation.¹⁵⁶⁵ In the case of section 32 of the *National Water Act* it cannot be said that it was ascertainable in advance¹⁵⁶⁶ so as to be predictable and not retrospective in its operation.¹⁵⁶⁷ *Secondly*, retrospective legislation might contravene the rule of law where it “unreasonably or unfairly impaired the ability of those bound by the law to regulate their conduct” in accordance with the statute.¹⁵⁶⁸ It can be argued that the *National Water Act* of 1998 unreasonably or unfairly impaired the ability of those bound by the law to regulate their conduct in accordance therewith, as it retrospectively determined new consequences for acts that were lawful at the time. *Thirdly*, there is at least in criminal law a presumption against retrospectivity. Unless otherwise provided, as in the *National Water Act*¹⁵⁶⁹ where section 32 defined an existing lawful water use in a manner that extinguished existing civil

1562 S 2 *National Water Act* 36 of 1998.

1563 *National Water Act* 36 of 1998.

1564 See the discussion of unexercised riparian rights in para 5.9.3 of Chapter 5. See *In the Determination of Rights to Waters of Long Valley Creek Stream System* Sys 25 Cal 3d 339 (1979) on 359. *Town of Chino Valley v Prescott* 638 P.2d 1324, 1330 (1981). *Belle Fourche Irr. Dist. v Smiley*, 176 N.W.2d 239, 245 (S.D. 1970). *Determination of the Rights to the Use of the Surface and Ground Waters of Chumstick Creek Drainage Basin in Chelan County, Washington: The State of Washington Department Of Ecology (Respondent) v Adsit (Appellants)* 103 Wash.2d 698, 694 P.2d 1065 on 1069 (1985). *Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott* 103 Wash.2d 686, 694 P.2d 1071 (1985). *San Carlos Apache Tribe v Super. Ct.* 972 P.2d 179, 201 Ariz. (1999). *Compare Franco-American Charolaise, Ltd. v Oklahoma Water Resources Bd.* 855 P.2d 568 (Okla. 1990) on 571. For the method used, see *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438, 444 (1982) and *In Re Willow Creek* 74 Or 592 (1914).

1565 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 2 SA 674 (CC) in para 39.

1566 The Washington court in *Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott* 103 Wash.2d 686, 694 P.2d 1071, 1072 (1985) held that after 1917 new water rights could only have been acquired through compliance with the permit system and existing water rights not put to beneficial use were relinquished. There was no unconstitutional taking. The steady and gradual evolution toward prior appropriation by the court and the legislature in the early days of statehood, culminating in the 1917 water code and the cases following from it, constituted sufficient notice and opportunity for the exercise of unused riparian rights (on 1077).

1567 In the Texan case of *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438, 444 (1982) the question was whether the State of Texas could constitutionally limit riparian claimants to the quantity of water that actually was beneficially used during any one of the five years between 1963 and 1967. The court held that, after notice and upon reasonable terms, the termination of the riparians' continuous non-use of water is not a taking of their property. Curtailment occurred because of the riparian's inaction or failure to comply with the statutory transition mechanism. Huang 2007 *U Denv Water L Rev* 66. See para 5.9.3.

1568 *Robertson v City Of Cape Town; Truman-Baker v City Of Cape Town* 2004 5 SA 412 (C) paras 135-136. The court in *Robertson* referred to para 39 of *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 2 SA 674 (CC).

1569 S 32 *National Water Act* 36 of 1998.

rights and obligations, a statute is not to be interpreted to extinguish existing rights and obligations.¹⁵⁷⁰ This is basic to the concepts "fairness" and "justice" integral to the rule of law, which is a foundational principle of the *Constitution*.¹⁵⁷¹ In the case of criminal law elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.¹⁵⁷² *Fourthly*, the Constitutional Court in the case of *Alexkor Ltd v Richtersveld Community*¹⁵⁷³ held that the general rule is that the interim *Constitution* did not operate retroactively, in the sense that

. . . as at a past date the law shall be taken to have been that which it was not, so as to invalidate what was previously valid, or vice versa. . . (T)he (interim) Constitution does not turn conduct which was unlawful before it came into force into lawful conduct. It has, however, been stated, and the possibility has been left open that there may be cases where the enforcement of previously acquired rights would in the light of present constitutional values be so grossly unjust and abhorrent that it could not be sustained, because it was contrary to public policy or on some other basis.¹⁵⁷⁴

This is, however, not such a case. In the *FNB*¹⁵⁷⁵ case the court concluded that a deprivation of property is arbitrary in terms of section 25(1) when the law referred to in the subsection does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.¹⁵⁷⁶ The *National Water Act*¹⁵⁷⁷ does provide sufficient reason for the deprivation of unused water rights. Currie and De Waal¹⁵⁷⁸ explain that procedural fairness means that the state should exercise its powers in terms of rules and principles set out in advance. The exercise of power is arbitrary where it is unpredictable. This supports the main complaint against the mechanism in sections 32 and 33 of the *National Water Act*,¹⁵⁷⁹ namely that it was retrospective and thus procedurally unfair. If the section had stated that water should be used in the next two years or the water use rights are to become forfeited, this argument would not have applied. The time period of two years

1570 Compare *San Carlos Apache Tribe v Super. Ct.* 972 P.2d 179, 189 (1999) where the court held that legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events.

1571 *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2006 2 SACR 319 (CC) at para 26, para 28 and para 34.

1572 *National Director of Public Prosecutions v Carolus* 1999 2 SACR 607 (C) para 60.

1573 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC). See the discussion of *Richtersveld* in Barry 2004 SAJHR 355.

1574 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 35 - para 38.

1575 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) in para 100. See Du Plessis *Compensation for Expropriation* 83.

1576 Currie and De Waal *Bill of Rights Handbook* 542 explains that the protection against deprivations of property that are not in accordance with due process should be understood in a wider substantive sense, as well as a narrower procedural sense. Currie and De Waal *Bill of Rights Handbook* 544.

1577 *National Water Act* 36 of 1998.

1578 *Bill of Rights Handbook* 544.

1579 *National Water Act* 36 of 1998.

when water rights had to be exercised prior to the enactment of the *National Water Act*¹⁵⁸⁰ was also rather short. Furthermore, conduct that occurred before the Act was promulgated is measured with yardsticks interpreted with reference to the objects of the *National Water Act*, which only came into being when the *National Water Act* commenced in 1998. The administrative law concept of "fairness" is offended by this. The only logical way of reconciling the requirement of 'good reason' in section 33 with the principle that events prior to the coming into effect of an act must be adjudged according to the law then prevailing, is to limit good reason to that which was lawful according to the law then prevailing. It should be kept in mind that the right to use public water in a government control area¹⁵⁸¹ has at least since the 1956 *Water Act*¹⁵⁸² been limited to the requirement of beneficial use with the state being in regulatory control of the water resources.¹⁵⁸³ However, the problem with section 32 of the *National Water Act*¹⁵⁸⁴ is that few water use right holders would have realised that lawful water uses would be restricted to use within a specific two year period.

They would also not have taken the objectives of the *National Water Act*¹⁵⁸⁵ into account before it had been promulgated. The hypothetical water user would more likely have been influenced by objective factors, for example a drought that possibly caused the fountain to dry up as in the case before the emperor discussed above. In the *Combrink v Minister of Correctional Services*¹⁵⁸⁶ case the Court held that the Minister's actions in making a policy document applicable to prisoners who were already in prison when parole guidelines were issued constituted retrospectively an infringement of those prisoners' right to procedurally fair administrative action contained in section 33(1) of the *Constitution*.¹⁵⁸⁷ Prisoners incarcerated prior to 1998 had a legitimate expectation that their case for placement on parole would be considered and done in accordance with existing criteria and guidelines.¹⁵⁸⁸ The same principle is arguably applicable when members of the Department of Water Affairs apply the objectives in the *National Water Act*¹⁵⁸⁹ retrospectively¹⁵⁹⁰ and ignore the existence of, for example, a drought. Their interpretation of sections 32 and 33 of the Act would amount to a procedurally unfair deprivation of property when the content of a good reason is determined with reference to a statute that

1580 Act 36 of 1998.

1581 Rivers were declared part of government water control areas when there still existed water to be allocated. When all the water in the resource had been allocated, as was the case with some rivers, no water control area needed to be declared.

1582 *Water Act* 54 of 1956.

1583 See para 4.4.1.

1584 Act 36 of 1998.

1585 S 2 of the *National Water Act* 36 of 1998.

1586 *Combrink v Minister of Correctional Services* 2001 3 SA 338 (D).

1587 *Constitution* of 1996.

1588 *Combrink v Minister of Correctional Services* 2001 3 SA 338 (D) 343A - 343B.

1589 S 2 of the *National Water Act* 36 of 1998.

1590 *Combrink v Minister of Correctional Services* 2001 3 SA 338 (D) 341F - H and 341J - 342B.

did not exist when the decision was made. The reason is that one of the internal qualities of all public law is that it should be certain in the sense of being ascertainable in advance so as to be predictable and not retrospective in its operation.¹⁵⁹¹ The problem with the interpretation of good reason in section 33 can largely be addressed by the publication of a set of guidelines on which factors may be taken into account when assessing whether a good reason existed not to exercise a water use.

The above paragraph¹⁵⁹² was written from the perspective of the water user who has a direct interest in preserving his water use right as a right in property. It is indeed so that the retrospective definition of existing lawful water use has extinguished individual water use rights without compensation. The method used is open to criticism as it was retrospective and only took into account the utilisation of water use rights that occurred during a short period of time. On the other hand, the existence of a good reason why the water use rights were not exercised should mitigate many significant deprivations when correctly applied. The fact is that the invasion of individual water use rights needs to be balanced against the state's constitutional duty to increase access to sufficient water for all its people in terms of section 27 of the *Constitution*.¹⁵⁹³ The conundrum is that the duty to improve access to sufficient water for all clashes with the individual's existing water use rights, that are rights in property and are protected by section 25 of the *Constitution*.¹⁵⁹⁴ The question is where the point of equilibrium between the protection of existing water rights and adjusting water use rights to improve access to sufficient water lies. It was stated above that section 32 of the *National Water Act*¹⁵⁹⁵ is not arbitrary for want of a sufficient reason. It may be arbitrary because it has a retrospective effect. Some will argue that section 33(3) may prevent an arbitrary effect because a use that was not exercised may, in certain circumstance, be declared to be an existing lawful water use because a good reason existed for the non-exercise of the water use right. Other people would argue that the possibly arbitrary effect of the retrospective operation of section 32, where it is not mitigated by section 33 of the Act, is not an infringement of the right to property because in terms of section 36(1) of the *Constitution* the retrospective limitation of water use rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁵⁹⁶ It is reasonable and justifiable because in many cases there was not enough water left in the water resource to enable the water use rights holder to exercise the water use right that was not exercised in the two years before the

1591 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 2 SA 674 (CC) in para 39.

1592 Para 4.5.

1593 *Constitution* of 1996.

1594 *Constitution* of 1996.

1595 S 32 of the *National Water Act* 36 of 1998.

1596 See para 5.9 on water law reform in America, for example.

promulgation of the Act. Furthermore, section 33 of the *National Water Act* may prevent undue hardship in deserving cases. Those people whose unexercised water use rights were cancelled, will also be entitled to apply for permits should they wish to initiate a beneficial water use.

In the next paragraph the stipulations of section 25 of the *Constitution*¹⁵⁹⁷ will be applied in more detail to the water reform measures in sections 32 and 33 of the *National Water Act* in order to determine whether the *National Water Act* ever brings about an arbitrary deprivation or an expropriation of property or not.

4.6 Do the water reform measures in the *National Water Act* amount to an arbitrary deprivation of property?

4.6.1 Does the concept "beneficial use" affect water use rights as rights in property?

Before the question whether there was a deprivation of property can be addressed, it needs to be established what the status of unexercised water use rights were prior to the promulgation of the *National Water Act*¹⁵⁹⁸ in 1998 when the *Water Act*¹⁵⁹⁹ of 1956 was in operation. The reason is that had the existence of water use rights been conditional on the concept "beneficial use", in the sense that it was a condition that the water use rights had to be beneficially exercised or would be cancelled, then unexercised water use rights cannot be protected as property.

The nature of water use is such that water which flows unused past one's property becomes available for use by one's downstream neighbours. *De facto* one needs to use water flowing past one's property or one will lose it. It is the *de iure* position that needs to be discussed. The nature of the right to public water prior to the promulgation of the *National Water Act*¹⁶⁰⁰ was not ownership,¹⁶⁰¹ but a right to use public water. When the *Water Act*¹⁶⁰² of 1956 was promulgated it did not derogate from rights that had been beneficially exercised.¹⁶⁰³ Although riparian rights that had not been beneficially exercised, had a more limited scope after the promulgation of the *Water Act*,¹⁶⁰⁴ they were not cancelled. It is an indication that some remnant of the water use right remained even if it had not been exercised. The unexercised right to use riparian water became a right to use

1597 *Constitution* of 1996.

1598 *National Water Act* 36 of 1998.

1599 *Water Act* 54 of 1956.

1600 *National Water Act* 36 of 1998.

1601 Lazarus *Regulatory Framework for Groundwater* 12. See Thompson *Water Law* 80; S 6(1) of the *Water Act* 54 of 1956 and Pienaar and Van der Schyff 2003 *Obiter* 135.

1602 S 4(1)(a) of the *Water Act* 54 of 1956.

1603 See para 4.4.1.

1604 See para 4.4.1.

surplus water. It lost its priority and was subjected to conditions other than a right to use the normal flow when the water law dispensation was reformed because of water scarcity.

No explicit stipulation existed that the rights to use water existing in terms of the 1956 *Water Act*¹⁶⁰⁵ had to be exercised or they might be cancelled or reduced. No general rule thus existed in South African water law that repeats the stipulation of water law in the Western United States,¹⁶⁰⁶ that beneficial use means that the water must be appropriated and put to valuable use. In the case of rights to use public water, it was implied that unexercised water use rights would not be recognised when a Government Water Control Area was declared.¹⁶⁰⁷ Unexercised water use rights were rights to use public water, but their extent could be affected as a result of an action taken by the Minister. Even when one's land was not listed in a schedule of land to be irrigated from a Government Water Control Scheme because one had not exercised one's riparian right, one was still entitled to apply for a permit to irrigate land.¹⁶⁰⁸ The better protection of water uses that were exercised might have been implied in the case of public water where only existing lawful water uses was protected when a Government Water Control Area was declared,¹⁶⁰⁹ or when the *Water Act*¹⁶¹⁰ stated that the Act should not have been construed as affecting any right to water which at the commencement of the Act was *being beneficially exercised* by any person. However, the beneficial exercise of a water use right as a condition for its existence, is arguably too important a matter to be left to mere inference.

The sole and exclusive use and enjoyment of private water vested in the owner of the land where it was found,¹⁶¹¹ except when there was a servitude.¹⁶¹² However, it was pointed out earlier on that private water referred to a relatively small quantity of water that could not be applied to common use.¹⁶¹³ The typical uses to which private water was applied, have survived the *National Water Act*.¹⁶¹⁴ In the first place, a person is entitled to continue with

1605 See para 4.4.1.

1606 Anderson 2007 *McGeorge L Rev* 505. The court in *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438, 445 (1982) held that in the system of appropriation of water the general rule is that the beneficial use of waters is the conservation of the resource, but the non-use of appropriated waters is equivalent to waste. See para 5.8 and para 5.9.

1607 See Thompson *Water Law* 98; s 62(2A)(a); s 62(2F)(a) read with s 62(2E)(c).

1608 Uys "Synopses" *Government Water Control Area* para 3.4. S 62 *Water Act* 54 of 1956.

1609 See section 63 of the *Water Act* 54 of 1956.

1610 S 4(1)(a) of the *Water Act* 54 of 1956.

1611 Thompson *Water Law* 89. S 5(1) of the *Water Act*, 54 of 1956:

Subject to the provisions of sub (2) and of s 12, s 21, s 22, s 23 and s 24 and rights lawfully acquired and existing at the commencement of this Act, the sole and exclusive use and enjoyment of private water shall vest in the owner of the land on which such water is found: Provided that nothing in this section contained shall be construed as derogating from the right of an owner of land to a reasonable share of water which, rising on the land of an upper owner, flows in a known and defined channel on, or along the boundary of, land situated beyond that upon which such water rises, and has for a period of not less than 30 years been beneficially used by the owner of the land so situated.

1612 See para 4.4.1.2.

1613 See para 4.4.1.

1614 *National Water Act* 36 of 1998, read with Sched 1 to the Act.

an existing lawful water use.¹⁶¹⁵ *Secondly*, 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 without an authorisation or a licence in terms of the *National Water Act*.¹⁶¹⁶ *Thirdly*, it is possible that users of private water will receive an authorisation to use the former "private water" by way of a general authorisation in terms of the Act.¹⁶¹⁷ These authorisations are sometimes issued for geographical areas and are sometimes issued to individuals. Should the water use exceed Schedule 1 of the Act; no general authorisation be forthcoming and there be no existing lawful use, one needs to apply for a licence in terms of section 40.¹⁶¹⁸

The right to use and control groundwater that had been allocated and used immediately prior to the declaration of a subterranean water control area vested in the land owner to whom the right to use was allocated.¹⁶¹⁹ It appears that when a subterranean water control area was declared, the exercise of a use was a condition to retain a right to use groundwater. The right to the use and control of ground water vested in the Minister if the water was unallocated or unused immediately prior to the declaration of a subterranean water control area. Other groundwater which had been exercised was private water.¹⁶²⁰ Two possible arguments exist with regard to the effect of the concept "beneficial use" on private groundwater. In terms of the first one might argue that water users with rights in groundwater, like water users with rights to use public water, knew that they would lose unexercised water rights should a Government Water Control Area be declared. There was thus always the risk that unexercised rights to use groundwater would be lost. One might argue that those water use rights were by implication burdened by a condition that they had to be exercised, otherwise the extent of the water use rights might be curtailed by government control.

In terms of the second possible argument one might argue that the *Water Act*¹⁶²¹ nowhere clearly stated that rights to use private water - whether above or below the ground - had to be exercised otherwise the extent of their use would be limited. In the matter of *Fedlife Assurance v Wolfaardt*¹⁶²² the Supreme Court of Appeal held that where a statute is ambiguous as to whether or not an existing law or right has been repealed, abolished or altered and the existing law or right is not in conflict with "the spirit, purport and objects of

1615 See s 22(1) and s 40(4) of the *National Water Act* 36 of 1998.

1616 S 4(1) of the *National Water Act* 36 of 1998, read with Sched 1 to the Act.

1617 See s 4(3); s 22(1)(a)(iii); s 27(1) and s 39 of the *National Water Act* 36 of 1998.

1618 S 22(6) only provides for compensation for the non-granting of a licence for an existing lawful water use in the case of a compulsory licence application in terms of section 43. See discussion of s 22(6) in para 3.8.3; para 4.2.2; para 4.3.6.5; para 4.4.2.4; para 4.5.1; para 4.6.3; para 4.6.4 and para 4.6.5

1619 Lazarus *Regulatory Framework for Groundwater* 10.

1620 54 of 1956. See Thompson *Water Law* 76-77.

1621 *Water Act* 54 of 1956.

1622 *Fedlife Assurance v Wolfaardt* 2002 1 SA 49 (SCA) para 16.

the Bill of Rights,” the presumption against alteration will still find application. It is arguable that one cannot conclude that the *Water Act*¹⁶²³ intended to change the law by implication to make the existence of a water use or a water use right dependent on being exercised. Because the existence of water use rights had not been conditional on its beneficial use, unexercised water use rights should still be protected as property. Furthermore, section 25 of the *Bill of Rights* came into operation when the *Water Act*¹⁶²⁴ was still in operation and the water use rights that existed in terms of the Act should be protected as constitutional property.¹⁶²⁵

The question to be answered next is whether the limitation of only recognising water uses which have been exercised between 1997 and 1999 for surface water and between 1996 and 1998 for ground water is an arbitrary deprivation of property. The first question that will be discussed is whether there was a deprivation of property.

4.6.2 *Was there a deprivation of such rights in property?*

The question that is discussed in this section is whether the scheme in sections 32 and 33 of the *National Water Act*¹⁶²⁶ can be classified as a deprivation¹⁶²⁷ of property. A deprivation of property does not always result in the taking away of property.¹⁶²⁸ Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. In the case of water that was previously classified as private water and was thus insufficient for common irrigation, it is likely that the rights to use are now granted in terms of Schedule 1 to the *National Water Act*¹⁶²⁹ or in terms of general authorisations. In those cases there is no deprivation of property, as the water use rights now exist in the form of water use entitlements. However, there may be instances where old order water use rights are not replaced by Schedule 1 water use entitlements or general authorisations *in toto*. It is also possible that right holders might then be refused licences to use what used to be classified as private water. With the definition of existing lawful water uses in terms of section 32 of the *National Water Act*, the extent of old order water use rights were changed by way of regulation. This amounts to a regulatory deprivation of property.¹⁶³⁰

1623 Act 54 of 1956.

1624 Act 54 of 1956.

1625 See para 4.2.2.

1626 *National Water Act* 36 of 1998.

1627 See para 4.3.2 and para 4.3.3.

1628 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 32. See Van der Walt 2005 SALJ 75 on 80; Currie and De Waal *Bill of Rights Handbook* 541; Freedman 2006 TSAR 93. Plasket and Euijen 2005 *Annu Surv SA L* 402.

1629 Act 36 of 1998.

1630 See para 4.6.4 on the expropriation of property.

The same applies in instances where the rights to use groundwater that were not situated in Government Control Areas, are not, or will not be granted by Schedule 1 to the *National Water Act*,¹⁶³¹ general authorisations or a licence. It also amounts to a regulatory deprivation of property when the unexercised water use rights are not replaced by entitlements in terms of the *National Water Act*.¹⁶³² The next matter to be addressed is whether the deprivation of unexercised rights was arbitrary.

4.6.3 Was the deprivation arbitrary?

Section 25(1) of the *Constitution*¹⁶³³ does not prohibit the deprivation of property, but only the arbitrary deprivation of property. By doing so, the *Constitution*¹⁶³⁴ ensures that government is able to regulate natural resources without having to be concerned about affecting property rights. Government's regulatory power to reallocate water so that everybody has access to sufficient water is derived from section 27(1) of the *Constitution*.¹⁶³⁵ The government also has to ensure that the objects of the *National Water Act*¹⁶³⁶ are achieved. They place a duty on government to ensure that the nation's water resources are *inter alia* managed in ways which take into account meeting the basic human needs of present and future generations; promoting equitable access to water; and redressing the results of past racial and gender discrimination. The regulatory scheme in sections 32 and 33 of the *National Water Act*,¹⁶³⁷ in terms whereof unexercised water uses were not recognised as existing lawful water uses, was designed to make more water available for the achievement of the objects of the Act. The scheme affects existing rights. In this case private water use rights are in conflict with the need to increase an equitable allocation of water resources.¹⁶³⁸

According to Du Plessis¹⁶³⁹ regulatory limitations of property, for instance in town planning, are allowed insofar as they are legitimate and necessary and not arbitrary or unfair.¹⁶⁴⁰ The reform of South Africa's water law dispensation to make more water available to those who have in the past been denied access to sufficient water, is not only reasonable, but necessary. In 2006 there were about 8 million people who did not have adequate access to water.¹⁶⁴¹ About 98% of South Africa's water resources have already been

1631 *National Water Act* 36 of 1998.

1632 *National Water Act* 36 of 1998.

1633 *Constitution* of 1996.

1634 *Constitution* of 1996.

1635 *Constitution* of 1996. See para 3.6 and para 3.7. Local government's function to deliver basic municipal services, an obligation arising from the right of access to sufficient water, is derived from *Schedule 4B* to the *Constitution*, read with ss 151-164 of the *Constitution* of 1996. See para 3.4.

1636 S 2 of the *National Water Act* 36 of 1998.

1637 *National Water Act* 36 of 1998.

1638 See para 4.6.1.

1639 *Compensation for Expropriation* 83.

1640 See Chapters 5 and 6 for the exercise of the police power in respectively America and Australia.

1641 *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 2.

allocated and economic development is already being impeded.¹⁶⁴² Water that is not needed for the Reserve should still not flow unused to the oceans. The scheme in the *National Water Act*¹⁶⁴³ was necessary and legitimate, but was it arbitrary?

As explained above, the court in the *FNB*¹⁶⁴⁴ case concluded that a deprivation of property is arbitrary in terms of section 25(1) when the law referred to either does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.¹⁶⁴⁵ One may establish sufficient reason by evaluating the relationship between the means, or the deprivation in question, and ends, namely the purpose of the law in question. In the *FNB* case, however, the court did not deal with legislative policies to bring about water reform.¹⁶⁴⁶ In the *Mkontwana* case¹⁶⁴⁷ the court provided that sufficient reason is to be established by considering a complexity of relationships or perhaps a web of interests.¹⁶⁴⁸ The complexity of relationships or web of interests involved in the case of water reform can be explained by reference to the property clause in section 25 of the *Constitution*. In terms of this section the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources.¹⁶⁴⁹ The reforms include reform to bring about equitable access to water. The subsection serves to strengthen the link between land and water reform that exists in reality. The state must also take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis¹⁶⁵⁰ and to achieve the progressive realisation of *inter alia* the right to have access to sufficient water.¹⁶⁵¹ Section 25(8) of the *Constitution* states that no provision of the property clause may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.¹⁶⁵² In addition to section 25(8), fulfilling the right of access to sufficient water in section 27(1) would constitute sufficient reason for the reform mechanism in sections 32 and 33 of the *National Water Act*. Water reform is a legitimate government purpose.

1642 Tempelhoff 2009 www.beeld.com.

1643 S 32 and s 33 *National Water Act* 36 of 1998.

1644 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100. See para 4.3.3 and Du Plessis *Compensation for Expropriation* 83.

1645 Currie and De Waal *Bill of Rights Handbook* 542.

1646 See *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 70.

1647 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC). para 34.

1648 See Arnold 2002 *Harv Envtl L Rev* 334-335; Zellmer and Harder 2008 *Ala L Rev* 684-685.

1649 S 25(4)(a) of the *Constitution*.

1650 S 25(5) of the *Constitution*.

1651 S 27(2) of the *Constitution*.

1652 Currie and De Waal *Bill of Rights Handbook* 565 argue that a failure to pay compensation is a violation of s 25(2). It may, however, be justifiable in terms of s 36(1). In their opinion s 25(8) is redundant and more a case of assurance that the state may expropriate land and water for purposes of redistribution.

The court in the *FNB*¹⁶⁵³ case held that one should move away from a static, typically private-law conceptualist view of the *Constitution*¹⁶⁵⁴ as a guarantee of the status quo to a dynamic, typically public-law view of the *Constitution* as an instrument for social change and transformation in terms of entrenched constitutional values. The object of the *National Water Act*¹⁶⁵⁵ being to bring about the sustainable use of water for the benefit of all users, one person's water use rights should be balanced against the nation's need for sustainable water resources.¹⁶⁵⁶ A point of equilibrium between the protection of property rights and the achievement of reform should be found. The case for the constitutionality of the *National Water Act*¹⁶⁵⁷ is that, in the case of water law reform, a clear nexus exists between the nature and extent of the infringement and the object of the *National Water Act*.¹⁶⁵⁸ The government is not improving its own economic situation via the scheme in the *National Water Act*,¹⁶⁵⁹ but it is the steward of the water resources of the nation.¹⁶⁶⁰ The *National Water Act*¹⁶⁶¹ is not arbitrary.¹⁶⁶² It provides sufficient reason for the deprivation of old order water use rights and their substitution by water use entitlements in terms of section 4 of the Act. If this had not been the case, water rights would have been so rigid that they could never be redefined and this would have hampered the achievement of equality.¹⁶⁶³ It would also have made it very difficult, if not impossible, for the state to take reasonable legislative and other measures,¹⁶⁶⁴ within its available resources, to achieve the progressive realisation of the right to have access to sufficient water.¹⁶⁶⁵

When the relationship between the purpose of the deprivation *vis a vis* the nature of the property and the extent of the deprivation is considered, it must be considered that the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.¹⁶⁶⁶ The need for water allocation reform is, of course, compelling. In the case of sections 32 and 33 of the *National Water Act* there was a close relationship between means and ends, as the cancellation of unexercised

1653 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 52. Van der Walt 2004 SAPL 69 states that the decision leaves room for the application of varying levels of scrutiny in the arbitrary deprivation test. This might mean that a more accommodating level of scrutiny could apply to land reform cases.

1654 *Constitution* of 1996.

1655 *National Water Act* 36 of 1998.

1656 Pienaar and Van der Schyff 2003 *Obiter* 153.

1657 *National Water Act* 36 of 1998.

1658 *National Water Act* 36 of 1998.

1659 *National Water Act* 36 of 1998. See para 4.3.6 on expropriation.

1660 Pienaar and Van der Schyff 2003 *Obiter* 153.

1661 *National Water Act* 36 of 1998.

1662 Pienaar and Van der Schyff 2003 *Obiter* 153.

1663 See s 9(2) of the *Constitution* of 1996.

1664 Pienaar and Van der Schyff 2003 *Obiter* 153.

1665 S 27(2) of the *Constitution* of 1996.

1666 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 35. In *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 34 the court held that as the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. This would seldom be applicable in the case of water reform, as there would never be a relationship between the person with the unexercised water use rights and the beneficiaries of water reform.

rights meant that they were available for redistribution when there was water in the resource to back them up.

The nature of the property is also important when considering whether sufficient reason exists for the deprivation. Water formed part of the *res omnium communes*. The national government now is custodian of the nation's water resources. Water use rights have always been limited by the rights of others. Circumstances will dictate whether the measure is rationality or proportionality.¹⁶⁶⁷ This depends on the interplay between means and ends, the fact that water is essential for life and livelihoods and the extent of the deprivation. In the final instance the facts determine whether deprivation of property was arbitrary.¹⁶⁶⁸ Water being important to sustain life and livelihoods, mere rationality would probably be too light a test and a test similar to the test in section 36(1) would probably be too heavy a burden for the state. The deprivation of property should be proportional¹⁶⁶⁹ with the governmental purpose.

A deprivation of property is also arbitrary in terms of section 25(1) when the particular deprivation in question is procedurally unfair.¹⁶⁷⁰ The limitation of only recognising water use rights which were exercised between 1997 and 1999 for surface water and between 1996 and 1998 for groundwater, is a retrospective limitation. Moreover, it restricts existing water use rights to rights exercised during a relatively short period of two years before the Act came into operation. Some people would argue that the possible arbitrary nature of this retrospective limitation is saved by section 33 of the *National Water Act*,¹⁶⁷¹ which states that if the right had not been exercised for good reason in the two year period, it might still be recognised as a lawful water use. In deserving cases this prevents the scheme in the Act from being a blunt instrument that creates hardship. A responsible authority may only make a declaration that such a water use is an existing lawful water use, if it is satisfied that the water use took place lawfully more than two years before the date of commencement of the Act and was discontinued for good reason.¹⁶⁷²

Other people would argue that, even should the retrospective cancellation of unexercised water use rights in terms of section 32 of the *National Water Act* be regarded to be arbitrary because of a lack of due process, a court may find that the limitation was

1667 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100.

1668 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100.

1669 Section 49(2) and section 49(3) of the *National Water Act* states that an amendment of a condition of a licence may be made if it is *inter alia* desirable to accommodate demands brought about by changes in socio-economic circumstances, but it may be made only if the conditions of other licences for similar water use from the same water resource in the same vicinity have also been amended in an equitable manner through a general review process. A criterion of proportionality has thus been adopted for these circumstances.

1670 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100.

1671 *National Water Act* 36 of 1998.

1672 S 33(3), read with s 33(1), of the *National Water Act* 36 of 1998.

reasonable and justifiable in terms of section 36(1) of the *Constitution*.¹⁶⁷³ Sufficient water does not exist in the resource to enable unexercised water use rights to be exercised. The limitation of water use rights by recognising only those rights that had been exercised in the case of public water also does not appear to go beyond the normal restrictions¹⁶⁷⁴ on property use or enjoyment found in an open and democratic society, as required by section 36 of the *Constitution*. It will appear from chapter 5¹⁶⁷⁵ that in America most dual system states terminated unused rights by limiting vested rights to those that had been used before the state adopted a permit system.¹⁶⁷⁶ In Australia a right to a natural resource which is created by statute, may be modified or even extinguished by that statute, without constituting an acquisition of property, depending on the terms of the legislation.¹⁶⁷⁷ Furthermore, where a law in Australia resolves or adjusts competing claims, obligations or property rights, the law is not a law for the acquisition of property within the meaning of section 51(xxxi).¹⁶⁷⁸ It indicates in the context of section 25(1) that there is nothing irregular should a regulator only recognise rights to public water that had been exercised. Roux¹⁶⁷⁹ is of the opinion that the declaration that the public interest includes the nation's commitment to land reform (and to the reform of access to all South Africa's natural resources)¹⁶⁸⁰ read with the attempted immunisation of land and natural resource reform from constitutional impediment in section 25(8), may have the effect of lowering the level of scrutiny when the test for arbitrariness in section 25(1) is applied.¹⁶⁸¹

What constitutes good reason should be objective reasons that were lawful at the relevant time - when the water use right was not being exercised. Examples of good reasons would be the existence of a drought or an earthquake. The principle is that people making decisions prior to the promulgation of the *National Water Act* 36 of 1998 had a legitimate expectation that their decisions would be judged in terms of the *Water Act* 54 of 1956.¹⁶⁸² Even the fact that it was lawful not to have exercised the water use rights, as was the case with private water, should be taken into account when the existence of a good reason is determined. If this was the case, the reform mechanism in sections 32 and 33 of

1673 *Constitution* of 1996.

1674 See section 36 of the *Constitution* of 1996. See *In Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott* 103 Wash.2d 686, 694 P.2d 1071, 1072 and 1077 (1985), as well as *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438 (1982) on 444. See para 5.9.3.

1675 See para 5.6 and para 5.9.

1676 See Tarlock *L. of Water Rights and Resources* § 3:53.

1677 See *Brian Clarence Bienke, Irene Anne Bienke and Brian Trevor Bienke v the Minister of Primary Industries and Energy; Australian Fisheries Management Authority and Commonwealth of Australia* [1996] FCA 1220 para 48. See para 6.6.3.

1678 See para 6.5.4.

1679 "Property" 46-24 in Woolman *et al* (eds) *Constitutional Law of South Africa*.

1680 S 25(4)(a) of the *Constitution* of 1996.

1681 Roux "Property" 46-28.

1682 See the discussion of *Combrink v Minister of Correctional Services* 2001 3 SA 338 D 343 A - 343 B in para 4.5.2.1.

the *National Water Act*¹⁶⁸³ would be procedurally fair and its application would not lead to an arbitrary deprivation. However, one should not use objectives that were adopted by the *National Water Act* years after the decisions had already been made to motivate why a decision not to exercise a water use before 1996 was motivated by a good or bad reason. When section 33 is applied by taking into account the objectives of the *National Water Act*¹⁶⁸⁴ that did not exist when the decision was made, it might lead to an arbitrary deprivation of property because of procedural unfairness. Fortunately a court might declare the use to be an existing lawful water use if there existed an objectively good reason not to have exercised the water use right and the other requirements of section 33 are met. Compensation in terms of sections 22(6) and 22(7) of the *National Water Act*¹⁶⁸⁵ would be payable in the case where a section 43¹⁶⁸⁶ application for a licence is denied for what the court declared to be an existing lawful water use.

One may conclude that the scheme in sections 32 and 33 is not arbitrary for want of a sufficient reason for the deprivation. However, when the scheme is applied in a procedurally unfair manner by taking the objectives of the *National Water Act* into account when determining whether a reason not to exercise a water use was a good reason or not, it might lead to an arbitrary deprivation of property. It would not be the scheme itself that led to an arbitrary declaration of property, but the application thereof. In conclusion one can state that the scheme in sections 32 and 33 of the *National Water Act* does not constitute an arbitrary deprivation of property in terms of section 25(1) of the *Constitution* of 1996, but is a regulatory measure provided for in section 25(1). The property clause provides for compensation in the case of an expropriation in terms of section 25(2) of the *Constitution* of 1996. Some insist that the scheme in sections 32 and 33 of the Act results in an expropriation because compensation is possible in certain circumstances. The possibility of an expropriation will be discussed next.

4.6.4 Is it an expropriation?

The *National Water Act*¹⁶⁸⁷ is, in the case of water use rights, the law of general application that section 25(2) of the *Constitution*¹⁶⁸⁸ refers to when it states that property may be expropriated only in terms of law of general application.¹⁶⁸⁹ Section 25(3) is in terms of section 22(7) of the *National Water Act*¹⁶⁹⁰ applicable to the determination of

1683 Act 36 of 1998.

1684 S 2.

1685 Act 36 of 1998.

1686 Compulsory licensing.

1687 S 22(6) and s 22(7) *National Water Act* 36 of 1998.

1688 S 25(2) *Constitution* of 1996.

1689 The question whether s 32 of the *National Water Act* 36 of 1998 leads to an arbitrary deprivation or an expropriation of property will be discussed in para 4.5 and para 4.6.

1690 S 22(7) *National Water Act* 36 of 1998.

compensation for consequential financial loss that is payable in terms of section 22(6) of the *National Water Act*.¹⁶⁹¹ Compensation should, in terms of section 22(6), be paid for the refusal to grant a water licence for an existing lawful water use or the amendment of a water licence, as discussed above.¹⁶⁹² The implication of the applicability of section 25(3) to the determination of compensation is that regulatory compensation is paid for the refusal to grant a water licence for an existing lawful water use as though it was an expropriation of the existing lawful water use.

However, section 22(6) of the *National Water Act*¹⁶⁹³ does not apply to water use rights that have not been exercised in the two years before the promulgation of the Act, as they are not defined as existing lawful water uses in terms of section 32 of the Act. The fact that compensation is payable for an expropriation makes the reliance on expropriation an attractive option for those who insist that the deprivation of unexercised water use rights led to damages for which they should be compensated as though it was an expropriation. An expropriation¹⁶⁹⁴ is a category of deprivation of property. It takes place when property is expropriated for a public purpose or in the public interest¹⁶⁹⁵ and is subject to compensation.¹⁶⁹⁶ Kidd¹⁶⁹⁷ states that expropriation consists of a transfer of property to the state. The question is whether unexercised water use rights have been transferred to the state in terms of the *National Water Act*.¹⁶⁹⁸ In terms of section 3(1) of the *National Water Act*¹⁶⁹⁹ the national government, acting through the Minister, is the public trustee of the nation's water resources and must ensure that water is protected, used, developed, conserved, managed and controlled. In terms of section 3(3) of the Act the national government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic. It is clear from the phrase "nation's water resources" that the water resources vest in the nation and not in the state. The Minister acting on behalf of the national government merely has the power to regulate the water resources¹⁷⁰⁰ as the public trustee of the nation's water resources.¹⁷⁰¹ Soltau¹⁷⁰² states that on the definition of expropriation as the taking of property and the transfer thereof to the state, which does not happen in the case of water, section 32 of the *National Water Act* does not amount to an expropriation. It is more likely to be understood as a deprivation of

1691 S 22(6). See para 4.2.2 and para 4.4.2.4.

1692 See discussion of s 25(3) of the *Constitution* of 1996 and s 22(7) of the *National Water Act* 36 of 1998 in para 4.2.2.

1693 Act 36 of 1998. See para 4.2.2 and para 4.4.2.4.

1694 See para 4.3.6.

1695 S 25(2)(a) of the *Constitution*.

1696 S 25(2)(b).

1697 "Development of Water Law" 99.

1698 Act 36 of 1998.

1699 Act 36 of 1998. See para 4.4.2.3.

1700 S 3(3) *National Water Act* 36 of 1998.

1701 S 3(1) *National Water Act* 36 of 1998.

1702 Soltau 1999 *Acta Jur* 251.

property. The *National Water Act*¹⁷⁰³ does not transfer¹⁷⁰⁴ the water resources or water use rights to the state and, because there is no acquisition of property by the state, it does not constitute an expropriation. It is usually explained that when an authority exercises a statutory power not aimed at the compulsory acquisition of property,¹⁷⁰⁵ but to serve a public need such as protecting public health or a control measure such as town planning, it does not amount to expropriation even though the owner or possessor may be deprived of property or negatively affected thereby.¹⁷⁰⁶ Rights to use common things like running water are by their very nature dependent on the condition of the resource and the number of users. Water use rights, like old order riparian rights, moreover sometimes need to be readjusted to allow newcomers access to the resource.¹⁷⁰⁷ In Australian law for, example, where a law resolves or adjusts competing claims, obligations or property rights, the law is not a law for the acquisition of property within the meaning of section 51(xxxi).¹⁷⁰⁸ The *National Water Act*¹⁷⁰⁹ is an excellent example of a statute that adjusts competing claims to the water resources or water use rights as property rights, and is not a law for the acquisition of property.

In terms of section 4(4) of the *National Water Act*,¹⁷¹⁰ entitlements granted by the Act replace any right to use water which that person might otherwise have been able to enjoy or enforce under any other law. The only water use rights that did not survive the promulgation of the *National Water Act*¹⁷¹¹ were the ones where the uses were not lawful or not exercised beneficially. There is no question of one losing one's water use rights to another licensee in the manner that is described in the case of *Agri South Africa v Minister of Minerals and Energy*(2)¹⁷¹² as the court *in casu* rejected the contention that the *Mineral*

1703 S 4 and s 32 *National Water Act* 36 of 1998.

1704 The placing of water entitlements in the public trust and the extinguishment of unused water uses have to be distinguished from section 64 of the *National Water Act* 36 of 1998 that allows for the expropriation of property. See Couzens "Expropriation" 2009 *LAWSA Supp* para 46. The Minister may expropriate any property for any purpose contemplated in the Act, if that purpose is a public purpose or is in the public interest. The mechanism in section 32 in terms of which a water use entitlement is defined restrictively, has to be distinguished from section 64 of the *National Water Act* 36 of 1998. Section 32 is an example of the exercise of the police power and section 64 is an example of the exercise of the power of eminent domain. Section 32 is applicable to the general public and section 65 to cases where individuals' property are expropriated. The *National Water Act* is also applicable in the case of expropriation for rehabilitation and other remedial work. If a rehabilitator or remediator reasonably requires access to the land of another in order to effect rehabilitation or remedial work, but is unable to acquire access on reasonable terms, the Minister may expropriate the necessary rights in respect of that land for the benefit of the rehabilitator or remediator, who will then be vested with the expropriated rights. S 65(1) *National Water Act* 36 of 1998. Couzens 2010 *SALJ* 23 notes that it is not made clear whether the expropriation would be of a permanent nature. He suggests that the expropriation must have been intended to be of a temporary nature. Couzens 2010 *SALJ* 23.

1705 Gildenhuys and Grobler "Expropriation" in 1998 *LAWSA* para 136.

1706 See Badenhorst "Property and the Bill of Rights" *Butterworths Bill of Rights Compendium* 3FB-13 and Mostert and Badenhorst "Property and the Bill of Rights" *Bill of Rights Compendium* 3FB-21 and 3FB-41.

1707 See para 2.6.3 and para 4.4.1.

1708 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 23. See para 6.5.4.

1709 Act 36 of 1998.

1710 Act 36 of 1998.

1711 Act 36 of 1998.

1712 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 80.

and *Petroleum Resources Development Act*¹⁷¹³ did not deprive the complainant of his coal rights, but only regulated the use thereof¹⁷¹⁴ Regulating the use of property presupposes that the individual whose use is regulated, still has the property, although the content is curtailed. In the case of the *Mineral and Petroleum Resources Development Act*¹⁷¹⁵ mineral rights were legislated out of existence. Coal rights, the use whereof could be regulated, did not exist anymore. Water being needed for life and to sustain livelihoods has always been seen as common property because water as a resource was classified as *res omnium communes*. Water, unlike treasures like gold and diamonds, is essential to life on earth.¹⁷¹⁶ However, water use rights were merely redefined and not regulated out of existence. Should one lose one's lawful and beneficially used water rights to another licensee in the case of compulsory licensing, regulatory compensation are payable in terms of sections 22(6) and 22(7) of the *National Water Act*.¹⁷¹⁷

4.6.5 Is it constructive expropriation?

It was explained above that section 25(1) of the *Constitution*¹⁷¹⁸ only prohibits arbitrary deprivations. When a deprivation results from a valid government purpose, like reform, there is sufficient reason for the reform and the individual usually cannot prove arbitrariness in terms of section 25(1). It is in any event not in the public interest that measures to achieve water reform be declared to be arbitrary merely because of the effect it has on an individual. It was also explained that section 25(2) of the *Constitution*¹⁷¹⁹ usually only requires compensation when there was an expropriation in the form of an acquisition by the state. There was no acquisition of unexercised rights by the state in the

1713 *Mineral and Petroleum Resources Development Act* 28 of 2002.

1714 *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 66 and para 67.

1715 *Mineral and Petroleum Resources Development Act* 28 of 2002.

1716 The reasons why the forfeiture of unexercised water uses in terms of section 32 of the *National Water Act* 36 of 1998 cannot be equated to the forfeiture of mineral rights, relate to the historical classification of these types of property. According to Van der Schyff *Constitutionality of the MPRDA* 54 minerals were regarded as fruits of the land. The principle that unsevered minerals were not capable of separate ownership, but were included in the *dominium* of the landowner, is a legacy of South Africa's Roman-Dutch common law. When section 3(1) of the *Mineral and Petroleum Resources Development Act* 28 of 2002 which states that the state is the custodian of mineral resources for the benefit of all South Africans, was adopted it resulted in a break with tradition. On the other hand section 3(1) of the *National Water Act* 36 of 1998 which states that as the public trustee of the nation's water resources the national government must ensure that water is protected, used, managed and controlled in a sustainable and equitable manner, is in line with our legal tradition. Unlike water use rights, mineral rights have never before formed a part of the *res omnium communes*. See Just 2.1.1, Van der Schyff *Constitutionality of the MPRDA* 103 and para 2.2.3. Competing claims to mineral rights as part of a *res omnium communes* never existed and therefore did not need to be regulated as such. A decision regarding minerals and custodianship is has to take into account that mineral rights are a commercial form of property. (See Marcianus' classification of property in para 2.2.2.) The principles that are applicable in the case of water is that water is a form of common property where the individual has a mere right to use the resource. Unlike the servitude of *aqueductus* in Roman law, use was never a condition on which a mineral right was dependent. *AGRI South Africa v Minister of Minerals and Energy* (1) 2010 1 SA 104 (GNP) para 9 and 14 and *Agri South Africa v Minister of Minerals and Energy* (2) Case number 55896/07 para 29.

1717 *Act* 36 of 1998.

1718 *Constitution* of 1996. See para 4.3.4 and para 4.6.3.

1719 *Constitution* of 1996. See para 4.3.6 and para 4.6.4.

*National Water Act*¹⁷²⁰ and thus no expropriation in terms of section 25(2). Some individuals would argue that they did not exercise their water use rights, for example rights to use private water, in the two years before the promulgation of the Act because they believed they acquired the water use rights with the property and did not know about a requirement to exercise the water use right or risk losing it being cancelled. There was no requirement of appropriation and use of the water in the resource in order for the right to come into existence and to remain in existence. Moreover, section 33 only mitigates the operation of section 32 of the *National Water Act* where a water use had been exercised at some stage, or where steps towards exercising the use had been taken. The section *inter alia* does not apply where land with rights to use water had been bought, but there were no immediate plans to exercise the water use rights. This would be the case where someone who had inherited a farm in 1987, bought a part of his neighbour's land in 1988 because it contained a fountain. The neighbour never used the water of the fountain because he did not need to. The purchaser dreamt of retiring on the inherited land in 2003 and doing hydroponic farming by using the water of the fountain, but did not take any steps towards effecting the use, as required by section 33(3)(b).¹⁷²¹ In this case section 33 would not operate to soften the effect of section 32 on the holder of a right to use private water.

It was explained above¹⁷²² that an unfair burden is the criterion that normally attracts a liability for the state to pay compensation. Compensation should spread the burden of regulation that is in fact unfair and excessive more equally. When applying Van der Walt's¹⁷²³ notion of constructive expropriation to the cancellation of unused water use rights, the criteria he stated can be applied as follows: *Firstly*, the deprivation, or cancellation, of unexercised water use rights as a result of section 32 of the *National Water Act*, was set up and employed as a regulatory measure and not as an expropriation. All water users are affected by the adjustment of water use rights, and not only individuals, as one would expect in the case of an expropriation. *Secondly*, the effects of the deprivation on the affected property holder must be so serious and so unfair or disproportionate (e.g. when compared to others in a similar position) that a court would be tempted to strike it down for being arbitrary (*i.e.* there is insufficient reason for that effect under those circumstances). This might be the case where water use rights had not been used in the two years before the *National Water Act* came into operation purely because the landowner had not yet retired and had not yet taken any steps to put his

1720 S 4 and 32 of the *National Water Act* 36 of 1998.

1721 S 33(3)(b) *National Water Act* 36 of 1998.

1722 See para 4.3.6.2 and para 4.3.7.

1723 Van der Walt 2004 *SAPL* 79.

dream of a hydroponic farm into effect. Section 33 of the *National Water Act* would thus not be applicable. *Thirdly*, the deprivation and the regulatory scheme that it forms part of, namely sections 32 and 33 in the *National Water Act*, was authorised by the legitimate and important state purpose of water reform. In the circumstances a court will probably be unwilling to strike down the legislation or the deprivation involved. The idea of constructive expropriation could be used by a court not to frustrate water law reform, but rather to facilitate it. It may do so by saving a necessarily harsh regulatory measure from being struck down.¹⁷²⁴ There might be situations where it would be possible that a court will decide that an infringement can be saved by treating it as an expropriation that requires compensation.¹⁷²⁵

Roux's¹⁷²⁶ argument that compensation can save an otherwise arbitrary law by making it proportional, should perhaps be developed by a court reading in a clause providing for compensation, where a law that is needed for reform goes too far and becomes a taking.¹⁷²⁷ According to Roux¹⁷²⁸ an order for constitutional damages in terms of section 25(1) would be to make good any loss above the one that the claimant is expected to bear under the test for arbitrary deprivation. In South Africa the courts have a duty to mould an order providing effective relief to those aggrieved by a constitutional breach.¹⁷²⁹ Van der Schyff¹⁷³⁰ argues that the protection of section 9 of the *Constitution*¹⁷³¹ might ensure that individuals are not stripped of their entitlements to their property by excessive regulatory burdens when their rights to use their property are extinguished in a way that affects some people more than the rest of society and therefore burdens them unequally. She also argues that one should consider the effect of the regulation on the individual.¹⁷³² The grey area between the state's duty to improve access to water by regulation and the individual's old order right to use or not to use water should in appropriate circumstances be bridged by the notion of constructive expropriation. When a court decides to develop the notion of constructive expropriation to grant compensation in suitable individual cases, the court would be able to allow water allocation reform to continue without causing hardship to holders of cancelled water use rights.

1724 Van der Walt 2004 *SAPL* 80.

1725 See also Soltau 1999 *Acta Jur* 250.

1726 "Property" 46-19 in Woolman *et al* (eds) *Constitutional Law of South Africa*. See para 4.3.7.

1727 See para 5.8 on regulatory takings.

1728 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf 10.

1729 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) in para 31. See para 4.3.7.

1730 *Constitutionality of the MPRDA* 175.

1731 *Constitution of 1996*.

1732 Van der Schyff *Constitutionality of the MPRDA* 176.

4.7 Conclusion

The challenge facing the government in South Africa with regard to water use is to balance the protection of existing property rights against the achievement of greater access to water.¹⁷³³ The mechanism that is evolving to do that in South African water law is the concept "beneficial use". The main objective of the study¹⁷³⁴ was to determine whether and how the concept "beneficial use" is used to determine the content of a water use right, whether it influences the availability of water for reform and whether it may be used to reflect the public interest in the extent of a water use right. The study showed that the concept "beneficial use" has both a narrow and a wide meaning. Beneficial use in the wide sense means that a water use may not be harmful. Beneficial use in the narrow sense means that a water use right that has not been exercised will not be protected by the law.¹⁷³⁵ The previous water law dispensation in terms of the *Water Act* 54 of 1956 will be discussed before the current water law dispensation in terms of the *National Water Act* 36 of 1998 is discussed.

4.7.1 Water Act 54 of 1956

It was necessary to first determine whether water use rights were rights in property before it could be determined whether and how the concept "beneficial use" determined the content of the water use right. In terms of the *Water Act* 54 of 1956 water use rights were recognised by the courts as rights in property for which the rights holder had to be compensated when the water use rights were expropriated.¹⁷³⁶ Section 6 of the *Water Act* 54 of 1956 prevented the acquisition of the right of ownership or dominium in public water. The nature of the right to water was that it was a right of use. The sole and exclusive use and enjoyment of private water vested in the owner of the land where it was found in terms of section 5.

It appeared that even in terms of the previous water law dispensation the government was concerned about promoting the more beneficial use of the water resources in South Africa. By 1952 almost all water adjoining riparian land was being used, even though some riparian owners were not exercising their riparian water use rights.¹⁷³⁷ Many unexercised riparian water use rights only existed in theory because there was not enough water in the resource to back them up. The Hall commission acknowledged that reform of the water law system had to recognise the water use rights of riparian owners,

1733 See para 4.1.2.

1734 See para 1.2.

1735 Support for the point of view that beneficial use has a narrow meaning can be found in Roman law. See para 2.2.

1736 See para 4.2.2.

1737 See para 4.4.1.

but only where they were being used beneficially at the time. It was an application of the principle of beneficial use in the narrow sense that had up to that time not been written into the water legislation that was applicable to water use rights. However, Parliament was supreme and supported the reform of the water law system with the result that the *Water Act 54 of 1956* only did not derogate from pre-existing water use rights which had been beneficially used.¹⁷³⁸ The application of the concept "beneficial use" in the narrow sense determined that water use rights that were exercised, were preferred to those that were not exercised when the *Water Act 54 of 1956* was adopted. Unexercised riparian rights continued to exist, but they could only be exercised when there was surplus water. One was entitled only to as much surplus water as one could *beneficially use*. Despite the application of the concept "beneficial use" in both the narrow sense, where only beneficially exercised riparian rights to normal flow remained in existence, and in the wide sense, where one should have had the capacity to use public water in a manner that was beneficial,¹⁷³⁹ the *Water Act 54 of 1956* did not clearly spell out the role of the concept "beneficial use".

In the case of public water, the water that a riparian owner required for the efficient and economical irrigation of his land was the same as the water needed for his reasonable requirements and was also the same as the beneficial use of the water without waste.¹⁷⁴⁰ The standard of the beneficial use of water without waste shows how the public interest in the beneficial use of water curtailed the quantity of water that could be used. The waste of water would never have been in the public interest. The extent of water use rights were thus limited by what the public interest required. In the case where a Government Water Control Area had been declared, the Minister had the right to determine with due regard to any existing right *beneficially exercised* the extent of the land that had been irrigated, and he had to allocate the quantity of the water to be abstracted.¹⁷⁴¹ In other words, one's right to use public water in the case of a Government Water Control Area only needed to be taken into consideration by the Minister when it had been beneficially exercised. In effect the concept "beneficial use" was applied in a narrow sense when it came to the allocation of water in these areas.

In the case of groundwater the concept "beneficial use" in the narrow sense of the word played a role when a subterranean water control area was declared. The right to use groundwater that had been used immediately prior to the declaration of a subterranean

1738 See para 4.4.1.

1739 See para 4.4.1.

1740 See para 3.8.1.

1741 See para 4.4.1.1.

water control area vested in the land owner to whom the right was allocated.¹⁷⁴² The right to the use of ground water vested in the Minister if the water was unused immediately prior to the declaration of a subterranean water control area. The fact that government declaration of control areas for both public and underground water meant that unexercised water use rights were not protected, means that there were instances where the concept "beneficial use" was applied in the narrow sense in terms of the *Water Act* when the government elected to declare control areas. No requirement of reasonable or beneficial use of private water was found in the *Water Act* or in case law.¹⁷⁴³

It was stated above that it was necessary to determine whether the concept "beneficial use" in the narrow sense determined the content of a water use right in terms of the *Water Act* 54 of 1956.¹⁷⁴⁴ The most prominent instance when only beneficially exercised rights to use the normal flow of the river were protected was when the *Water Act* of 1956 came into operation. The fact that beneficially exercised rights had a higher priority after the promulgation of the Act occurred because Parliament elected to reform the water law dispensation. It did not happen automatically. In the other cases where unexercised water use rights were not protected, namely when government control areas were declared in the case of public water or subterranean water, it was the regulator's actions that meant that unexercised rights were not recognised.¹⁷⁴⁵ Unexercised rights did not lose their protection automatically. The result is that unexercised water use rights remained rights in property that were protected by the property clause of the South African *Constitution* of 1996 when the *National Water Act* 36 of 1998 came into operation.

4.7.2 National Water Act 36 of 1998

Despite the fact that old order water use rights have now been converted into statutory water use entitlements, they are still, in certain circumstances, protected as property rights by the payment of compensation for an invasion of the water use entitlement. Under the current water law dispensation, compensation is payable in terms of section 22(6) of the *National Water Act* 36 of 1998 for the refusal of a compulsory licence application for an existing lawful water use when there was severe prejudice to the economic viability of an undertaking. The same is true where a licence is amended in terms of section 49(4) of the *National Water Act* and the effect is severe prejudice to the economic viability of an undertaking. It is implicit in this subsection that the existing lawful water use or water use licence must be exercised at the time of the licence application for the economic viability

1742 See para 4.4.1.3.

1743 See para 4.4.1.2.

1744 See para 4.4.1.

1745 See para 4.4.1.3.

of an undertaking to be affected. The concept "beneficial use" in the narrow sense thus determines that compensation is only to be paid for a water use entitlement that is currently being exercised. The possibility of compensation, for an amendment of a water use licence and the refusal of a licence for an existing lawful water use, implies that a water use licence is a right in property. Some argue that water use entitlements that are being exercised are regarded as constitutional property in terms of the *National Water Act* 36 of 1998 because section 22(7)(a) of the Act states that the amount of the compensation must be determined in accordance with section 25(3) of the property clause in the *Constitution* of 1996.

The concept "beneficial use" in the narrow sense, in terms whereof a water use right that has not been exercised will not be protected by the law, will probably also play a role when the value of the compensation is determined. The current and historical use of the property should be taken into account in terms of sections 25(3)(a) and 25(3)(b) of the *Constitution* of 1996. The reference to the use of the property may be interpreted as underlining the importance of the (beneficial) exercise of a water use right when its value is determined.

The discounting of any reduction in the existing lawful water use in order to provide for the Reserve, and to rectify an over allocation of water (uses) and unfair or disproportionate water uses in terms of subsection 22(7)(b) of the *National Water Act*, underlines basic premises of the *National Water Act*. They are that a right to use water for economic purposes can only exist when sufficient water exists in the resource to enable the water use entitlement to be exercised.¹⁷⁴⁶ Furthermore, once a water use entitlement is exercised, the use should be beneficial.¹⁷⁴⁷ It should not be unfair or disproportional. A use which is disproportionate or unfair can never be beneficial.¹⁷⁴⁸ The stipulations of section 22(7) draws the attention to the fact that the exercise of both existing lawful water uses and water use licence as rights in property is subject¹⁷⁴⁹ to basic principles of the *National Water Act* like *inter alia* the Reserve¹⁷⁵⁰ and the concepts "custodianship"¹⁷⁵¹ and "beneficial use"¹⁷⁵² of the water resources.

The concept "beneficial use" in the narrow sense also played a role when the concept "existing lawful water use" was defined in terms of section 32 of the *National Water Act*.¹⁷⁵³ The effect of the definition of an existing lawful water use in section 32 was to only

¹⁷⁴⁶ See para 3.1.4.

¹⁷⁴⁷ See para 4.4.2.4.

¹⁷⁴⁸ See para 3.8.1 and para 4.4.2.4.

¹⁷⁴⁹ See para 4.4.2.

¹⁷⁵⁰ See para 3.1.4, para 4.2.2 and para 4.5.

¹⁷⁵¹ See para 2.7.1 and para 4.4.2.3.

¹⁷⁵² See para 3.8.1 and para 4.4.2.4.

¹⁷⁵³ See para 4.5.1.

recognise water use rights that had been lawfully, or as is postulated, beneficially exercised in the two years prior to the promulgation of the *National Water Act*. The concept "beneficial use" was thus utilised to influence the availability of water for reform by cancelling unexercised water use rights and making them available for reform purposes. It directly impacted on the water use right as a property right. Old order water use rights were protected as constitutional property by section 25 of the *Constitution* of 1996, as they were vested rights to use water that existed in terms of the *Water Act*. The question that was discussed in this thesis was whether the refusal to declare an unexercised water use to be an existing lawful water use in terms of section 32 of the *National Water Act* could be a deprivation of property, or even an expropriation or a constructive expropriation of property.

In some cases it amounted to a regulatory deprivation of property when the unexercised water use rights were not replaced by entitlements in terms of the *National Water Act*.¹⁷⁵⁴ The question was, of course, whether section 32 led to an arbitrary deprivation of water use rights.¹⁷⁵⁵ In the *FNB* case the court concluded that a deprivation of property is arbitrary in terms of section 25(1) when the law referred to either does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.¹⁷⁵⁶ Sufficient reason for water law reform is provided by section 25 of the *Constitution* of 1996. Section 25(8) of the *Constitution* states that no provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform. Section 32 of the *National Water Act* was a regulatory measure that was required by section 25(8) and section 27(1) of the *Constitution* that guarantees the right of access to sufficient water.¹⁷⁵⁷ It adjusted competing rights or claims to use the water resources and followed from the state's duty to regulate the water resources.¹⁷⁵⁸ A deprivation in terms of section 32 is therefore not an arbitrary deprivation of property for a want of sufficient reason for water law reform. When a deprivation results from a valid government purpose, such as reform, there is sufficient reason for the reform and the individual cannot rely on section 25(1). It is, in any event, not in the public interest that measures to achieve water law reform be declared to be arbitrary because of the effect they have on the individual.

The fact that section 32 has a retrospective nature may in the opinion of some justify a finding of procedural unfairness because the law should be known in advance.¹⁷⁵⁹ There

1754 See para 4.6.2.

1755 See para 4.6.3.

1756 See para 4.6.3.

1757 See para 3.7.

1758 See para 6.5.4.

1759 See para 4.5.2.1.

are at least two possible counterarguments to this argument. The first is that hardship caused by section 32 of the *National Water Act* 36 of 1998 could be alleviated by the showing of good reason in terms of section 33 of the Act. It was argued that section 33 should be applied with reference to circumstances and the legislation that existed at the time that a decision not to exercise the water use right was made. The other counterargument to a claim of procedural unfairness would be that section 32 is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of section 36(1) of the *Constitution* of 1996. The main justification would be that sufficient water does not exist in the resource to honour all unexercised water use rights. Following on this, it could also be argued that the forfeiture of unexercised water use rights also occurs in the United States of America, which is an open and democratic society.¹⁷⁶⁰

A case could not be made out that an expropriation had taken place when unused water use rights were cancelled, as the water resources vest in the nation and not in the state. The Minister acting on behalf of the national government merely has the power to regulate the water resources as the public trustee of the nation's water resources.¹⁷⁶¹ On the definition of expropriation as the taking of property and the transfer thereof to the state section 32 of the *National Water Act* does not amount to an expropriation.¹⁷⁶² It was also explained that section 25(2) of the *Constitution*¹⁷⁶³ usually only requires compensation when there was an expropriation in the form of an acquisition by the state. There was no acquisition of unexercised rights by the state in terms of sections 4(4) and 32 of the *National Water Act* and thus no expropriation in terms of section 25(2).

Although section 33 makes the existence of section 32 palatable in most cases, there do exist cases where hardship does occur as a result of section 32. The *lacuna* in the law is that the individual might have suffered damages from the deprivation of property if he did not exercise his water use rights, for example, for no reason other than that it was perfectly lawful not to use it. Furthermore, section 33 is only applicable where a water use had been exercised or where steps towards exercising the use had been taken. An example would be the man who bought land with a fountain so that he could do hydroponic farming when he retired years later. No steps towards effecting the use had been taken.¹⁷⁶⁴ The grey area between the state's duty to improve access to water by regulation and the individual's old order right to use or not to use private water, for

1760 See para 5.7.

1761 See para 4.4.2.3.

1762 See para 4.6.4.

1763 See para 4.3.6 and para 4.6.4.

1764 See para 4.6.5.

example, may be bridged by the notion of constructive expropriation.¹⁷⁶⁵ The protection of section 9 of the *Constitution* of 1996 might ensure that compensation sweetens a regulation that is aimed at reform but extinguishes individual's water use rights in a way that affects them to a greater extent than the rest of society and therefore burdens them unequally.

The government's role as custodian of the nation's water resources developed because the public interest plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property. The mechanism in section 32 of the *National Water Act* illustrates that when water scarcity necessitated the reform of the water law dispensation, the definition was adapted of which water use rights were regarded to have been used beneficially and were to be protected. It happened because the public interest had changed to one where section 25(8) of the *Constitution* of 1996 demanded water allocation reform and section 27(1) of the *Constitution* of 1996 guaranteed the access of everyone to sufficient water. The beneficial exercise of water use rights meant that beneficially exercised water use rights were preferred to those that were not exercised when there was competition or conflict in the sense of there being less water available than water use rights. In a time of increased competition for scarce water resources, one should not be allowed to hoard one's water use rights. The golden standard when water use rights for economic purposes are allocated, should be whether one will use the water beneficially. The beneficial use of water should assist in building the economy and creating jobs. Using economic growth as the standard for the beneficial use of the water resources would mean that property rights have to be respected. No investment or economic growth is likely to take place when property rights are not respected. Measures to reform the allocation of water should thus be curtailed by using economic growth as the standard for the beneficial use of the water resources.

In the beginning of this chapter the question was posed how the condition of beneficial use assists one in reaching the point of equilibrium between private and public interests. The answer can be found in the fact that entitlements to use the nation's water, which are held in terms of the public trusteeship of the minister, are protected as constitutional property by the payment of compensation as long as they are beneficially used.¹⁷⁶⁶ It means that water use entitlements must be exercised beneficially, proportionally and fairly so that the rights of other water users are not affected. The point of equilibrium between private and public interests in the water resources is reached when all water entitlement holders exercise their entitlements beneficially. A use that impacts negatively or

¹⁷⁶⁵ See para 4.6.5.

¹⁷⁶⁶ See para 4.2.2 and para 4.4.2.

disproportionally on other water users can never be a beneficial use. A water use entitlement that is not exercised impacts negatively on other water users because somebody else could have used the water. In the next chapter water law reform in America and the role of the concept "beneficial use" in that country will be discussed.

CHAPTER 5

WATER LAW REFORM IN AMERICA

5.1 Introduction

In the previous chapter the conclusion was reached that water use entitlements as property rights are more limited than other forms of private property because their exercise may intrude on a *res omnium communes*. Water use entitlements are subject to prior public claims such as the public trust, beneficial use and to the laws protecting the water from pollution.¹⁷⁶⁷ The concept of "public trusteeship" holds that the state retains a residual right in relation to natural resources¹⁷⁶⁸ because it is the custodian of the nation's natural resources. Common property, like water, is inherently liable to be adjusted to meet the requirements of the public interest.¹⁷⁶⁹

The question to be asked when doing comparative legal research should be whether foreign rules will be useful when one tries to solve local problems.¹⁷⁷⁰ An appropriate question would be what should be the construction put on the water use right by the property clause in the *Constitution* of 1996 when compared to the protection, if any, the American property clause affords water use rights when unused riparian rights are forfeited. During the research a method similar to Choudhry's¹⁷⁷¹ dialogical mode of comparative constitutional interpretation was followed. *Firstly*, comparative jurisprudence, in this case American water law, was used as a means to identify important concepts in America's water law system that are also found in South African water law. They were concepts like the "public trust doctrine" and "constitutional property." *Secondly*, a key concept like "beneficial use" was encountered when American water law was studied. Further research indicated that it was also a key concept in South African water law and had its roots in Roman law. *Thirdly*, the concepts "public trust" and "beneficial use" and their impact on the water use right as a property right in both countries were discussed separately. *Fourthly*, it was kept in mind that America is a developed country and that South Africa has a legacy of apartheid and the unjust allocation of natural resources. Transformation of access to natural resources might not be viewed as urgent in America, but in South Africa¹⁷⁷² it is mandatory.

1767 See *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) and Sax 1993 *Loy LA L Rev* 944-945; Sax 1990 *U Colo L Rev* 257 on 259 at fn 4. Compare *Florida Rock Industries, Inc. v United States* 45 Fed Cl 21, 24 (1999) and *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313 (2001); Anderson 2007 *McGeorge L Rev* 461 (*Tulare* was heavily criticised in *Klamath Irrigation District v The US* 67 Fed Cl 504 (2005) at 538.)

1768 Soltau 1999 *Acta Jur* 240.

1769 See para 4.4.2.

1770 See Malan 1997 *THRHR* 225 and para 1.4.2.

1771 Choudhry 1999 *Indiana LJ* 836.

1772 See s 25(8) of the South African *Constitution* of 1996.

The thesis tests the hypothesis that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right. The following supporting hypotheses will be investigated in this chapter. *Firstly*, the concept "beneficial use" should be used to determine the existence of the right to use water. *Secondly*, the public interest plays a larger role in the allocation of water use rights in conditions of water scarcity than in the allocation of rights to other forms of property. *Thirdly*, when some private rights in a water resource is in conflict with other private rights, beneficial use is the tool that is used to determine which uses are to be preferred to others. *Fourthly*, when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

Water reform in America will be studied with reference to the question whether compensation should be paid for either the forfeiture of unused riparian rights or the adjustment of water use rights because of environmental considerations.

5.2 Overview

In Chapter 2¹⁷⁷³ case law was discussed in terms of which American water law influenced the development of South African water law to the extent that a system of water as common property was eventually adopted by the legislature. In this chapter one of the questions investigated is whether a concept like the "public trust doctrine," which is central to American water law, has any role to play in the definition and limitation of a water right. Another matter to be investigated is whether the concept "beneficial use" that goes hand in hand with the public trust doctrine also forms a part of the definition of a water use right. A controversial mechanism in section 32 of the *National Water Act*¹⁷⁷⁴ in South Africa, that was discussed in chapter 4, has the result that unexercised riparian rights are not recognised as existing lawful water uses. It is to be investigated whether compensation should be paid when unused riparian rights are similarly forfeited in America. Furthermore, should compensation be paid when water rights are reduced to provide for interests like the environment? American case law on the protection of property and the question whether compensation has to be paid when water law reform affects property rights to use water will be discussed. The objective with the comparison of American water law reform to South African water law reform is to see whether anything useful can be learned when the research question is adapted to read: How does the concept "beneficial use" influence American water law reform? Before addressing this question one needs to determine the

¹⁷⁷³ See para 2.6.1.

¹⁷⁷⁴ S 32 *National Water Act* 36 of 1998.

context in which water use rights are protected in America. In the next paragraph the answer to the question whether a right of access to sufficient water is protected as a human right will be discussed, before it is determined whether there exists a concept of a public trust in America as there does in South Africa.

5.3 The protection of first generation human rights

This section discusses whether a right of access to water is protected as a human right by the American Constitution. The *zeitgeist* of the American Constitution,¹⁷⁷⁵ which became effective for the ratifying states in 1788, was one of civil and political rights, or “first generation”¹⁷⁷⁶ human rights only. A well-known document of its time, the *Declaration of the Rights of Man*¹⁷⁷⁷ was approved by the National Assembly of France on August 26, 1789. It stated that the natural and inviolable rights of man are liberty, property, security, and resistance to oppression. Although amended many times since coming into effect at the time of the *Declaration of the Rights of Man*, the American Constitution has never included second and third generation rights.¹⁷⁷⁸

The American legislature is reluctant to include second and third generation rights into its Constitution. In 1968 an amendment to the American Constitution which guaranteed every person’s inalienable right to a decent environment¹⁷⁷⁹ failed to receive sufficient support. In 1970 a proposed amendment included a right to pure water.¹⁷⁸⁰ This attempt to change the American Constitution also failed, probably because Congress had already begun to pass landmark federal environmental legislation to address many of the environmental problems of the time.¹⁷⁸¹ One of the reasons behind the reluctance to include socio-economic rights in the American Constitution might be an opinion that a constitution should only secure liberties and not entitlements.¹⁷⁸² The American Constitution is a *Bill of Rights* because the government has no authority to deprive persons of their liberties. People are guaranteed liberties to engage in activities of their choice. To secure socio-economic benefits constitutionally means subordinating individual liberties to notions of

1775 Constitutionfacts.com 1996 explains in *Dates to remember* that the American Constitution became effective for the ratifying states when New Hampshire was the ninth state to ratify it on June 21, 1788. When Virginia ratified the *Bill of Rights* on December 15, 1791, 10 of the 12 proposed amendments became part of the American Constitution. See Kommers and Finn *American Constitutional Law* 331.

1776 See para 3.2 for an explanation of the three generations of human rights.

1777 National Assembly of France 1789 *Declaration of the Rights of Man* Articles 1, 2 and 4 http://avalon.law.yale.edu/18th_century/rightsof.asp.

1778 Gallagher 1997 *Fordham Envtl LJ* 117 explains that in the absence of clear legal and historical precedent for basic constitutional environmental rights, the courts fear being drawn into political, scientific, social and economic battles of the moment. See also Hernandez-Truyol and Day 2000-2001 *Ind L Rev* 1227.

1779 Gallagher 1997 *Fordham Envtl LJ* 120-121.

1780 S 1. The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment shall not be abridged.

1781 Gallagher 1997 *Fordham Envtl LJ* 322.

1782 Siegan 1992 *San Diego L Rev* 172.

the collective good.¹⁷⁸³ In Siegan's¹⁷⁸⁴ opinion a constitution that protects liberties and entitlements is incoherent and difficult to interpret, since the interpreter will not know whether to expand or reduce governmental authority. To enforce entitlements the judiciary might have to mandate the imposition of taxes. Neither the people nor the legislature would be able to control this power. A common American objection is that communist regimes tried to provide so many entitlements that they had to subordinate the fundamental rights of life, liberty and property. Another concern is that socio-economic rights can by their nature not be achieved immediately.¹⁷⁸⁵

America is of course a developed country and achieving access to water for domestic purposes is not an issue. The California *Water Code*,¹⁷⁸⁶ for example, expressly states that the use of water for domestic purposes is the highest use of water. There is probably no need to protect a right of access to sufficient water as a human right.¹⁷⁸⁷ America is also a mature democracy. A government that fails to make sufficient water available will probably lose at the ballot box. Although a right of access to water is not a human right, it does not mean that the protection of the water resources is not important in America. In the next section the development and role of the public trust doctrine in America will be discussed.

5.4 The public trust doctrine

5.4.1 Who is responsible for regulating water?

Although America is a mature democracy, it is in the nature of politics that there is often a tug of war on who should exercise which power or function in a federal state like the United States of America. This section aims to answer the question: who is responsible for regulating water in America, the federal government or the states?

By the late eighteenth century unfair laws and misguided measures caused conflict between the various commercial regulations of the constituent states of the American confederation.¹⁷⁸⁸ This destroyed the harmony of the states and was the immediate cause of the American constitutional convention. By 1781, a resolution had been presented to

1783 Siegan 1992 *San Diego L Rev* 173.

1784 1992 *San Diego L Rev* 173.

1785 Compare *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28 para 58 and para 61. See para 3.7.

1786 State of California *Water Code* Article 106. The second highest use is water for irrigation. See the discussion of *Joslin v Marin Mun Water Dist* 429 P.2d 889, 891; 897-98 (Cal. 1967) in Walston 2008 *Whittier L Rev* 777. A municipal water agency had a prior right to the flows of a river in order to serve the domestic needs of its citizens, above the right of an upstream gravel-washing operation to use the water for commercial purposes.

1787 Koch 2002 *Wis Envtl LJ* 138 wants Article IX(1) in the Wisconsin *Constitution*, stating that the navigable waters are common highways and forever free, to be read as a right instilling a duty on the state to act on behalf of the public trust and giving a cause of action to the people to force it to do so. Koch 2002 *Wis Envtl LJ* 141-142 proposed that Article IX(1) be read as a positive second generation right. In her opinion requiring horizontal duties between private individuals, something which third-generation solidarity rights would require, may be "too great a leap for any United States court." For more on Article IX see State of Wisconsin *Constitution Article IX*. For more on the public trust in Wisconsin, see Sax 1969-1970 *Mich L Rev* 509.

1788 *Gibbons v Ogden* 22 US 1, 224 (1824).

the American Congress affirming that it was necessary for the American Congress¹⁷⁸⁹ to be vested with a right to oversee the commercial regulations of every state. The *Commerce Clause* is one of the most powerful clauses in the American Constitution and states that:¹⁷⁹⁰

The Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.¹⁷⁹¹

Rotunda and Nowak¹⁷⁹² explain that the purpose of the *Commerce Clause* was to create and foster a common market among the states and eradicate internal trade barriers. Moreover, it had to prevent the economic balkanisation of the federation.¹⁷⁹³ In the case of *Gibbons v Ogden*¹⁷⁹⁴ the court held that Congress' power over navigation is not a power incidental to that of regulating commerce; "it is the thing itself".¹⁷⁹⁵ In *Gilman v City of Philadelphia*¹⁷⁹⁶ the court affirmed that the power to regulate commerce comprehends the control of all the navigable waters of the United States which are accessible from a state other than those in which they are situated. Navigable waters are the public property of the nation and subject to legislation by the American Congress. Congress possesses all the powers which existed in the states before the adoption of the American Constitution, and which have always existed in the Parliament in England.¹⁷⁹⁷

In *State of New Jersey v State of New York*¹⁷⁹⁸ the American Supreme Court held that:

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished.

1789 The American Constitution limits the power of the federal government to those delegated by the Constitution.

Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the *Constitution*, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

1790 Art 1(8) of the American Constitution.

1791 There are echoes of the *Commerce Clause* and the case law developed around it in s 44(2) of the SA *Constitution* of 1996.

1792 2 *Treatise on Const L* § 11.1. See Hulsebosch 2002 *Cardozo L Rev* 1061.

1793 See *Hughes v Oklahoma* 441 US 322, 325 (1979).

1794 *Gibbons v Ogden* 22 US 1, 229 (1824).

1795 See Lazarus 1986 *Iowa L Rev* 637.

1796 *Gilman v City of Philadelphia* 70 US 713, 724-725 (1865).

1797 *Gilman v City of Philadelphia* 70 US 713, 724-725 (1865).

1798 *State of New Jersey v State of New York* 283 US 336, 342 (1931). Dellapenna 2000 *Wm & Mary Envtl L & Pol'y Rev* 317. See also Sax 1988-1989 19 *Envtl L* 481.

The doctrine of the public trust is an aspect of the protection of the navigable waters that needs to be explained. When the revolution took place, the people of each state became themselves sovereign; and held the absolute right to all their navigable waters (and the soil under them) for their common use, subject only to the rights surrendered by the constitution to the general government.¹⁷⁹⁹ The doctrine of the public trust, which protects navigable waters, developed at the same time that the federal power to regulate navigable waters developed out of the *Commerce Clause*. In *New York v New York and Staten Island Ferry Co.*¹⁸⁰⁰ the court explained that the state, in the place of the Crown, holds the title, as trustee of a public trust,¹⁸⁰¹ but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide-waters, or authorise a use inconsistent with the public right, subject to the paramount control of the American Congress in pursuance of the power to regulate commerce, given by the federal Constitution. The navigational servitude limits the states' authority to regulate water rights, because it precludes the states from granting rights that impair or affect the navigability of navigable waters. The essence of the doctrine of the public trust is to be found in the phrase that the state, in the place of the Crown, holds the title, as trustee of a public trust.¹⁸⁰² In *Glass v Goeckel*¹⁸⁰³ the court stated that in the American common law tradition, the state, as the sovereign, acts as trustee of public rights in natural resources.¹⁸⁰⁴ In *Martin v Waddell's Lessee*¹⁸⁰⁵ it was held that the country granted by King Charles II to the Duke of York was held by the king in his public and regal character, as the representative of the nation; and in trust for them.¹⁸⁰⁶ In England the inability of the sovereign to alienate Crown lands was not a restriction on the government, but only on the King.¹⁸⁰⁷ Whatever the restraints that the law might have imposed on the King, it was within the authority of Parliament, by exercising the police power, to enlarge or diminish the public rights for a legitimate public purpose. The American legal system, according to Sax,¹⁸⁰⁸ has adopted a

1799 See *Pollard v Hagan* 44 US 212, 229 (1845) and *Shively v Bowlby* 152 US 1, 14 (1894). In *Shively v Bowlby* 152 US 1, 57-58 (1894) the court explained that the new states admitted into the federal union since the adoption of the American Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions.

1800 *New York v New York and Staten Island Ferry Co* 23 Sickels 71, 4 (1877).

1801 See Smith and Sweeney 2006 *B C Envtl Aff L Rev* 321.

1802 See *New York v New York and Staten Island Ferry Co* 23 Sickels 71, 4 (1877).

1803 *Glass v Goeckel* 473 Mich. 667, 673 (2005).

1804 Tarlock 2001 *Nat Resources J* 779-780 fn 65 notes that the public trust doctrine is often criticised because there exists uncertainty about its source. Is the source the American Constitution or state law? See Walston 2008 *Whittier L Rev* 774.

1805 *Martin v Waddell's Lessee* 41 US 367 (1842).

1806 Butler 1981-1982 *WM & Mary L Rev* 90. The public trust concept may be more capable of responding to changed needs than the commons concept because the public trust less clearly defines the nature of the public's equitable interest. (See Taylor 1998 *Geo. Int'l Envtl L Rev* 391-392). Under the public trust the state holds legal title to certain resources, while the people have an equitable interest. The commons concept gives a class of people the legal right to make use of another's land. (Butler 1981-1982 *WM & Mary L Rev* 88-89.)

1807 Sax 1969-1970 *Mich L Rev* 476.

1808 Sax 1969-1970 *Mich L Rev* 476.

dual approach to public property that reflects both the Roman and the English notion that certain public uses ought to be specially protected.¹⁸⁰⁹

According to Lazarus,¹⁸¹⁰ the public trust found its way into the English common-law heritage through the writings of Bracton.¹⁸¹¹ Bracton borrowed from the Roman notion of *res omnium communes*. The court in *National Audubon Society v Superior Court of Alpine County*¹⁸¹² explained that from the stipulation in the *Institutes of Justinian* that water is common to all, the English common law evolved the concept of the "public trust," in terms of which the sovereign owns all of the navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people". These powers of the state as trustee of the public trust are subject to the paramount control of the American Congress in pursuance of the power to regulate commerce, given by the federal Constitution.¹⁸¹³

The development of the *Commerce Clause* was, however, not plotted in advance by the drafters of the American Constitution as the Constitution does not set boundaries for the commerce power vested in the Congress.¹⁸¹⁴ Savoy¹⁸¹⁵ calls the evolution of the American Supreme Court's interpretation of the *Commerce Clause* a chronicle of a prolonged and bitter struggle over the legitimate ends of government.¹⁸¹⁶ The *Commerce Clause* is especially important when congressional legislation attempts to regulate water use rights that had been granted by a particular state. The power to regulate the environment when interstate commerce is affected, might, in addition to the regulation of navigable waters, affect the very existence of water use rights directly.¹⁸¹⁷ The interests of interstate commerce are always paramount to the interests of the environment. In *Hughes v Oklahoma*¹⁸¹⁸ the court held that states may protect and conserve wild animal life within their borders, but only in ways consistent with the basic principle that the American "economic unit is the nation". When a wild animal becomes an article of commerce its use cannot be limited to the inhabitants of one state, thereby excluding the inhabitants of another. In *Waste Management Holdings v Gilmore*¹⁸¹⁹ the court cautioned that today it is

1809 See Van der Schyff *Constitutionality of the MPRDA* 108-109 for more on the historical roots of the public trust concept.

1810 Lazarus 1986 *Iowa L Rev* 635.

1811 See para 2.5.1.

1812 *National Audubon Society v Superior Court of Alpine County* 33 Cal.3d 419, 433-434 (1983). Deveney 1976 *Sea Grant LJ* 17 criticises the view that Justinian's statement (in Just 2.1.1 - see para 2.2.3) that the air, running water and the sea and its shores are common to mankind, was the forerunner of the public trust doctrine. Deveney argues that the Romans had no conception of a trust. The public, as the beneficiary of a trust, had no remedies against state allotment of land. The state exploited resources with private monopolies. It was only late in Roman history that a distinction was made between the public and the personal status of the ruler. See Huffman 2007 *Duke Envtl L & Pol'y F.* 1 para III.

1813 *New York v New York and Staten Island Ferry Co* 23 Sickels 71, 4 (1877).

1814 Rotunda and Nowak 2 *Treatise on Const. L* § 11.1.

1815 1985 *Howard LJ* 838.

1816 There are echoes of the *Commerce Clause* and the case law developed around it in s 44(2) of the SA *Constitution*.

1817 See the discussion on the reduction of water rights to provide for the *Endangered Species Act* in para.5.9.2.

1818 *Hughes v Oklahoma* 441 US 322, 338-339 (1979).

1819 *Waste Management Holdings v Gilmore* 64 F.Supp.2d 523, 537 (1999).

Virginia that is trying to stop the flow of New York's garbage across its borders. Tomorrow it may be New York that tries to block the importation of Virginia's tobacco, it being another article of commerce that is disapproved of by some members of the public. The court held: "Such interstate commercial warfare is clearly in no one's interest."¹⁸²⁰ The court also held that this type of prohibition is exactly what the *Commerce Clause* seeks to forbid. Van der Schyff¹⁸²¹ explains that many state legislatures have passed environmental statutes expressing that the public trust extended to all natural resources. By 1996 a third of all state constitutions contained public access and use provisions.¹⁸²² The right of the federal government to regulate the use of water to conserve protected species is also derived from the federal power to regulate commerce.¹⁸²³ The need to balance traditional water uses and new demands for instream water for ecosystem protection exists alongside tension between state primacy in water law and the federal prerogative to develop environmental and natural resource laws.¹⁸²⁴ The right of the federal government to regulate the environment trumps the exercise of state water rights.¹⁸²⁵ While Congress may not control specific methods used by states to allocate water rights, it may affect the administration and exercise of those rights through comprehensive statutes, like the *Endangered Species Act (ESA)*.¹⁸²⁶ In every case in this chapter where water rights are discussed, reference will be made to both state and federal law where they are relevant. It is clear from the above that both the *Commerce Clause* and the public trust doctrine impact on the content of the interests in water held by the assorted stakeholders in water.

5.4.2 *Structure of interests in the public trust*

The next case to be determined is the nature of the legal interest of the various stakeholders in water. The nature of the interest impacts on the content of the water right, as will be seen below.¹⁸²⁷ A private party who acquires littoral property from the sovereign acquires only the *jus privatum*, or private property right, held subject to the public trust. The grant is normally interpreted to make the title and rights of the grantee subject to the public rights of navigation, commerce, and fishery as well as to the power of the state or nation to make regulations for the protection of commerce and navigation.¹⁸²⁸

1820 *Waste Management Holdings v Gilmore* 64 F.Supp.2d 523, 537 (1999).

1821 *Constitutionality of the MPRDA* 132-133.

1822 Gallagher 1997 *Fordham Envtl LJ* 132.

1823 Yuffee 1993 *Wash U LQ* 1233 and 1235.

1824 Moore, Mulville and Weinberg 1996 *Nat Resources J* 319-320.

1825 Tarlock 2001 *Nat Resources J* 772.

1826 Bricker and Filippi 2000 *Envtl L* 751-752.

1827 See para 5.5.

1828 Danne, Glenn & Weinstein 65 *CJS* §128.

The fact that navigable rivers are common to all the people is paramount. In *Arnold v Mundy*¹⁸²⁹ the court held that navigable rivers, including both the water and the land under the water, for *inter alia* the purposes of navigation and fishing, are common to all the people. Each has a right to use them according to his pleasure, subject only to the laws which regulate that use. The property vests in the sovereign, but it vests in him for the sake of order and protection, and not for his own use, but for the use of the citizen.

In *Illinois Central Railway Co v State of Illinois*¹⁸³⁰ the American Supreme Court described the state's interest in its navigable waters as "title". The word "title" was not used in a proprietary sense, but as a "title" that was held in trust for the people of the state so that they are able to enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing in the water free from the interference of private parties.¹⁸³¹ Moreover, when the state surrendered its property and control in a grant of the land to the Illinois Railroad Company, it abdicated this trust.¹⁸³² In our terminology it acted *ultra vires* as it did not act within its legislative power. On the other hand, the state is allowed to grant parcels for the foundations of wharves and other structures in aid of commerce, which do not substantially impair the public interest in the waters remaining.¹⁸³³

The nature of the state's ownership is that it retains the authority needed to assure the continued existence and beneficial application of the resource for the common good.¹⁸³⁴ This makes it clear that the concepts "public trust" and "beneficial use"¹⁸³⁵ go hand in hand. The latter is a tool of the former. The Hawai'ian Constitution¹⁸³⁶ *inter alia* requires the state to protect natural resources and to promote their use and development.¹⁸³⁷ There exists a duty to assure that the waters of Hawai'i are put to reasonable and beneficial uses.¹⁸³⁸ The public trust is a dual concept of sovereign "right" and "responsibility".¹⁸³⁹ The public interest in the waters of Hawai'i was understood to necessitate retention of authority.

1829 *Arnold v Mundy* 6 N.J.L 1, 9 (1821).

1830 *Illinois Central Railway Co v State of Illinois* 13 S.Ct. 110,118 (1892). See Sax 1969-1970 *Mich L Rev* 489-491.

1831 *Illinois Central Railway Co v State of Illinois* 13 S.Ct. 110, 118 (1892).

1832 Grant 1995 *Ariz St LJ* 423 states that a grant of land in violation of the trust is inherently revocable. See discussion of *Illinois* in Lazarus 1986 *Iowa L Rev* 638-640; Butler 1981-1982 *WM & Mary L Rev* 881 fn 103; Van der Schyff *Constitutionality of the MPRDA* 110-112 and Kleinsasser 2005 *Envtl Aff* 424.

1833 In the case of *People of New York v New York and Staten Island Ferry Co* 68 N.Y. 71, 5 (1877) the court held that a grant from the state to a grantee to erect wharves and piers upon certain lands means that the grantee acquires the title to the soil but the state does not divest itself of the right to regulate the use of the granted premises in the interest of the public and for the protection of commerce and navigation. See also *Boone v Kingsbury* 206 Cal. 148, 189 (1928).

1834 *Water Use Permit Applications* 94 Hawai'i 97, 129 (2000).

1835 See para 4.4.2.3, para 4.4.2.4 and para 5.7.

1836 Article XI, s 1 of the Hawai'ian Constitution.

1837 *Water Use Permit Applications* 94 Hawai'i 97, 139 (2000).

1838 *Water Use Permit Applications* 94 Hawai'i 97, 113 (2000).

1839 *Water Use Permit Applications* 94 Hawai'i 97, 135 (2000).

The doctrine protects several public use rights. Public trust easements or limited rights of use of property are traditionally defined in terms of navigation, commerce and fisheries.¹⁸⁴⁰ These rights have been held to include the right to fish, hunt, bathe, swim, and use the navigable waters of the state for boating and general recreation. They include using the bottom of the navigable waters for anchoring, standing, or other purposes. Public use rights include the public's rights to use the state's water highways physically by mandating public access and limiting roadblocks to navigation.¹⁸⁴¹ The doctrine protects against environmental and aesthetic degradation.¹⁸⁴² It has provided for the protection of land at the edge of the water and wetlands areas through shore land zoning ordinances; preserves aesthetic beauty; limits the discharge of fill into navigable waters; stopped development that would harm fish spawning; nursery habitat; water quality and water plants. It has halted the draining of major lakes, and helped to promote clean water.¹⁸⁴³ The public trust imposes a duty to maintain the purity and flow of its waters for future generations.¹⁸⁴⁴ It protects *inter alia* an individual's right to walk along the shores of the Great Lakes.¹⁸⁴⁵ The public trust does not permit every use of trust lands and waters. It protects only limited public rights. It does not justify trespass on private property. The exercise of these traditional public rights remains subject to criminal or civil regulation (the police power).¹⁸⁴⁶ The state, as quasi-sovereign and representative of the interests of the public, has *locus standi*.¹⁸⁴⁷

...to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned...

The public has the same rights in and to tidelands.¹⁸⁴⁸ The public uses of tidelands are flexible enough to encompass changing public needs. The state does not have to deal with an outmoded classification favouring one mode of utilisation over another.¹⁸⁴⁹ The Hawai'i Supreme Court in the *Water Use Permit Applications*¹⁸⁵⁰ case has identified three

1840 *Marks v Whitney* 491 P.2d 374, 380 (1971).

1841 *Water Use Permit Applications* 94 Hawai'i 97, 135 (2000).

1842 *Water Use Permit Applications* 94 Hawai'i 97, 135 (2000).

1843 Czarnezki 2007 *Marquette L Rev* 470. See also the discussion of the expansion of the public trust doctrine by Van der Schyff *Constitutionality of the MPRDA* 121-126.

1844 *Water Use Permit Applications* 94 Hawai'i 97, 138 (2000). For case law on the protection of the environment see *State Department of Parks v Idaho Department of Water Administration* 530 P.2d 924 (1974) and *USA v State Water Resources Control Board* 182 Cal.App.3d 82 (1986); Weber 1995 *Ariz St LJ* 1155.

1845 *Glass v Goeckel* 473 Mich 667, 704 (2005).

1846 *Glass v Goeckel* 473 Mich 667, 674 (2005).

1847 *Hudson County Water Company v Robert H McCarter* 209 US 349, 355 (1908).

1848 *Marks v Whitney* 491 P.2d 374, 380 (1971).

1849 *Marks v Whitney* 491 P.2d 374, 380 (1971).

1850 *Water Use Permit Applications* 94 Hawai'i 97 (2000) on 128. See *People of New York v New York and Staten Island Ferry Co* 68 N.Y. 71, 5 (1877). See Lazarus 1986 *Iowa L Rev* 636. Deveney 1976 *Sea Grant LJ* 45.

separate interests in public trust resources: the *ius publicum*,¹⁸⁵¹ the interests of the public in water resources or public trust; the *ius privatum*,¹⁸⁵² or private property right to use the water, and the *ius regium*, otherwise known as the police power or right to regulate the use of water. The public trust's basic purpose is reserving the resource for use and access by the general public without preference or restriction. The court in the *Water Use Permit Applications*¹⁸⁵³ case observed that the trust's limitation on private rights follows from the public character of the property, being held by all the people for purposes in which all the people are interested. It recognised enduring public rights in trust resources that are separate from, and superior to, the private interests in the resources at any given time. The public trust has to weigh the protection of individual rights, such as the right of a property owner to be free in excluding others, against the common good that takes priority over all other individual goods.¹⁸⁵⁴ The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.¹⁸⁵⁵

Certain water uses may even be excluded from a property right to use water. Where navigation was involved, the American Supreme Court in the *United States v Chandler-Dunbar Water Power Company*¹⁸⁵⁶ case held in 1913 that riparian owners of the shore and bed of the St. Marys river have no right of private property in the water power for which compensation must be made by the United States for condemning all land and property of every kind north of St. Marys Falls ship canal that were lying between such canal and the entire international boundary line. The court held that the American Congress did not act arbitrarily in determining that for the purposes of navigation of the waters and the waters connected therewith, the whole flow of the stream should be devoted exclusively to navigation. In *Hudson County Water Company v. Robert H. McCarter*¹⁸⁵⁷ the American Supreme Court held that the police power of the state justifies the enactment of laws under which a riparian owner may be prevented from diverting the waters of a stream of such state into any other state.¹⁸⁵⁸

While the public trust may allow grants of private interests in trust resources under certain circumstances, private commercial use is not among the public purposes protected by the

1851 According to Deveney 1976 *Sea Grant* LJ 46 the *ius publicum* is solely an interest in navigation and a public right to have navigable rivers free of nuisances.

1852 Deveney 1976 *Sea Grant* LJ 45 states that the *ius privatum* might be in the sovereign or in a subject of his.

1853 *Water Use Permit Applications* 94 Hawai'i 97 (2000) on 138.

1854 Smith and Sweeney 2006 *B C Env'tl Aff L Rev* 317.

1855 *Hudson County Water Company v Robert H. McCarter* 209 US 349, 356 (1908).

1856 *United States v Chandler-Dunbar Water Power Company* 229 US 53 (1913).

1857 *Hudson County Water Company v Robert H. McCarter* 209 US 349, 356 (1908). See Sax 1988-1989 *Env'tl L* 479-480 who applauds the statement that the private right to appropriate is subject to the rights of lower owners and the limitation that it may not substantially diminish one of the great foundations of public welfare and health.

1858 Butler 1981-1982 *WM & Mary L Rev* 844 FN 103 explains that the resurrection of the public trust doctrine in America was *inter alia* due to problems with pollution and overcrowding caused by a significant increase in population. This led to an increasing demand for open spaces and lands reserved for public use.

trust.¹⁸⁵⁹ No one could contend that the state could grant tidelands free of the trust merely because the grant served a public purpose, such as increasing tax revenue or because the licensee may use the property for commercial purposes. Private use for economic development may produce important public benefits. Such benefits must figure into any balancing of competing interests in water, but they do not include private commercial use as a protected trust purpose.

5.4.3 Legal remedies provided by the public trust

Although it has an elevated standing in law as a result of the public trust doctrine, the natural environment cannot appear in court to defend its own interests. The advantage of the public trust doctrine is that it enables various stakeholders in public trust resources to have *locus standi* before the courts to defend their interest in natural resources. Lazarus¹⁸⁶⁰ writes that the public trust can be used *firstly* by private parties against the government¹⁸⁶¹ where proposed government action threatens the public trust or its values; *secondly* it can be used by government to prevent private parties from infringing on trust values; and *thirdly* it can be used by private parties¹⁸⁶² against other private parties where trust values are infringed. Sax¹⁸⁶³ states that the content of the above rights are that the public trust *firstly* creates an obligation that could be enforceable against the government; *secondly* vests some concept of a legal "right" in the general public; and *thirdly* should be interpreted consistent with contemporary concerns for the environment.¹⁸⁶⁴ Regarding government's duties, Sax¹⁸⁶⁵ explains that the doctrine imposes duties on government *firstly* only to use the property subject to the trust for public purposes; *secondly* never to sell the property and *thirdly* to maintain the property for particular types of uses.

5.4.4 Development of natural resources law

Lazarus¹⁸⁶⁶ asserts that the public trust doctrine rests on legal fictions. He argues that *sovereign ownership* of certain natural resources and the *duties of the sovereign as trustee* to natural resources are judicially created shorthand methods to justify treating differently government action that involves those resources. The purpose of the public trust doctrine at various periods of American legal history has been to avoid judicially

1859 *Water Use Permit Applications* 94 Hawai'i 97, 138 (2000).

1860 See the discussion in Lazarus 1986 *Iowa L Rev* 645-646. See also Van der Schyff *Constitutionality of the MPRDA* 145.

1861 Lazarus 1986 *Iowa L Rev* 658 states that promoting the public trust doctrine was in part based on its potential for providing citizens with the 'legal interest' necessary to confer *locus standi* to bring a lawsuit.

1862 See *Marks v Whitney* 491 P.2d 374, 377-78 (1971).

1863 1969-1970 *Mich L Rev* 474. Van der Schyff *Constitutionality of the MPRDA* 119.

1864 See *National Audubon Society v The Superior Court of Alpine County* 33 Cal.3d 419, 431 (1983).

1865 Sax 1969-1970 *Mich L Rev* 477; Koch 2002 *Wis Envtl LJ* 148. See a discussion of the relevance of the public trust doctrine to modern fishery management in Lynch 2007 *NYU Envtl LJ* 288-289.

1866 1986 *Iowa L Rev* 632.

perceived limitations or consequences of existing rules of law. Recently the source of worry regarding the environment has been “insufficiencies of the democratic process”. The public trust doctrine is tantamount to an academic call to legal arms on behalf of the natural environment, according to Lazarus.

It is the balancing of the competing interests in water that has caused a greater limitation of private rights to use water. Lazarus¹⁸⁶⁷ writes that modern trends in natural resources law are eroding traditional concepts of “private property rights” in natural resources. They are being substituted with new notions of sovereign power over those resources. These trends are weaving a new fabric for natural resources law that is more responsive to current social values and the physical characteristics of the resources. These remarks are in accordance with the hypothesis that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

Criticism centres on the observations that the public trust doctrine obscures analysis and makes the reworking of natural resources law more difficult.¹⁸⁶⁸ It threatens to fuel a clash between furthering individual rights of security and dignity, or the protection of private property, and supporting environmental protection and resource preservation goals. The latter are dependent on governmental programmes designed to achieve longer-term collectivist goals.¹⁸⁶⁹

5.4.5 *Conclusion on the role of the public trust*

It is possible that America would have protected water as a natural resource effectively without making use of the public trust doctrine. However, when one deals with a nation where the constituent parts threaten to pull away from the centre, one needs a concept like the “public trust” that is easy to understand and can be followed by all. Moreover, the public trust concept helps to sustain the health of the navigable waters on which the nation depends for its unity. The public trust doctrine gives natural resources a conceptual standing that it might not have had if a right to a healthy environment or access to water had been merely protected as human rights. The danger in merely protecting a right of access to sufficient water as a human right is that it often is one of many rights that are weighed up against one another. The advantage of the public trust doctrine is that it gives natural resources an elevated standing in law that should be beyond the reach of corrupt officials.

1867 1986 *Iowa L Rev* 633.

1868 Lazarus 1986 *Iowa L Rev* 633.

1869 Kleinsasser 2005 *Envtl Aff* 426 regards the fact that the use of natural resources exists in a dynamic relationship with evolving values of the community, as a positive feature of the doctrine.

5.5 The concept "water use right"

Although the water use right is prone to being affected by changing values, it has crystallised into a concept with a certain meaning. It was explained above¹⁸⁷⁰ that there exist three separate interests in public trust resources, namely the *ius publicum*, or public trust; the *ius privatum*, or private property right to use the water, and the *ius regium*, otherwise known as the police power or right to regulate the use of water.¹⁸⁷¹ This section discusses the content of the *ius privatum* or the private right to use water.

In the 1853 case of *Eddy v Simpson*¹⁸⁷² the Supreme Court of California held that:

the foundation of a right to water is the first possession; and this right is usufructuary,¹⁸⁷³ and consists not so much in the fluid itself, as in its use.¹⁸⁷⁴

The owner of land over which it flows has the right to its use during its passage. This right is not in the *corpus* of the water, and only continues with its possession. When the water of a stream leaves the possession of a party, all his right to and interest in it, is gone.¹⁸⁷⁵

It is possible that the California Court confused the Roman law terms *usus* and *usus fructus*, but this is not fatal, as Pomponius¹⁸⁷⁶ had called the right of use of water a personal right that is generally created in the same way as *usus fructus*. It is debatable whether water has fruits, but the essence remains the same. One person has rights to use and enjoy the things (water) of another (the state). The American interpretation of the Roman law concepts of *usus* and *usus fructus*¹⁸⁷⁷ is in line with South African law. As seen earlier, Justice Bell in *Retief v Louw*¹⁸⁷⁸ relied on *Tyler v Wilkinson*¹⁸⁷⁹ where the court held that a riparian owner had "no property in the water itself; but a simple use of it, while it passes along".¹⁸⁸⁰ Anderson¹⁸⁸¹ explains that in Rome the use of the rivers was the common right of everyone. The Civil Law commentator Pothier¹⁸⁸² called this common

1870 See para 5.4.3.

1871 *Water Use Permit Applications* 94 Hawai'i 97 (2000) on 128.

1872 *Eddy v Simpson* 3 Cal. 249 (1853).

1873 According to Sax 1969-1970 *Mich L Rev* 485 the usufruct in the case of water law is an interest that incorporates the needs of others. The government has to regulate water uses for the general benefit of the community. It has to take account of the public nature and the interdependency which the physical quality of the resource implies. See also chapter 7.

1874 See Anderson 2007 *McGeorge L Rev* 493. He criticises an initial failure to distinguish between the substance of the water and the flowing water.

1875 See para 4.4.2.

1876 D 7.8.21 in Watson's translation of the *Digest of Justinian*. See para 2.2.3.1.

1877 Anderson 2007 *McGeorge L Rev* 472 fn 32 is of the view that the chief contribution of the term "usufruct" in American law, shorn of its civil law context and having none at common law, is that it (1) sounds like the word "use"; (2) has an erudite, vaguely Latin and thus authoritative ring and (3) ends thoughtful analysis.

1878 *Retief v Louw* 4 Buch 165 (1874). See the discussion in para 2.6.1.

1879 *Tyler v Wilkinson* 4 Mason 397 (1827) on 401.

1880 See para 2.6.1; Angell *Treatise on the Law of Watercourses* 161-163 and Watson 1990 *Ga L Rev* 163 on 216.

1881 Anderson 2007 *McGeorge L Rev* 475-476.

1882 Van der Walt *Ontwikkeling van Houerskap* 372 explains that according to Pothier *usus fructus* was not property, but a mere servitude with the result that the usufructuary could not make use of the *rei vindicatio*.

right a negative community of interest as the water belonged to no one, but everyone who had access to the resource had a right to take from it. The negative community of interest was the antithesis of property. The implicit feature of the public right to running water was the right not to be obstructed from using it.¹⁸⁸³ The *res* or subject matter of the property right is the watercourse or the running water. Anderson¹⁸⁸⁴ states that there is no property in the substance of the water in the stream that could be transferred to the user. He makes two conceptual points. *Firstly*, prior to the separation of the water from the source, the proprietary right is *usufructuary* in character.¹⁸⁸⁵ *Secondly*, after the separation of the water, the proprietary right is possessory.¹⁸⁸⁶

He also makes the important point that the concept “public ownership” has no substantive meaning if it does not exclude or limit the assertion of private ownership, and does not include a present or a future right of possession or use by the state.¹⁸⁸⁷ As long as water runs in a stream, it cannot be possessed and there can be no ownership. If a resource is incapable of ownership, it does not make sense to say that it is owned by the people.¹⁸⁸⁸ Barton, however, states that the right to use water extends only to its use, while the title remains with the state. A water right is considered real property and enjoys the same protection from takings as other non-possessory rights such as easements and non-title holding rights such as leases.¹⁸⁸⁹ Water rights are also subject to limitations like the doctrine of reasonable and beneficial use and the public trust.¹⁸⁹⁰

According to Angell,¹⁸⁹¹ a “right to take something out of the soil, as turf or coal, is not an easement, but a *profit à prendre*”.¹⁸⁹² A *profit à prendre* has been defined as the right to take a part of the soil or the products thereof from the land of another.¹⁸⁹³ Angell¹⁸⁹⁴ distinguished the “service” of *aquae haustus*, of taking out water from another’s well or pond, from the service of *aquae ductus*. *Aquae haustus* is a right of profit or a *profit à*

1883 See s 27(1) of the South African *Constitution* of 1996. It provides a right of access to sufficient water.

1884 Anderson 2007 *McGeorge L Rev* 486. He is the assistant chief counsel of the California Department of Water Resources.

1885 Lock 2000-2001 *U Denv Water L Rev* 86 states that the primary sticks in the bundle of rights an appropriator of water acquires under the doctrine of prior appropriation are priority and use.

1886 Anderson 2007 *McGeorge L Rev* 489. Lock 2000-2001 *U Denv Water L Rev* 82 states that when reduced to possession by diversion into an artificial structure, the *corpus* of water itself becomes private property.

1887 Anderson 2007 *McGeorge L Rev* 469 fn 23(3).

1888 Anderson 2007 *McGeorge L Rev* 484 fn 80. Anderson 2007 *McGeorge L Rev* 493-494 fn 109 states that neither the French riparian right as recognised in the French Civil Code, nor the Louisiana riparian right, is an usufruct. They are a right of use inhering in riparian property and not a personal servitude on the ownership of another. See para 4.4.2.

1889 Barton 2001-2002 *Environs Envtl L & Pol’y J* 109 on 121. In *Board of Regents v Roth* 408 US 564 (1972) the American Supreme Court insisted that people seeking protection for economic interests under either the due process or takings clauses must establish they have ‘property’ if they are to avoid dismissal of their lawsuit. See Merrill 2000 *Va L Rev* 887.

1890 Barton 2001-2002 *Environs Envtl L & Pol’y J* 121-122.

1891 Angell *Treatise on the Law of Watercourses* 165.

1892 See para 6.6.2 on the *profit à prendre* in Australia.

1893 Roberts 1940-1941 *Ky LJ* 3.

1894 Angell *Treatise on the Law of Watercourses* 165.

prendre. Meyers¹⁸⁹⁵ explained that in America an easement is a right of the dominant estate holder to use the land of the servient estate holder for a specific purpose. It has also been defined as a burden or servitude imposed on the land of another. In *Mosier v Mead*¹⁸⁹⁶ the court held that:

An easement is generally defined as an interest in land created by grant or agreement, express or implied, which confers a right on the owner thereof to some profit, benefit, dominion or lawful use out of or over the estate of another.

In casu the defendants had an easement for the construction of a flood control levee. Although a number of courts held that an easement is an interest in land without any rights to the profits of the servient estate, the modern trend is to treat easements and profits alike and classify them both as servitudes.¹⁸⁹⁷ The American easement has the same origin as the South African servitude.

Hahner¹⁸⁹⁸ distinguishes a *profit* from a licence as follows: The licence holder has mere permission to do something on the land of another, while the holder of the profit has rights against the owner and the community in general protecting him from interference in his use. A licence is normally revocable, unless it is coupled with a grant of an interest. Then it becomes and remains irrevocable as long as the interest continues. An example would be when a licensee, one Z, purchases growing trees. He has an implied licence to cut the trees. The latter is revocable. Once the trees are severed, the purchaser gets the title to the trees and has an irrevocable license to enter the land and remove the trees. A licence grants no interest in the land. When a right is exercised in common with someone else it is nonexclusive and called a *profit à prendre* in common or right of commons. It consists of rights like pasturage and piscary.¹⁸⁹⁹

Anderson compared the property right in a mineral *profit à prendre* to the property right in a water right. In the former the property is the use right in the land where the minerals are located. The property of the water right is a use right in the water course and not property in the *corpus* of the water itself.¹⁹⁰⁰ Severed they become property separate and apart from the land or watercourse from which they were detached.¹⁹⁰¹ Examples of *profits à*

1895 Meyers 1988 *Or L Rev* 783. See discussion of Angell above in para 2.6.1.3.

1896 *Mosier v Mead* 45 Cal.2d 629, 632 (1955).

1897 Meyers 1988 *Or L Rev* 784. See also *Lobato v Taylor* 71 P.3d 938 (2002) and Golten 2005 *Nat Resources J* 481-482. Compton 2002 *AMPLA LJ* 153 wrote that apparently the "medieval layperson understood that the soul and spirit of God were not things seen and incorporeal hereditaments were of this nature".

1898 Hahner 1946 *Or L Rev* 223-224.

1899 Hahner 1946 *Or L Rev* 228-229. See para 6.6.2 on the *profit à prendre* and para 6.6.3 and 6.6.4 on rights in a fishery in Australia.

1900 Anderson 2007 *McGeorge L Rev* 498-499. See Burger *Roman Water Law* 12-13.

1901 *Stanislaus Water Co v Bachman* 152 Cal 716 (1908).

prendre are the interest of a mineral owner or lessee in the right to take something, such as oil or gas, from the land itself,¹⁹⁰² and the right to attached seaweed in the privately owned inter-tidal zone.¹⁹⁰³ Anderson compares a water use right to the *profit à prendre*.¹⁹⁰⁴

TABLE 5.1: Comparison of the water right and the *profit à prendre* as rights in property

	Water right	<i>Profit à prendre</i>
Character of right	A non-possesory right of use	A non-possesory right of use
Use entitled	Taking water	Taking material etc.
Property <i>res</i>	The watercourse (Not owned by water right holder).	The servient estate (Not owned by the profit holder).
<u>Not</u> the property <i>res</i>	The substance of the water to be taken.	The material to be taken.
Physical effect of exercise	Severance of water from the watercourse and reduction to possession of the water taken.	Severance of material from the realty and reduction to possession of the material taken
Legal effect of exercise	A new title (ownership) is created in the water taken	A new title (ownership) is created in the material taken.
Rights under new title	Possessory use and dispossession of water taken.	Possessory use and dispossession of material taken

5.6 Water rights systems in America

There used to be two water rights systems in the United States before many states adopted a statutory water permit system. The two systems have their origin in the fact that east of the 100th meridian water was plentiful and west of the meridian water was scarce.¹⁹⁰⁵ To the east a system of riparian rights was followed and to the west a system

1902 Graham 1969 *Loy U LA L Rev* 136.

1903 Feeney 2001-2002 *Ocean and Coastal LJ* 343-344 explains that sea weed that is floating is a public resource. Seaweed that is washed ashore becomes the property of the land owner.

1904 Anderson 2007 *McGeorge L Rev* 502. See also Osherenko 2006 *J Envtl L & Litig* 332 for a comparison of the types of right one gets towards natural resources in America, as well as their characteristics. Osherenko 2006 *J Envtl L & Litig* 327 compared patterns of property rights (in South African terms the division of property rights).

1905 Bricker and Filippi 2000 *Envtl L* 738-739 state that the plentiful water supplies to the east of the 100th meridian allowed state water law to develop using loose legal doctrines and imprecise standards, like reasonable use. Moreover, precipitation is generally sufficient to support agriculture without irrigation.

of prior appropriation. Neither the riparian right nor the right of prior appropriation presupposes or confers any property in the water itself.¹⁹⁰⁶

5.6.1 *The riparian right*

A riparian right is a nonpossessory right of use of the water flowing past riparian land. It is similar to an easement¹⁹⁰⁷ appurtenant.¹⁹⁰⁸ It is a nonpossessory and non-exclusive right to the use of the naturally flowing watercourse, which is the result of the possession of the riparian estate. It is not a property right in the substance of the water itself.¹⁹⁰⁹ In the *CRV Enterprises Inc v US*¹⁹¹⁰ case the Federal Claims Court explained that because California retains title to all public waters, a property owner with a riparian right of access may use those waters, but that right is burdened with a servitude in favour of California in the exercise of its trust power over navigable waters.

Anderson¹⁹¹¹ explains that the *Enclosure Movement* was a legal social and economic movement in terms of which land subject to common rights passed into private ownership and was fenced. The movement traces England's development from a feudal to a mercantile and industrial society. This meant that eventually only the owners of the land had access to the watercourses. The doctrine of riparian rights was thus an accident of enclosure. In *Tyler v Wilkinson*¹⁹¹² the court stated that there must be allowed a reasonable use¹⁹¹³ of that which is common. The test of the principle and extent of the use is whether it is to the injury of the other proprietors. In other words, one shares the available water with everybody else. The implication is that if the flow were reduced, so is the right to use of everybody else. This means that the riparian right is in essence subject to being altered. Dellapenna¹⁹¹⁴ lists the following shortcomings of riparian rights: *Firstly*, the vagueness and unpredictability of the criteria of decision in any conflict over water. *Secondly*, there is a lack of a process for managing water during extreme shortages or for protecting public values. *Thirdly*, there is a systematic bias in favour of large users. *Finally*, it is impractical to develop markets¹⁹¹⁵ under a legal system that suffers from such shortcomings.¹⁹¹⁶

1906 Anderson 2007 *McGeorge L Rev* 483.

1907 Servitude. See para 2.6.1.3 on the influence of Roman and Civil Law on American water law.

1908 Belonging to the land.

1909 Anderson 2007 *McGeorge L Rev* 481.

1910 *CRV Enterprises Inc v US* 86 Fed Cl 758, 765 (2009). See *Marks v Whitney* 6 Cal.3d 251, 263 (1971).

1911 Anderson 2007 *McGeorge L Rev* 480.

1912 *Tyler v Wilkinson* 4 Mason 397, 474 (1827).

1913 Len 2004 *U Denv Water L Rev* 60 explains that reasonable use means one may only judge the reasonableness of a use in the context of other proposed uses. See *Franco-American Charolaise, Ltd. v Oklahoma Water Resources Bd.* 855 P.2d 568, 573 (Okla. 1990).

1914 Dellapenna 2004 *W Va L Rev* 559.

1915 See chapter 7.

1916 See para 2.6.3.

5.6.2 Prior appropriation

The miners in California in the western USA during the gold rush had the custom of “first in time is first in right”¹⁹¹⁷ when staking mining claims and water use rights. The lands on which they dug for gold were state land and not in private ownership, with the result that the riparian doctrine did not apply.¹⁹¹⁸ The legality of the miners' actions were protected because of public opinion and the 19th century view that resources only have value when they are controlled by man.¹⁹¹⁹ “First in time is first in right” developed into the right of prior appropriation. In most Western states in America water property rights are governed by prior appropriation.¹⁹²⁰ In the case of prior appropriation the opportunity to create title in the water by possession, was not created by access, as in the case of riparian ownership, but by appropriation itself.¹⁹²¹ There exists no title in the flowing water, but there is an opportunity to create title by diverting water from the water course and reducing it to one's possession.¹⁹²² Contrast this with the riparian right which is a nonpossessory and non-exclusive right to the use of the naturally flowing watercourse, which is the result of the possession of the riparian estate, and not a result of the possession of the water. Appropriation is not part of this doctrine.¹⁹²³

The basic principles of prior appropriation are priority¹⁹²⁴ and beneficial use. Prior appropriation eventually evolved into an administrative system to allocate unused waters on entire streams, to protect the rights of third parties against potential injury and to assert a public interest in how scarce waters were allocated.¹⁹²⁵ The evolution into a statutory permit system reflected the transition from a grazing, mining and dry farming economy to an increasingly large scale irrigation society.¹⁹²⁶ It resonates with the hypothesis that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. This society is supported by large dams, hydro-electric power and aqueducts.

1917 Dellapenna 2004 *Ga St U L Rev* 321 explains that vigilante law was based upon the “most elementary notion of justice - first in time, first in right”. If someone occupied another's mining claim, the vigilantes would hang the new occupier if he could not justify his occupation.

1918 Anderson 2007 *McGeorge L Rev* 482.

1919 Williams and McHugh 1990 *Stan Envtl LJ* 137. Scott & Coustalin 1995 *Nat Resources J* 827 state that after a period of rapid industrialisation in the eastern United States in the early 19th century, the systems of appropriative water rights in the Western USA resembled water law regimes practised during pre-Industrial Revolution England.

1920 Howitt and Hansen 2005 *Choices* 59-60. The dual system of appropriative and riparian rights is known as the California doctrine. Anderson 2007 *McGeorge L Rev* 483 fn 78.

1921 Anderson 2007 *McGeorge L Rev* 479.

1922 Anderson 2007 *McGeorge L Rev* 505.

1923 The previous statutory water regime in South Africa was not based on a pure riparian doctrine. See para 4.4.1.

1924 Dellapenna 2004 *Ga St U L Rev* 322 states that despite statutes and legal proceedings to facilitate putting claims on record, on some watercourses the earliest and most valuable rights to use water have never been precisely quantified. Prescriptive, abandoned, or forfeited rights also create gaps in the official record.

1925 Tarlock 2001 *Nat Resources J* 770-771. The existence of reservoirs that back-stop water rights and not the law are the reason water rights are relatively secure, despite droughts.

1926 Grant 1995 *Ariz St LJ* 431 points out that although the exercise of water rights has been subject to significant state control traditionally; there has been a strong tradition of security of investment for appropriators who do use water beneficially.

Some of the main criticisms against prior appropriation is that the perpetual “use it or lose it” nature of the rights locks too much water into marginal fields.¹⁹²⁷ It also encourages inefficient off-stream consumptive uses to the detriment of the environment and the needs of people.¹⁹²⁸

The projected gap between growing urban water demands and available supplies in Arizona, California, New Mexico and Nevada is already of political concern. Many states and local governments are starting to link water supply and urban growth.¹⁹²⁹ Although the reallocation of water is necessary, rights holders in Western states have been reluctant to lease water rights out, for fear of eventually losing their right to use water. Permanent transfers have been costly and time consuming.¹⁹³⁰ In the next section we deal with the legal mechanism by which water is regulated times of scarcity.

5.7 Beneficial use

Sax¹⁹³¹ explains that the story of water law is a record of the change taking place in society continually. Measures to regulate water in conditions of scarcity have been written into the California Constitution, for example. All California water laws are subject to reasonable and beneficial use and the public trust. Article 10(2) of the California Constitution¹⁹³² states that because of the conditions in the state, the general welfare requires that the water resources of the state should be put to beneficial use to the fullest extent of which they are capable. The waste or unreasonable use or unreasonable method of use of water should be prevented. The conservation of waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.¹⁹³³ Article 10A(1) of the California Constitution states that the people of the state provide the following guarantees and protections: water rights; water quality, and fish and wildlife resources. Section 100 of the California *Water Code* states that the right to use water from any watercourse is and shall be limited to such water as shall be reasonably required for the beneficial use to be served. The right does not extend to the waste or unreasonable use of water. These stipulations of the California Constitution and the California *Water Code* illustrate the operation of the public trust in America. The nature of the state's ownership in the public trust in America is that it retains the authority needed to assure the continued existence and beneficial application of the

1927 Tarlock 2001 *Nat Resources J* 772.

1928 See also Bricker and Filippi 2000 *Envtl L* 735 who criticise the doctrine on the grounds that it rewards waste and discourages conservation.

1929 Tarlock and Van de Wetering 2006 *Pub Land & Resources L Rev* 38-39.

1930 See chapter 7 on water markets.

1931 1990 *U Colo L Rev* 267-268.

1932 See s 100 to s 112 of the California *Water Code*.

1933 Benson 2002 *Envtl L* 575. See the 1935 case of *Tulare Irr Dist. v Lindsay Strathmore Irr Dist*; *Lindsay-Strathmore Irr Dist v Consolidated People's Ditch Co* 45 P.2d 972 (1935) and Cottingham 2006 *Okla City u L Rev* 277.

resource for the common good.¹⁹³⁴ In the case of an appropriative water right beneficial use means that the water must be appropriated and put to valuable use. This is because water in the west of America is scarce.¹⁹³⁵ Sax¹⁹³⁶ succinctly explains the place of beneficial use in American water law:

...the fundamental rule remains that beneficial use is the basis, measure, and limit of property rights in water.

No matter how old a use, if it is not seen as beneficial any more, it is repudiated in favour of modern conceptions of beneficial use. Pollution laws provide a relevant example.¹⁹³⁷ One may conclude that the hypothesis that the concept "beneficial use" should be used to determine the existence of the right to use water is true in the case of the appropriative water use right.

5.8 Public limitation of private property

It was explained above that the property of the water right is a right of use in the water course and not property in the *corpus* of the water itself.¹⁹³⁸ Despite the fact that a water use right is a property right in water, Lazarus, as discussed above,¹⁹³⁹ warned that modern trends in natural resources law are eroding traditional concepts of "private property rights" in natural resources. Sax¹⁹⁴⁰ explained that land is being viewed more often as being a part of the community rather than merely an amalgam of isolated, individualised tracts. Much of the value of the property that property owners enjoy, is itself the product of public investment in infrastructure like transportation and utilities, rather than the product of individual enterprise. The result is that the individual claim owners have, is not so strong. Sax¹⁹⁴¹ calls the shift in priorities regarding resources the move from a cowboy economy to a spaceship economy. In the latter achievement is measured by our ability to maintain the stock of resources we have at our disposal. They have to be put to effective and sustainable use. This obviously impacts on the water right of the individual. It also causes governments to turn toward the control of waste and water marketing as ways to reallocate supplies and meet new demand.¹⁹⁴²

1934 *Water Use Permit Applications* 94 Hawai'i 97. In South Africa the public trust and beneficial use also go hand in hand. [S 3(2) of the *National Water Act* 36 of 1998.]

1935 Anderson 2007 *McGeorge L Rev* 505. The court in *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438, 445 (1982) held that in the system of appropriation of water the general rule is that the beneficial use of waters is the conservation of the resource, but the non-use of appropriated waters is equivalent to waste.

1936 Sax 1988-1989 *Envtl L* 478.

1937 Sax 1988-1989 *Envtl L* 478.

1938 Anderson 2007 *McGeorge L Rev* 498-499. See Burger *Roman Water Law* 12-13. See para 4.4.2.

1939 1986 *Iowa L Rev* 633. See para 5.4.5.

1940 Sax 1983 *Wash L Rev* 494. See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 530 (CC) para 41.

1941 Sax 1990 *U Colo L Rev* 257.

1942 Sax 1990 *U Colo L Rev* 258-259. See chapter 7 on water trading.

5.8.1 *The takings clause*

The question that needs to be addressed in the light of the limitation of beneficial use is when, if at all, is a property right in water protected by the American Constitution in the case of water reform? First, the general question is addressed, namely which interests in property relevant to water rights are protected by the *Fifth Amendment* of the American Constitution. Some specific questions are then addressed. They are: When does American constitutional law protect water rights as property; and when does it provide that compensation has to be paid when water rights are taken? In this section the operation of the *Fifth Amendment* is explained. In the next section classical cases relating to takings law and water are discussed.

The *Fifth Amendment* to the American Constitution reads that:

No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.¹⁹⁴³

The *14th Amendment*¹⁹⁴⁴ makes these provisions applicable to the states and adds the provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. Brownstein¹⁹⁴⁵ states that the language in some takings cases suggest that equality principles underlie decisions on the *takings clause*. This appears from *Armstrong v United States*¹⁹⁴⁶ where the court held that:

The *Fifth Amendment's* guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

One should, however, not confuse the operation of the first part of the *Fifth Amendment* dealing with due process and the second part dealing with compensation for expropriation. A regulation that does not serve any legitimate governmental objective may

1943 Thomas Cooley in the 19th century described the sovereign powers of state legislatures in America after independence as the power of eminent domain, the power to tax and the police power. (Power 2009 *BYU J Pub L* 224). Eminent domain is the power arising from natural law which is the "government's inherent power to take private property for public uses". It is a rule founded in equity and is accompanied by a provision for compensation on the exercise of the power of the law-giver to deprive an individual of his property without his consent. (Angell *Treatise on the Law of Watercourses* 523-524.) See para 4.3.6.1.

1944 ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Private property is also protected by the *Third Amendment's* prohibition against quartering soldiers in private homes and the *Fourth Amendment's* rejection of unreasonable searches and seizures. See Patterson 1984 *Md L Rev.* 526.

1945 1996 *Const Comment.* 26.

1946 *Armstrong v United States* 364 US 40, 49 (1960). See *Dolan v City of Tigard* 114 S Ct 2309 on 2316.

be so arbitrary or irrational that it conflicts with the due process clause.¹⁹⁴⁷ In the case of *Lingle v Chevron*¹⁹⁴⁸ the court held that an inquiry whether a regulation of private property is *effective* in achieving some legitimate public purpose has some logic in the context of a due process challenge. A regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the *Due Process Clause*. The *Due Process Clause* is intended, in part, to protect the individual against the exercise of power “without any reasonable justification in the service of a legitimate governmental objective”.¹⁹⁴⁹ The test whether power was exercised without any reasonable justification in the service of a legitimate governmental objective is not a valid method to determine whether private property has been “taken” for purposes of the *Fifth Amendment*.¹⁹⁵⁰ Whether a regulation of private property is effective in achieving some legitimate public purpose reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights.¹⁹⁵¹ It also does not provide information about how any regulatory burden is distributed among property owners. It does not help to identify those regulations of which the effects are comparable to government appropriation or invasion of private property.¹⁹⁵² The owner of property subject to a regulation *effectively* serving a legitimate state interest may be just as singled out and as burdened as the owner of property subject to *ineffective* regulation.¹⁹⁵³ An ineffective regulation may not significantly burden property rights at all. It may distribute any burden evenly among property owners. A regulation does not take private property for public use merely because it is ineffective or foolish. A taking has to be proven on the facts of the case.

5.8.2 Case law explaining which interests in property are protected

The two interests in property protected by American courts that are most relevant to water are the interest of physical control and the investment interest. Patterson¹⁹⁵⁴ explains that the investment or economic interest is divided into, *firstly*, the economic impact of the regulation and, *secondly*, respect for reasonable expectations. The final interest in property which the American Constitution protects that will be discussed in this section is that of physical control. These criteria are the ones that the courts normally refer to when

1947 *Lingle v Chevron USA Inc* 544 US 528, 542 (2005). Compare s 25(1) of the property clause in the South African Constitution of 1996.

1948 *Lingle v Chevron USA Inc* 544 US 528, 542 (2005).

1949 *County of Sacramento v Lewis* 523 US 833, 846 (1998).

1950 *Lingle v Chevron USA Inc* 544 US 528, 542 (2005).

1951 *Lingle v Chevron USA Inc* 544 US 528, 543 (2005).

1952 *Lingle v Chevron USA Inc* 544 US 528, 542 (2005).

1953 *Lingle v Chevron USA Inc* 544 US 528, 543 (2005).

1954 Patterson 1984 *Md L Rev* 548. Some forms of property, like property for speculation, might be more protected under American law, than under German law. Mostert 2000 *HJIL* 303. According to the American economic theory of property, wealth maximisation or the satisfaction of individual preferences is the core purpose of property.

deciding whether government regulation of water rights amount to a regulatory taking or not.

5.8.2.1 Loss of physical control

In *Goldblatt v Town of Hempstead*¹⁹⁵⁵ the court held that the exercise of the police power will be upheld if any state of facts either known, or which could be reasonably assumed, affords support for it. The exception was that if the property were permanently occupied, it was a taking without regard to the public interests that it may serve.¹⁹⁵⁶

5.8.2.2 Economic impact of the regulation

The case of *Penn Central Transportation Co v New York City*¹⁹⁵⁷ illustrates the criterion of the impact of the regulation on the affected rights holder.¹⁹⁵⁸ *In casu* the court's inquiry focused on the following factors:

1. the economic impact of the regulation on the claimant;
2. the extent to which the regulation has interfered with distinct investment backed-expectations; and
3. the character of the governmental action.¹⁹⁵⁹

The court found that the action did not interfere with the primary expectation, being the operation of the terminal.¹⁹⁶⁰ *Penn Central* earned a reasonable return on its investment.¹⁹⁶¹ It was also allowed to transfer the restricted rights to adjacent parcels of land. Landowners are thus not entitled to the most profitable use of their land.¹⁹⁶²

In *Nollan v California Coastal Commission*¹⁹⁶³ the American Supreme Court held that the regulatory commission's attempt to exact an easement (servitude) across a private beachfront in return for the issuing of a building permit was an unconstitutional taking.¹⁹⁶⁴ The court held that when the government leveraged the police power it had the burden to

1955 *Goldblatt v Town of Hempstead* 369 US 590, 596 (1962).

1956 Power 2009 23 *BYU J. Pub. L.* 243.

1957 *Penn Central Transportation Co. v New York City* 438 US 104, 124 (1978). See Kayden 1996 *Wash U J Urb & Contemp L* 129.

1958 See discussion in Sax 1983 *Wash L Rev* 483-484.

1959 See Van der Schyff *Constitutionality of the MPRDA* 136. Kayden 1996 *Wash U J Urb & Contemp L* 130.

1960 Kayden 1996 *Wash U J Urb & Contemp L* 131.

1961 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf calls this an *ad hoc* balancing approach.

1962 See para 4.4.2.4 on the limitation of beneficial use in South Africa and para 5.7 on that limitation in America. Kauffman 2003 *U Colo L Rev* 873-875 is of the opinion that this test should have been used in *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313 (2001). See para 5.9.2. It is difficult to show a taking has resulted where an act has caused the temporary restriction of water rights. According to Benson 2002 *Env'tl L* 582 by 2002 no land owner had established a taking in the eyes of the Supreme Court by making use of the test in *Penn Central Transportation Co v New York City* 438 US 104 (1978) on 124. The more one gets the impression that the government pulled the rug from under the property owner, the more likely it is that a court will find it to be a taking. Barton 2001-2002 *Environs Env'tl L & Pol'y J* 118.

1963 *Nollan v California Coastal Commission* 483 US 825, 837 (1987). See Alexander 2002-2003 *Cornell L Rev* 735 and Kommers and Finn *American Constitutional Law* 427-430.

1964 See Chaskalson 1993 *S. Afr. J. on Hum. Rts.* 402-403.

prove that there was an essential nexus.¹⁹⁶⁵ In *Lucas v South Carolina Coastal Council*¹⁹⁶⁶ the Supreme Court accepted that a prohibition on construction on the beach deprived Lucas of any reasonable economic use of its lots.¹⁹⁶⁷ The majority of the court held that a total taking¹⁹⁶⁸ is *per se* compensable.¹⁹⁶⁹ The *Lucas* case is the *locus classicus* of American takings jurisprudence and has been used time and again by scholars to explain how water rights are limited by their nature.¹⁹⁷⁰ The expectations concept of "property" protects the property owner's investment-backed expectations. These expectations are limited by regulatory schemes for which the owner is on notice when investing in property.¹⁹⁷¹

Justice Scalia's majority opinion in *Lucas v South Carolina Coastal Council*¹⁹⁷² recognised greater traditional protection of rights to make productive economic use of real property than of similar rights in personal property. Justice Scalia¹⁹⁷³ based this distinction on the American expectations of greater security in real property, in contrast to the more limited expectation in the traditionally more regulated arena of commercial goods and personal property. Arnold¹⁹⁷⁴ explains that proponents of an environmental theory of property criticises Scalia's opinion for focusing on the economic nature of land and the consumptive, exploitative relationships landowners develop with the land. They argue the courts should have focused on the sensitive, fragile, ecologically crucial nature of beachfront land and the environmentally responsible relationships landowners develop or should develop with the land. In *Lucas* the finding that the ban was necessary to prevent serious harm to property and life was not challenged.

Van der Schyff¹⁹⁷⁵ stresses that the American Supreme Court stated that the government need not compensate the property owner if the regulated or prohibited use was not part of

1965 See Van der Walt *Constitutional Property Clauses* 416.

1966 *Lucas v South Carolina Coastal Council* 505 US 1003 (1992). See Kommers and Finn *American Constitutional Law* on 431-436. Carter 1997 *Colo J Int'l Envtl L & Pol'y* 374.

1967 Tarlock and Van de Wetering 2006 *Pub Land & Resources L Rev* 67 explain that after the *Lucas* case landowners argued that there was no justification for a temporary suspension of the right to develop property. Courts have approved water service moratoria. However, they are valid only as long as a true supply deficit lasts. Two potentially inconsistent doctrines apply to limits on growth: (1) public utility law's "duty to serve" and (2) land use law's authority for local governments to regulate the timing and manner of development on private land. Land use policies that link growth restraints to water availability do not raise the unfairness concerns that taking jurisprudence has identified. Over time the police power can be used to dampen expectations.

1968 Yuffee 1993 *Wash U LQ* 1252 states that the total economic deprivation test would rarely be applicable. He asks: When is a property ever *totally* without value?

1969 *Lucas v South Carolina Coastal Council* 505 US 1003, 1019 (1992).

1970 See para 5.7.

1971 Arnold 2002 *Harv Envtl L Rev* 327-329.

1972 *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

1973 *Lucas v South Carolina Coastal Council* 505 US 1003, 1027 (1992).

1974 2002 *Harv Envtl L Rev* 317.

1975 *Constitutionality of the MPRDA* 136. Grant 1995 *Ariz St LJ* 427 states that the weightiness of the state's purposes was irrelevant to the takings issue in *Lucas*. See also Benson 2002 *Envtl L* 581-582; Kayden 1996 *Wash U J Urb & Contemp L* 132-135 and Findley 1991-1992 *Loy LA L Rev* 1221-1222.

his title to begin with.¹⁹⁷⁶ The *Lucas* majority held that there are two exceptions to the categorical regulatory takings rule. The property owner need not be compensated:

1. if the regulation prevents a nuisance; or
2. if the regulation is grounded in a state's background principles of property law.

The situation would have been different if the restrictions had already been put on the title of the property by the state's law of property. Kayden¹⁹⁷⁷ warns that the constitutional burden for the property owner remains high. *Firstly*, owners are not entitled to the most profitable use of their land. *Secondly*, substantial diminutions of value caused by government regulation are tolerated. *Thirdly*, virtually all public interests sought to be achieved by typical land use and environmental laws are legitimate in the eyes of the American Constitution. *Finally*, the mechanisms embodied in the laws usually substantially advance the articulated public interest.¹⁹⁷⁸ Lock¹⁹⁷⁹ states that *Lucas'* message is that government may not require property owners to leave their land in its natural state without payment of just compensation. Economic productivity, another description of beneficial use, determines the value of property, not its beauty or ecological importance. This may assist water users not in agreement with environmental legislation.

In *Dolan v City of Tigard*¹⁹⁸⁰ the American Supreme Court asked whether it was fair that Mrs Dolan was asked to set aside parts of her property for public use. The condition would deprive her, without compensation, of one of the most essential sticks of her property bundle, being the right to exclude the public. The court stated that two requirements had to be met to ensure fairness. *Firstly*, there has to be an essential nexus between legitimate public purposes and the conditions on the permit. *Secondly*, there must be rough proportionality between the nature and extent of the conditions and the extent of the impact of the proposed development.¹⁹⁸¹

In *Ruckelshaus v Monsanto Co*¹⁹⁸² the court held that where the applicant was aware of the conditions under which the data were submitted, and the conditions were rationally related to a legitimate government interest, a voluntary submission of data on pesticides in exchange for the economic advantages of a registration could hardly be called a taking. The principle is that when parties engage in an area that they know concerns the public

1976 *Lucas* 505 US 1003 (1992) on 1027.

1977 1996 *Wash U J Urb & Contemp L* 131.

1978 Kayden 1996 *Wash U J Urb & Contemp L* 132.

1979 2000-2001 *U Denv Water L Rev* 98.

1980 *Dolan v City of Tigard* 512 US 374 (1994).

1981 Kayden 1996 *Wash U J Urb & Contemp L* 136. See *First National Bank of SA Ltd t/a Wesbank v Commissioner SARS* 2002 4 SA 768 (CC) para 76. Van der Walt *Constitutional Property clauses* 408-409 states that the 'norm of repose' is that government must respect vested rights in property and contract. See discussion of *Dolan* in Rotunda *Modern Cases and Notes* 546-547 and Feldman and Brennan 1997 *Land & Water L Rev* 529-530.

1982 *Ruckelshaus v Monsanto Co* 104 S. Ct. 2862, 2874-2875 (1980).

and is regulated by government, they are on notice that the government may regulate in the future.¹⁹⁸³ This would lead to a lot of uncertainty in circumstances where one had no idea what the legislature would do next. It explains why “reasonable expectations” are protected.

5.8.2.3 Respect for reasonable expectations

Sax¹⁹⁸⁴ is of the opinion that the “essence of property law is respect for reasonable expectations”. The central idea of the public trust is to prevent the destabilising disappointment of expectations held in common, but without formal recognition in the way of a title.¹⁹⁸⁵ Stability is one of the most basic and persistent concerns of the legal system. Not all expectations are protected, only reasonable ones. An expectation of complete freedom from all government regulation is unreasonable.¹⁹⁸⁶

In *Pennsylvania Coal Co v Mahon*¹⁹⁸⁷ Holmes held that where a regulation severely interfered with the owner’s use of his or her property, it is a taking¹⁹⁸⁸ if it goes too far.¹⁹⁸⁹ *In casu* the defendants wanted to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The court held that where private persons or communities had taken the risk of acquiring only surface rights, the fact that their risk has become a danger does not warrant giving them greater rights than they bought. The court held that the destruction of property and contract rights by a statute forbidding the mining of anthracite coal in a manner causing the subsidence of buildings and places cannot be sustained as an exercise of the police power.¹⁹⁹⁰

5.9 Does government regulation of water rights lead to a taking?

Implicit in the threat of water scarcity is the knowledge that states might have to reduce water entitlements. The states in America did not regard constitutional property rights as an obstacle to major reforms of water law. Sax¹⁹⁹¹ states that water rights are property,

1983 Lazarus 1986 *Iowa L Rev* 673-674 states that the public concern with private decisions that affect the quality of the natural environment and the abundance of natural resources would place most environmental legislation within the scope of *Monsanto's* generous rule of constructive notice. See also Grant 1995 *Ariz St LJ* 438-439.

1984 Sax 1980-1981 *UC Davis L Rev* 186-187.

1985 Sax 1980-1981 *UC Davis L Rev* 188.

1986 Patterson 1984 *Md L Rev* 552.

1987 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922). Van der Walt 2002 *THRHR* 466 states that the *Steinberg* court was correct to use *Pennsylvania Coal Co v Mahon* 260 US 393 as the basis for the doctrine of constructive expropriation. (See para 4.4.9.) See discussion of Benson 2002 *Envtl L* 578-579 and Tader 1986 *U Ill L Rev* 292.

1988 This was quoted in *First National Bank of SA Ltd t/a Wesbank v Commissioner SARS* 2002 4 SA 768 (CC) in para 73.

1989 Kayden 1996 *Wash U J Urb & Contemp L* 129. See also Findley 1991-1992 *Loy LA L Rev* 1221.

1990 See Van der Walt *Constitutional property clauses* 400-401; 414 and 421-422. See Yuffee 1993 *Wash U LQ* 1238-1239.

1991 Sax 1990 *U Colo L Rev* 260.

however, they have no higher or more protected status than any other sort of property.¹⁹⁹²

In America the constitutional law of water is the same as the “constitutional law of potatoes and pork chops”. No right can be greater than a “fee interest” and no property right is exempt from the full exercise of the police power.¹⁹⁹³ Unless regulation is forbidden by some other constitutional provision, like that protecting free speech, or does not serve a public function, it is unlikely that there would be subjects that would get legislative majorities of which the purpose would be viewed as beyond the police power.¹⁹⁹⁴

Water rights have less protection than other property rights because their exercise may intrude on a public common. They are subject to prior claims like the public trust and servitudes and to laws protecting the commons, like anti-pollution laws. Their original definition is limited to beneficial and non-wasteful uses. This type of constraint does not apply to other property rights. Water rights are granted by permit and subject to the constraints on the permits. It is not unconstitutional for regulation to constrain pre-existing uses or rights that were legal when initiated.¹⁹⁹⁵ Retroactivity is not the test of compensability.

Sax¹⁹⁹⁶ explains that public values regarding the environment have changed and that the use of the water has reached critical limits. There is conflict between existing water users and in-stream uses. Valuable interests in water are at stake. Sax does not beat about the bush:

Let me start by saying that as a matter of legal analysis, the holders of existing water rights are in deep trouble...There is no legal or logical difference between poisoning fish by what you put in the water and suffocating them by what you take out.

In the 1886 case of *Pennsylvania Coal Co v Sanderson*¹⁹⁹⁷ a downstream owner objected because a coal company was dumping waste into the river. The court held that a mere personal inconvenience should yield to the necessities of a great public industry which

1992 Thompson 1998 *Ecology LQ* 371 explains that to Sax, the right to use water is created by society and is designed to promote social value. It is not a natural right. The issue for Sax is not whether compensation should be paid, but whether change can be implemented in such a manner that unnecessary individual impacts are reduced. He recognises the potential for sudden and drastic legal changes to disrupt plans and investments. He thus advocates gradual and evolutionary shifts in the law wherever possible. See para 4.5.

1993 Sax 1990 *U Colo L Rev* 261. See also Gaffney 1997 *Amer J Econ Sociology* 489. Please remember that in SA a right of access to sufficient water is also guaranteed in the *Bill of Rights* in the *Constitution* of 1996.

1994 Sax 1990 *U Colo L Rev* 262. Carter 1997 *Colo J Int'l Env'tl L & Pol'y* 377 explains why water rights are entitled to less constitutional protection than interests in real property: (1) there is a stronger public interest in water than in other forms of property; (2) water rights are usufructuary, rather than possessory; (3) water is the property of the public and is subject to the necessities of public ownership; and (4) water rights have a history of having been circumscribed by broad, regulatory restrictions.

1995 See the discussion in Van der Schyff *Constitutionality of the MPRDA* 138 of Manzanetti's view on prior notice in 1984 *Pac LJ* 1306.

1996 1988-1989 *Env'tl L* 474-475.

1997 *Pennsylvania Coal Co. v Sanderson* 113 Pa. 126 (1886) and Sax 1988-1989 *Env'tl L* 476-477.

serves a great public interest. Sax¹⁹⁹⁸ uses this case to illustrate that when the public interest was developmental, property rights to water, like the right to a natural flow, yielded to what was perceived to be the public interest of the time. As growth and development become less valuable guides to our future well-being, softer values like sustenance, continuity, adaptation and evolutionary change become more esteemed.¹⁹⁹⁹ Individuals and enterprises were endowed with property because it was assumed that the property system would allocate and reallocate the property resource to socially desirable uses. When the system regularly fails to allocate property to “correct” uses, society begins to lose faith in the system. Feudal tenures declined as they became non-functional. The private property system “is declining to the extent it is perceived as a functional failure.”²⁰⁰⁰ It appears that when some private rights in a water resource are in conflict with other private rights, beneficial use is the tool that is used to determine which uses are to be preferred to others.

In a country where some parts experience water scarcity, the obvious question is how the system should allocate property rights in water to correct uses. The protection offered to property rights by the *Fifth Amendment* is relevant both when individual water rights are affected by government action and when water rights systems in America are reformed to make more water available for other users. In the first part of the next section, the question is discussed whether government’s reduction of an individual’s water rights amounts to a regulatory taking. In the second part, the question is discussed whether compensation should be paid for water law reform in terms whereof unused riparian rights are forfeited.

5.9.1 Water allocation and the public trust

The court in *National Audubon Society v Superior Court of Alpine County*²⁰⁰¹ held that the state has a duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. The State of California argued in *National Audubon* that the state’s basic water rights laws authorise the modification of water rights where the rights are reasonable and beneficial under original conditions, but not under changing conditions. Neither the courts of California nor of other states have modified existing water rights strictly under public trust principles.²⁰⁰² Tarlock²⁰⁰³ is of the opinion that when a state resorts to public trust litigation for the

1998 1988-1989 *Envtl L* 478.

1999 Sax 1983 *Wash L Rev* 490.

2000 Sax 1983 *Wash L Rev* 484.

2001 *National Audubon Society v Superior Court of Alpine County* 33 Cal.3d 419, 444 (1983).

2002 Walston 2008 *Whittier L Rev* 778.

2003 2001 *Nat Resources J* 780. See Grant 1995 *Ariz St LJ* 425 and Williams and McHugh 1990 *Stan Envtl LJ* 157.

allocation of water, it exposes a deficiency in the state's water allocation policy that will have to be cured by a more comprehensive solution than a court can impose. In other words, the state government needs to formulate a comprehensive policy in terms of which it would allocate water. *National Audubon* is useful to break a political deadlock and to jumpstart a process of finding creative compromises.²⁰⁰⁴ Tarlock²⁰⁰⁵ points out that the public trust doctrine is too open-ended, uncertain and potentially unfair to serve as an alternative basis for water allocation. Only California²⁰⁰⁶ and Hawai'i²⁰⁰⁷ have used the public trust doctrine when it came to water allocation. Grant²⁰⁰⁸ points out that the public interest is a weighty consideration in both the balancing test under *National Audubon* and the balancing test for general category takings clause cases. The balancing in both involves subjective judgment because no objective measure exists to compare the competing factors. The best method for the water appropriator or water use right holder, for example, to establishing a taking would be to try to prove frustration of investment-backed expectations in terms of *Penn Central*.²⁰⁰⁹

5.9.2 Does a reduction of an individual's water rights imply a regulatory taking?

Where a water rights holder tries to prove frustration of investment backed expectations by a reduction in his beneficially used water rights, the court would look at the effect of the so-called taking on the rights holder in the context of the background-restrictions that the rights holder knew had been imposed by the public trust. Sax²⁰¹⁰ explains that the rule is that government's right to constrain the use of property without paying compensation to the owners is limited by what it withheld from the owner at the outset.²⁰¹¹ Property rights in water have been demarcated in very limited terms. The majority opinion in *Lucas*²⁰¹² turned on the definitional fixity of rights, and ideas on security that arise from such fixity. The real question is what the American Supreme Court will hold the definition of water rights, as part of the title to begin with, to be in a particular state. California's law of beneficial use, for example, has always been that the scope of private rights changes in response to changing circumstances.²⁰¹³ It is thus true that when water scarcity

2004 Tarlock 2001 *Nat Resources J* 780. See Grant 1995 *Ariz St LJ* 425 and Williams and McHugh 1990 *Stan Envtl LJ* 157.

2005 2001 *Nat Resources J* 779-780.

2006 See *National Audubon Society v The Superior Court of Alpine County* in 33 Cal.3d 419, 444 (1983) and the discussion in para 5.9.1.

2007 *Water Use Permit Applications* 94 Hawai'i 97 (2000) on 128.

2008 Grant 1995 *Ariz St LJ* 435-436.

2009 *Penn Central Transportation Co v New York City* 438 US 104, 124, 127 (1978). See discussion of *Penn Central* in para 5.8.2.2.

2010 Sax 1993 *Loy LA L Rev* 944-945.

2011 See para 4.2.2.

2012 See the discussion of *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) in para 5.8.2.2.

2013 Tader 1986 *U Ill L Rev* 296 argues that in the case of redefinition of beneficial use, the state could not force an appropriator to discontinue use without compensation when redefinition of beneficial use completely deprives the water right holder of a previously recognised property interest.

necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. Sax²⁰¹⁴ finds it problematic that property rights are defined via adjudication.²⁰¹⁵ The problem lies in determining that the *boni mores* have changed to the extent that the courts should take notice.²⁰¹⁶

Some uses are included in the property right to use water. Where water power was acquired by the government, it was held to be a taking. In *International Paper Co v United States*²⁰¹⁷ the company tried to recover compensation for property rights in water of the Niagara River that America took for war purposes. The American Supreme Court held that the government's acquisition of the corporation's water power was a "taking" under the power of eminent domain.²⁰¹⁸

When it comes to takings law and water rights, courts have distinguished between physical, partial and regulatory takings. The physical impounding of water amounts to a physical and not only a regulatory taking. In the 1963 case of *Dugan v Rank*²⁰¹⁹ riparian and overlying owners tried to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River. This was in contravention of the owners' rights to beneficial use of the waters of the river below the dam.²⁰²⁰ The court held that when the government subordinated the rights of riparian and overlying owners to the beneficial use of waters of a river to uses of a water reclamation project, it imposed a servitude that constituted an appropriation of property for which compensation should have been made.

Harris and Lowenberg²⁰²¹ point out that in a free society property rights and regulation must exist together. The takings clause implies that property may be taken but property owners must be compensated.²⁰²² A "partial taking" occurs when a regulation singles out a

2014 1993 *Loy LA L Rev* 953-954.

2015 Kleinsasser 2005 *Envtl Aff* 429. Grant 1995 *Ariz St LJ* 428 argues that the public trust doctrine is a common law tool the courts use to limit legislative and administrative power to sanction proprietary rights in trust resources. The regulation of water rights by the government under that doctrine has its origin in the judicial branch, even if a particular water reallocation ultimately is made by an administrative agency. The Supreme Court's cases have not settled whether judicially originated regulation is even subject to the *takings clause*.

2016 See the discussion of *Pennsylvania Coal Co v Sanderson* 113 Pa. 126 (1886) by Sax 1988-1989 *Envtl L* 476-477 in para 5.9.

2017 *International Paper Co v United States* 282 US 399 (1931). *In casu* the Niagara Falls Power Company was the owner of land and water rights on the American side of the river above the Falls.

2018 Barton 2001-2002 *Environs Envtl L & Pol'y J* 133-134 argues that *International Paper* is similar to *Tulare* (see para 5.9.2.1) in that both plaintiffs derived their water right to use from contract. Both were interrupted by government regulation. In *International Paper* the court does not state whether the taking was physical or regulatory. Barton 2001-2002 *Environs Envtl L & Pol'y J* 135 fn 199 states that the court's treatment of the taking was consistent with a physical taking as it did not weight the interests. Kauffman 2003 *U Colo L Rev* 870-871 distinguishes the two cases on the grounds that in *International Paper* the government took the plaintiff's water and removed it from his possession. In *Tulare* the government regulation resulted in passive restrictions on the water users' use of their property.

2019 *Dugan v Rank* 372 US 609 (1963).

2020 See also Benson 2002 *Envtl L* 562-563.

2021 Harris and Lowenberg 2004-2005 *St Mary's LJ* 673 fn 29.

2022 *Florida Rock Industries, Inc. v United States* 45 Fed Cl 21, 24-25 (1999).

few property owners to bear burdens, while benefits are spread widely across the community. The denial of a dredge and fill permit by the Army Corps of Engineers effected a compensable partial regulatory taking of property in the 1999 case of *Florida Rock Industries, Inc. v United States*.²⁰²³ The owner of wetlands property wanted just compensation for a regulatory taking arising from denial by the Army Corps of Engineers of a *Clean Water Act* permit to mine limestone on the property. The Court of Federal Claims held that the denial of a dredge and fill permit by the Army Corps of Engineers effected a compensable partial regulatory taking of the property,²⁰²⁴ as the denial resulted in a 73.1% diminution in its value. The owner's reasonable investment-backed expectation of being able to mine limestone was completely frustrated. The purpose of government action was to benefit the public by preserving wetlands.²⁰²⁵

5.9.2.1 Physical taking in *Tulare*

In the controversial *Tulare Lake Basin Water Storage District v United States*²⁰²⁶ it was held that government water use restrictions, imposed pursuant to the *Endangered Species Act*, effected a physical, rather than regulatory, taking of property in the case of water users who had contract rights entitling them to the use of a specified quantity of water by preventing users from using the water to which they would otherwise have been entitled. The court held that the government rendered the usufructuary right to that water valueless. It effected a "complete occupation of property". The issue was not whether the federal government had the authority to protect the winter-run Chinook salmon and delta smelt under the *Endangered Species Act*,²⁰²⁷ but whether the government had the authority to impose the costs associated with protection exclusively on private property owners.²⁰²⁸ The government's arguments were that mere frustration of the contract's purpose does not amount to a taking; this was a regulatory taking and the criteria of existence of reasonable investment backed expectations and a significant decrease in economic value have not been met.

The court held that under California law the title to water remained with the state. The right to the water's use was transferred first by permit to DWR, and then by contract to the end-

2023 *Florida Rock Industries, Inc. v United States* 45 Fed Cl 21, 24 (1999).

2024 *Florida Rock Industries, Inc. v United States* 45 Fed Cl 21, 43 (1999).

2025 *Florida Rock Industries, Inc. v United States* 45 Fed Cl 21, 39 (1999).

2026 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313 (2001). The facts were that the Bureau of Reclamation (BOR) and the Department of Water Resources (DWR) were granted water permits by the State Water Resources Control Board (SWRCB), the state agency with the ultimate authority for controlling, appropriating, using and distributing state waters. BOR and DWR contracted with county water districts, conferring on them the right to withdraw or use prescribed quantities of water. Some of the plaintiffs had contracts directly with the State Water Project (the SWP is a state project managed by the DWR) and some had subsidiary contracts with Tulare and Kern County.

2027 Kauffman 2003 *U Colo L Rev* 882. See Moore, Mulville & Weinberg 1996 *Nat Resources J* 332 on the link between irrigation and fish species being threatened.

2028 McQueen 2005 *Urb Law* 532.

users such as the plaintiffs.²⁰²⁹ The contracts conferred on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of the permits. That right remained in place until formally changed by administrative process. Plaintiffs' contract rights in the water's use were superior to all competing interests. The court held that a physical taking²⁰³⁰ occurs when government action amounts to a physical occupation or invasion of the property. This would include the functional equivalent of a practical ouster of the owner's possession.

A regulatory taking arises when the government's regulation restricts the use to which an owner may put his property.²⁰³¹ In assessing whether it is a regulatory taking the balancing test in *Penn Central* was used. Courts weigh the character of the government action against the economic impact of that action as well as the reasonableness of the property owner's investment-backed expectations.²⁰³² The court held that unlike other species of property where use restrictions may limit some of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value.²⁰³³ The biggest criticism against *Tulare* is that the court applied physical takings precedent to a regulatory action. McQueen²⁰³⁴ warns that this has the potential to turn every government regulation of property into a taking.²⁰³⁵ Benson²⁰³⁶ points out that the restrictions in *Tulare* have resulted in an overall reduction in the availability of water of respectively 0.11% and 2.92% for Tulare and Kern County. The amount of water taken was negligible. Kauffman²⁰³⁷ explains that the restriction on the use of a certain amount is not a physical taking of an amount of water, but rather a restriction on the pumping of water during certain periods as set out in the contract. The water user's ability to use the water is better described as restricted by government regulation rather than as being physically taken by the government. In the case of temporary restrictions on water use, the property is not valueless as the property rights will regain value as soon as the temporary restrictions are lifted.²⁰³⁸ Had the court applied the test in *Penn Central* correctly it might likely have found that the lack of economic impact precluded a successful regulatory takings claim.²⁰³⁹

2029 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313 (2001) 317.

2030 Roux http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf calls this a categorical approach.

2031 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313, 318 (2001).

2032 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313, 318 (2001).

2033 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313, 318 (2001). See also Davenport and Bell 2005 *U Denv Water L Rev* 48.

2034 2005 37 *Urb. Law* 535.

2035 The government decided to settle the case without taking it on appeal. It virtually guarantees that the case will have a lot of political influence. It is likely that Congress will review the *Endangered Species Act*. McQueen 2005 *Urb. Law* 529. The settlement prevents the case from having value as precedent, but there is the possibility that other courts may choose to follow the federal reasoning in "similarly situated cases" (on 536). See also Sax 2000 *Cal L Rev* 2375.

2036 2002 *Envtl L* 560.

2037 2003 *U Colo L Rev* 870.

2038 Kauffman 2003 *U Colo L Rev* 875.

2039 Benson 2002 *Envtl L* 585.

Benson²⁰⁴⁰ states that the difference between physical and regulatory takings is the difference between government acquisition and government control. According to her there was no taking. The government had a regulatory role.

In *Tulare* the government's last argument was that it was not liable for a taking when all it did was impose an explicit limit on a right that the contract, or in the alternative, common law principles operating in the background, such as the public trust, nuisance and reasonable and beneficial use implicitly had imposed.²⁰⁴¹ In other words, the public trust, nuisance and reasonable and beneficial use already limit the water use right and it authorises the state to put limits on the rights of the plaintiffs under the implied powers of the background common law. As a result no compensation would need to be paid.²⁰⁴² The court found that D-1485, a decision of the state water resources control board (SWRCB) represented the state's determination of various water rights. It reflected the amount of water that can reasonably be expected under state law. It was evident that the irrigator's use was not a nuisance, unreasonable, non-beneficial or violating the public trust.²⁰⁴³ One suspects that the result would have been different if the government had first amended its policy and then its determination of water rights. Benson argues that in *National Audubon*²⁰⁴⁴ the court held that where the public trust existed there could be no taking in terms of the *Fifth Amendment*. Rights associated with water are held subject to the public trust. The state may modify water rights via the courts or via the SWRCB.²⁰⁴⁵ *Tulare* stated that although California water policy may be ever evolving, rights based on contracts with states are not self-adjusting.²⁰⁴⁶ The promissory assurances in a contract remain fixed until formally changed.²⁰⁴⁷ Benson criticises this on the grounds that it is absurd to provide greater water rights to contractors than the water permit holders hold.²⁰⁴⁸ Unfortunately for the federal government, the contract absolved the state and not the federal government of liability.²⁰⁴⁹

2040 2002 *Envtl L* 586.

2041 Barton 2001-2002 *Environs Env'tl L & Pol'y* 123.

2042 Barton 2001-2002 *Environs Env'tl L & Pol'y J* 138.

2043 Davenport and Bell 2005 *U Denv Water L Rev* 56 state that the court dismissed the argument because the state agency responsible for defining the rights had not addressed the application of the public trust to these rights. See Zellmer and Harder *Ala L Rev* 740; Barton 2001-2002 *Environs Env'tl L & Pol'y J* 140. See also Benson 2002 *Env'tl L* 564.

2044 *National Audubon Society v The Superior Court of Alpine County* in 33 Cal.3d 419, 444 (1983). See para 5.9.1.

2045 Benson 2002 *Env'tl L* 572.

2046 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313, 322 (2001).

2047 *Tulare Lake Basin Water Storage District v United States* 49 Fed Cl 313, 322 (2001). Benson 2002 *Env'tl L* 565. According to Benson the court side-stepped the fact that D-1485 was decided before the listing of delta smelt and winter run Chinook salmon. The fact that D-1485 was later amended was held not to be applicable retro-actively.

2048 Benson 2002 *Env'tl L* 576.

2049 Kauffman 2003 *U Colo L Rev* 868 argues that the federal government may limit potential takings claims by limiting liability in future water contracts.

5.9.2.2 No physical taking in *Washoe County*

Other courts did not follow the reasoning in the *Tulare* case. In the 2003 case of *Washoe County v United States*²⁰⁵⁰ Washoe County acquired an option to purchase all the interest in Northwest Nevada's water rights. The court held that the BLM denial of a right-of-way permit for the water project did not effect a regulatory taking²⁰⁵¹ of permit applicants' property without just compensation, since the applicants had no inherent right to build a pipeline on federal lands. The denial of the permit did not impose regulatory restrictions on the applicants' use of their own land or appurtenant groundwater rights.²⁰⁵²

The court concluded that *Tulare* does not support the appellants' taking claim. In *Tulare*, the court reasoned that the government had physically appropriated the plaintiffs' water because its actions were no different than if the government had physically diverted water for its own consumptive use. *In casu* the government had neither physically diverted or appropriated any water nor physically reduced the quantity of water that is available to the appellants from the water source on the ranch.²⁰⁵³ The government did not effect a physical taking as it was acting as a landowner whose neighbour sought permission to lay a pipeline across its property. Because the government did not impose any regulations on the appellants' water rights, it did not bring about a regulatory taking.²⁰⁵⁴

5.9.2.3 Incidental impact on a contract

However, in the US Court of Federal Claims in *Klamath Irrigation District v The US*²⁰⁵⁵ wildlife agencies issued biological opinions concluding that the water deliveries were harming endangered species.²⁰⁵⁶ To avoid harm to the fish the Bureau of Reclamation

2050 *Washoe County v United States* 319 F.3d 1320 (2003). The facts were that the principals of Northwest Nevada Water Resources Limited Partnership ("Northwest Nevada") acquired title to the Ranch and its appurtenant ground and surface water rights in the mid-1980s. The water rights held by Northwest Nevada permitted it to draw certain quantities of groundwater from wells located on the Ranch and to use the water for agricultural purposes within the Honey Lake Valley. The Northwest Nevada partnership was formed in 1987 after the partners realised that they could sell their water rights, rights associated with the water on the Ranch as well as other water sources, to the Reno-Sparks metropolitan area for municipal and industrial ("M & I") use. All water sources in the State of Nevada belong to the public. See the discussion in Harris and Lowenberg 2004-2005 *St Mary's LJ* 685.

2051 The appellants argued that the government's action preventing them from using their water rights amounted to a taking of that property by rendering their property useless on three grounds. [*Washoe County v United States* 319 F.3d 1320 (2003) 1324.] The appellants relied on the *Tulare* case to argue that by declining to grant Washoe County a right-of-way permit, the government ensured that their groundwater remained in the aquifer for use by the Army. It constituted a literal taking of their water-rights property for government use.

2052 *Washoe County v United States* 319 F.3d 1320, 1326 (2003). See Harris and Lowenberg 2004-2005 *St Mary's LJ* 685 for a hypothetical discussion of the effects protection of an endangered toad might have on the rights of a property owner.

2053 *Washoe County v United States* 319 F.3d 1320, 1327 (2003).

2054 See Harris and Lowenberg 2004-2005 *St Mary's LJ* 691.

2055 *Klamath Irrigation District v The US* 67 Fed.Cl. 504, 506 (2005). The facts were that a group of water districts and individual farmers sought just compensation under the *Fifth Amendment*, owing to temporary reductions made in 2001 by the Department of Interior's Bureau of Reclamation (the Bureau) on the use, for irrigation purposes, of the water resources of the Klamath Basin of Southern Oregon and Northern California. The question was whether plaintiffs' interests in the use of Klamath River Basin water constituted cognisable property interests for purposes of the *takings clause*. The court had to consider the limitations inherent in such interests, in the light of the plaintiffs' contractual rights to receive water.

2056 Walston 2008 *Whittier L Rev* 816-817.

reduced water deliveries to agricultural water users. The court rejected the water users' claims that the United States had unconstitutionally taken their water rights. The water users did not have property rights, because the water belonged to the public rather than to the users. Davenport and Bell²⁰⁵⁷ note that the United States might be viewed as acting in its proprietary capacity in entering into the water contracts. Water shortage provisions in BOR water contracts do not obligate it to deliver the full contractual amount of water if such delivery is inconsistent with the *ESA*.²⁰⁵⁸ An act of government is considered to be sovereign so long as its impact on a contract is merely incidental to the accomplishment of a broader governmental objective.²⁰⁵⁹ The enactment and enforcement of *ESA* are sovereign acts. The users had contractual rights that can only be enforced through actions for breach of contract.²⁰⁶⁰ The court rejected much of the analysis of *Tulare Lake Basin*, stating that the decision:

...appears to be wrong on some counts, incomplete in others and distinguishable, at all events.²⁰⁶¹

Huang²⁰⁶² is an adherent of Arnold's²⁰⁶³ concept of a "web of all the interests in an object". Arnold's metaphor²⁰⁶⁴ regards property as a web of interests which consists of a set of interconnections among people, groups, and entities each with a stake in an identifiable tangible or intangible object, which is at the centre of the web. All of the interest-holders are connected both to the object and to one another.²⁰⁶⁵ The web of interests metaphor tends to strengthen the argument that restrictions on water rights for environmental protection purposes are unlikely to constitute a regulatory taking when the primary interest holder is aware of the various interests existing in addition to her own.

2057 2005 *U Denv Water L Rev* 50.

2058 *Klamath Irrigation District v The US* 67 Fed.Cl. 504, 531 (2005).

2059 Davenport and Bell 2005 *U Denv Water L Rev* 51; *Klamath Irrigation District v The US* 67 Fed.Cl. 504, 537 (2005).

2060 *Klamath Irrigation District v The US* 67 Fed.Cl. 504, 534(2005).

2061 *Klamath Irrigation District v The US* 67 Fed.Cl. 504, 538 (2005). The court held that *Tulare* failed to consider whether the contract rights at issue were limited so as not to preclude enforcement of the *ESA*. It treated the contract rights possessed by the districts as absolute, without sufficiently considering whether they were limited in the case of water shortage, by prior contracts, prior appropriations or another state law principle. Nor did the *Tulare* court consider whether the plaintiffs' use of water violated accepted state doctrines, including those designed to protect fish and wildlife. *Tulare* awarded just compensation for the taking of interests that may well not exist under state law. The court never reached the issue whether the violations of the contract rights should be analysed as breaches, not takings, and never considered the potential application of the sovereign acts and "unmistakability" doctrines. See Zellmer and Harder 2008 *Ala L Rev* 740-741.

2062 2007 *U Denv Water L Rev* 49 fn 19.

2063 See Arnold 2002 *Harv Envtl L Rev* 300.

2064 2002 *Harv Envtl L Rev* 333. Compare *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 550 (CC) para 41 and the test of a complexity of relationships in *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) para 100. Arnold 2002 *Harv Envtl L Rev* 334-335 states that the web consists of (1) an object, which has particular characteristics (2) persons, groups, and entities who have particular interests that they share in the object; (3) relationships (or connections) between the persons and the object; and (4) relationships (or connections) among the persons. The web is merely a metaphor, neither a theory nor property itself.

2065 Singer 2006 *Harv Envtl L Rev* 334 approves of this analogy, as both a modern economic analysis of third party impacts and an environmental analysis of the ecology have lessons about the interconnected nature of individual acts of self-interest.

5.9.3 Water reform affecting unexercised riparian rights

When a state reforms the system in terms of which water is allocated, it is exercising a police power. According to Sax,²⁰⁶⁶ every major change in Western water law has been sustained as a valid non-compensable regulation. Riparian and appropriative law states have the legislative authority to modify their water administration systems in order to move to a statutory permit scheme to conserve scarce water resources by way of regulation.²⁰⁶⁷ Tarlock²⁰⁶⁸ writes that in America most dual system states terminated unused rights by limiting vested rights to those that had been used before the state adopted prior appropriation. States have protected investment-backed expectations by preserving pre-existing water rights to the extent that they were put to actual use, but they have eliminated rights based on claims to future, undefined uses and quantities of the water. Permit systems eliminate rights not based on actual use, and all new users must acquire a permit to appropriate or to use the water.²⁰⁶⁹

5.9.3.1 Recognition of future riparian rights

When a water allocation system dealing with the allocation of riparian rights is reformed, it often happens that unused or future riparian rights are forfeited.²⁰⁷⁰ The riparian owner then tries to establish a takings claim.²⁰⁷¹ Neuman and Hirokawa²⁰⁷² write that California in the *In re Long Valley Creek*²⁰⁷³ case and Oklahoma in the *Franco-American Charolaise*²⁰⁷⁴ case were the only two states where the courts balked at statutory termination of riparian rights. In the *Determination of Rights to Waters of Long Valley Creek Stream System*²⁰⁷⁵ case the court held that the state water resources control board is authorised to decide that an unexercised riparian claim loses its priority with respect to all rights being exercised before the riparian right is exercised. The board may also determine that a future riparian right shall have a lower priority than any uses of water it authorises before the riparian in fact attempts to exercise his right. According to Davenport and Bell,²⁰⁷⁶ the California Supreme Court has held that such an extinguishment of future rights would

2066 1990 *U Colo L Rev* 259 at fn 4.

2067 See *Long Valley Creek Stream System Sys* 25 Cal 3d 339, 359 (1979).

2068 Tarlock *L of Water Rights and Resources* § 3:53.

2069 Tarlock *L of Water Rights and Resources* § 6:5.

2070 See para 4.5.

2071 Tarlock *L of Water Rights and Resources* § 3:92. Grant 1995 *Ariz St LJ* 434 explains that statutes and measures from the constitutions of many western states allow a junior appropriator with a preferred use to obtain water that would otherwise go to a senior appropriator with a less preferred use. They require the junior appropriator to pay just compensation to the senior appropriator.

2072 2000 *U Denv Water L Rev* fn 58.

2073 *Determination of Rights to Waters of Long Valley Creek Stream System Sys* 25 Cal 3d 339, 359 (1979).

2074 *Franco-American Charolaise, Ltd v Oklahoma Water Resources Bd* 855 P.2d 568, 571 (Okla. 1990).

2075 *Determination of Rights to Waters of Long Valley Creek Stream System Sys* 25 Cal 3d 339, 359 (1979).

2076 2005 *U Denv Water L Rev* 29.

constitute a taking.²⁰⁷⁷ The court held that the California *Water Code* conferred the power on the board to define and limit prospective riparian rights. In the absence of evidence that reasonable and beneficial use of waters of a stream could not be just as well promoted by limiting future riparian rights, the *Water Code* would not be interpreted as authorising the board to extinguish the riparian's future claim.²⁰⁷⁸ Tarlock²⁰⁷⁹ interprets the decision to convert all future riparian rights to appropriative ones to be inconsistent with California's long standing recognition of common law riparian rights. The reason is that it defines vested rights as those based on the actual use of water. It makes all future rights new appropriations. He calls this method of minimising the ability of riparians to reserve the right to future amounts of water, constitutionally dubious. Huang²⁰⁸⁰ on the contrary is of the opinion that the *In re Long Valley Creek* case is the rare case where a court has recognised the existence of a future riparian right. The ruling in favour of riparians is just a technical victory, because the court enabled the Board to place significant limitations on future riparian water rights. Courts tend to find that the transition to a state's ultimate system of water law does not amount to a taking.²⁰⁸¹ The curtailment of future expansion does not result from a compensable government action under the *Penn Central* analysis.²⁰⁸² Because riparian rights have always been incomplete property rights, the expectations of riparians to the enjoyment of these rights are weaker than the expectation of the right to exploit the full value of dry land.²⁰⁸³ It appears as if the public interest plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property in America.

The other case where future riparian rights have been protected is the case of *Franco-American Charolaise, Ltd v Oklahoma Water Resources Bd*²⁰⁸⁴ where the Oklahoma Supreme Court held that the vested common-law right to the reasonable use of the stream that the Oklahoma riparian owner enjoys is a valuable part of the property owner's "bundle of sticks" and may not be taken for public use without compensation. A statute which limited the riparian owner to domestic use and declared that all other water in the stream became public water that was subject to appropriation without any provision for compensating the riparian owner, was unconstitutional in terms of the state

2077 Neuman and Hirokawa 2000 *U Denv Water L Rev* 4-5 explain that if water rights holders can lose pre-code rights only by abandonment, but can lose post-code rights by forfeiture, post-code rights become second-class water rights. It is also more difficult, and likely more expensive, to prove abandonment than to establish forfeiture.
2078 *Determination of Rights to Waters of Long Valley Creek Stream System* 25 Cal 3d 339, 359 (1979).
2079 *L of Water Rights and Resources* § 3:53.
2080 2007 *U Denv Water L Rev* 68.
2081 Huang 2007 *U Denv Water L Rev* 66.
2082 See para 5.8.2.2.
2083 Tarlock *L of Water Rights and Resources* § 3:92.
2084 *Franco-American Charolaise Ltd v Oklahoma Water Resources Bd* 855 P.2d 568, 571 (1990).

constitution.²⁰⁸⁵ The court refused to interpret public law as legally destroying private rights by inference. Until the 1988 amendments to the Oklahoma water law, the riparian owner was never given express notice by the legislature that his use would be limited in the future to that validated under the 1963 amendments.²⁰⁸⁶ By then, the time for “perfection” under the validation mechanism had passed. The court was adamant that the “heart of the riparian right is the right to assert a use at any time”. The court included *prospective* reasonable uses into the riparian right.²⁰⁸⁷ Len²⁰⁸⁸ writes that under the standard in the *Lucas* case, the Oklahoma Supreme Court's identification of the core right of riparianism ended the takings inquiry. Denial of the right to assert a use at any time eviscerated the very essence of the riparian right at common law. Hageman²⁰⁸⁹ states that in *Franco-American*²⁰⁹⁰ the judiciary legislated an unworkable and unique water law scheme that endangers the security of every municipal water supply within the state. The Oklahoma Supreme Court was the only court in the last fifty years to hold restrictions on the future use of riparian rights unconstitutional.²⁰⁹¹

5.9.3.2 No protection of unused groundwater

On the other hand, the court in the 1982 case of *Town of Chino Valley v City of Prescott*²⁰⁹² did not protect unused rights to use groundwater in Arizona. The *Groundwater Management Act* of 1980, Arizona, hereafter referred to as the 1980 Act,²⁰⁹³ restricted new uses of water drawn from active management areas. This major change in western American water law was sustained as a valid non-compensable regulation despite adverse effects on existing claims of right. The court held that the 1980 Act furthered legitimate state interests. The principle applied *in casu* was that all water use rights are based on the application of water to beneficial use. A constitutionally-protected investment-backed expectation is triggered by the use of the water. Because of that, there is no constitutional right to the future use of groundwater.²⁰⁹⁴ According to Tarlock,²⁰⁹⁵

2085 Art. 2, § 24, *Okla Const.*

Private property shall not be taken or damaged for public use without just compensation...

See *Franco-American Charolaise Ltd v Oklahoma Water Resources Bd* 855 P.2d 568, 576 (1990).

2086 *Franco-American Charolaise Ltd v Oklahoma Water Resources Bd* 855 P.2d 568, 577 (1990).

2087 See discussion in Carter 1997 *Colo J Int'l Envtl L & Pol'y* 375. Len 2004 *U Denv Water L Rev* 84 stresses that the Oklahoma legislature did not only limit what riparian rights holders could do with their property; instead it took that property and redistributed it to appropriators. This is closer to an uncompensated taking than it is to regulation by way of zoning.

2088 2004 *U Denv Water L Rev* 83-84. It is likely that the majority of riparian owners use their water non-consumptively. These uses would not be considered “use” under appropriation law because they divert no flow; but riparian law allows reasonable uses that do not require diversion.

2089 Hageman 1994 *Okla L Rev* 183.

2090 *Franco-American Charolaise Ltd. v Oklahoma Water Resources Bd* 855 P.2d 568 (Okla. 1990).

2091 Hageman 1994 *Okla L Rev* 188.

2092 *Town of Chino Valley v City of Prescott* 638 P2d 1324 (1981) appeal dismissed 457 US 1101 (1982). Under the common law of Arizona, there is no right of ownership of groundwater before it is captured and withdrawn. *Real Estate Law Digest* § 11:14.

2093 *Groundwater Management Act* of 1980, Arizona.

2094 Tarlock and Van de Wetering 2006 *Pub Land & Resources L Rev* 66.

2095 *L of Water Rights and Resources* § 3:92.

drastic redefinition of the common law right was justified because of the need to prevent groundwater mining and to conserve limited supplies. By adopting prior appropriation, the legislature is firming up correlative water rights. It is not a taking because all right holders gain more than they lose because all rights are made more secure. Riparians who challenge the restriction of water rights to actual use will have a difficult time demonstrating injury because no use has been curtailed and future needs may be satisfied through a permit system. The expectation of actually using the water was always uncertain because of the nature of the riparian right. The substitution of a permit system for the common law makes all water rights more secure.

5.9.3.3 Reasonable time to exercise unused rights

Hageman²⁰⁹⁶ writes that a common thread in this type of case in other states was that riparians had to be given a reasonable time to exercise their previously unused rights. In the case of *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*²⁰⁹⁷ the question was whether the State of Texas could constitutionally limit riparian claimants to that quantity of water that actually was beneficially used during any one of the five years between 1963 and 1967. The court held that, after notice and upon reasonable terms, the termination of the riparian's continuous non-use of water is not a taking of their property. The court held that curtailment occurs because of the riparian's inaction or failure to comply with the statutory transition mechanism.²⁰⁹⁸ This inaction may lead a court to find that the riparian has abandoned her water rights. The court used the language of the Supreme Court of Oregon in *In Re Willow Creek*²⁰⁹⁹ when it held that the Texas legislature's statutory mechanism for transition cannot be arbitrary,²¹⁰⁰ unreasonable, or unduly burdensome. The court concluded that the riparian's failure to make use of the property right did not render the statutory forfeiture of that right a taking for which just compensation was required. Cottingham²¹⁰¹ is of the opinion that the actual hardship caused by a loss of future use in the *Guadalupe* case is that the riparian must apply to a state agency to secure a permit. The riparian owner would not necessarily be assured of getting a permit. The former rights holder's proposed use might be sufficiently beneficial to justify depriving other permit holders of water. The severity of the impact of loss of a future speculative use cannot be presently

2096 1994 *Okla L Rev* 186.

2097 *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438, 444 (1982).

2098 Huang 2007 *U Denv Water L Rev* 66.

2099 *In Re Willow Creek* 74 Or 592 (1914).

2100 See the discussion of s 25(1) of the SA Constitution of 1996 in para 4.4 above.

2101 Cottingham 2006 *Okla City u L Rev* 287-288.

ascertained.²¹⁰² In the *In Re Willow Creek*²¹⁰³ case the court confirmed that water rights are subject to the reasonable regulations essential to the general welfare, peace, and good order of the citizens of the state with the objective that the use of water by one person shall not be injurious to the equal enjoyment of others entitled to use water from the same source, nor injurious to the rights of the public.²¹⁰⁴ *In casu* the statute required that water users, on due notice, shall take measures for the ascertainment, certifying, and recording of their water rights. The court held that the requirements were not arbitrary, unreasonable, or unduly burdensome.

The Supreme Court of South Dakota in *Bell Fourche Irrigation District v Smiley*²¹⁰⁵ upheld a statute that recognised existing riparian rights, but only to the extent of the existing beneficial use. The statute was found to be a reasonable exercise of the state's power to provide for the maximum utilization of its water resources. In the case of the *Determination of the Rights to the Use of the Surface and Ground Waters of Chumstick Creek Drainage Basin in Chelan County, Washington: The State of Washington Department Of Ecology (Respondent) v Adsit (Appellants)*²¹⁰⁶ the Supreme Court of Washington held that where the *Water Rights Act* applied to all persons in the state claiming a right to use water, the newspaper notice was adequate. It also held that property owners have a vested interest in their water use rights to the extent that the water is beneficially used on the land. No unconstitutional taking occurs when the law requires that unused riparian rights revert to the state.²¹⁰⁷ *In casu* the statute at issue did not aim to regulate or restrict property rights. It merely required their registration. The water right owner's own neglect caused the right to be lost. The Supreme Court of Washington did not require compensation for the consequences of neglect.

The Supreme Court of Washington in the case of the *Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott*²¹⁰⁸ held that after 1917 new water rights might only have been acquired through compliance with the permit

2102 Cottingham 2006 *Okla City u L Rev* 291-292 explains that according to utilitarianism, all that is required to diminish property rights, is a claim of efficiency.

2103 *In Re Willow Creek* 74 Or 592, 617 (1914).

2104 See the discussion of arbitrary deprivation of property in para 4.4.5. See also Neuman and Hirokawa 2000 *U Denv Water L Rev* 10.

2105 *Bell Fourche Irr. Dist. v Smiley* 176 N.W.2d 239, 245 (1970).

2106 *Determination of the Rights to the Use of the Surface and Ground Waters of Chumstick Creek Drainage Basin in Chelan County, Washington: The State of Washington Department Of Ecology (Respondent) v Adsit (Appellants)* 694 P.2d 1065, 1069 (1985).

2107 *Determination of the Rights to the Use of the Surface and Ground Waters of Chumstick Creek Drainage Basin in Chelan County, Washington: The State of Washington Department Of Ecology (Respondent) v Adsit (Appellants)* 694 P.2d 1065, 1070 (1985). See also *Department of Ecology v Abbott* 694 P.2d 1071, 1077 (1985).

2108 *Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott* 694 P.2d 1071 (1985).

system and existing water rights not put to beneficial use were relinquished.²¹⁰⁹ Neuman and Hirokawa²¹¹⁰ explain that the court found that fifteen years after the code's adoption was a reasonable period of time for riparians to exercise their rights or lose them.²¹¹¹ On the other hand, the Nevada Supreme Court in *In re Manse Spring*²¹¹² refused to apply the statutory forfeiture provision to divest the applicant's water rights, because those rights had vested before adoption of the statute in 1913.²¹¹³ The legal question was whether a right could be impaired by providing a different method for its loss than had theretofore existed?

Before the code's adoption, an appropriator could lose a water use right by abandonment. It depends on the intent of the water user. Under statutory forfeiture, the water right could be lost by five years of non-use, regardless of the intent of the holder of the right.²¹¹⁴ The court found that to be a stricter and more absolute procedure than loss by abandonment – it took away much of the stability and security of the right to the continued use of such water. The court held that the change in method of loss of rights constituted an impairment of the early-acquired water right. It was for a court to determine whether there was intent to abandon the water right. Non-use and other circumstances could still be taken into consideration, and a court had the right to and would check a continued wanton and wilful waste of water.²¹¹⁵

In *San Carlos Apache Tribe v Super. Ct.*²¹¹⁶ section 24(1) of *House Bill 2276*, hereafter referred to as HB 2276, stated that unless otherwise specifically provided, it applied to all rights to appropriable water *initiated or perfected on or before the effective date of this act* and any rights subsequently initiated or perfected.²¹¹⁷ The court held that this demonstrated the Legislature's intention to apply both substantive and procedural

2109 *Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott* 694 P.2d 1071, 1072 (1985). The court in *Abbott* on 1077 *inter alia* relied on *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444-446 (1982) and *Town of Chino Valley v Prescott* 638 P.2d 1324, 1330 (1981).

2110 2000 *U Denv Water L Rev* 10.

2111 *Determination of the Rights to the Use of the Surface Waters of the Deadman Creek Drainage Basin in Spokane County, Washington: The State of Washington, Department of Ecology v Abbott* 694 P.2d 1071, 1076 (1985).

2112 *In re Manse Spring*, 108 P.2d 311, 316 (Nev. 1940). The person in possession of the farm had died before the period started running during which the water became forfeited (on 314). Joseph Yount in 1877 began diverting and beneficially using the waters of Manse Springs for irrigation and domestic purposes. This use was increased so that by 1910 he cultivated and irrigated as much as 300 acres of land. From 1877 to June 5, 1929 all of the waters of Manse Springs were beneficially used on the ranch (the successor in title died on that day). From June 15, 1929, until September 11, 1936, no water was used from the springs for irrigation or cultivation of lands except a small amount that was taken from the second spring to irrigate an orchard and vineyard of a few acres. Appellant contended that the right to the waters of Manse Springs was lost by non-use as defined by statute.

2113 Neuman and Hirokawa 2000 *U Denv Water L Rev* 13.

2114 See *In re Manse Spring* 108 P.2d 311, 315 (Nev. 1940).

2115 According to Neuman and Hirokawa 2000 *U Denv Water L Rev* fn 74 the five-year forfeiture provision was repealed in 1999.

2116 *San Carlos Apache Tribe v Super. Ct* 972 P.2d 179, 201 (Ariz. 1999).

2117 *San Carlos Apache Tribe v Super. Ct* 972 P.2d 179, 188 (Ariz. 1999).

changes retroactively. Neuman and Hirokawa²¹¹⁸ explain that in 1995, the Arizona legislature amended²¹¹⁹ the water code to declare that pre-code rights would not be subject to forfeiture proceedings. The court held that a statute may not attach new legal consequences to events that had been completed before the statute had been enacted. Legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events. A vested right is one that forms the foundation of a legal cause of action or defence or is “so substantially relied upon that retroactive divestiture would be manifestly unjust”.²¹²⁰ The specific problem with the legislature's attempt to save pre-code rights from forfeiture was that doing so might interfere with someone else's vested water rights.²¹²¹ If certain pre-code rights had in fact been lost due to non-use, and other appropriators had since acquired valid rights to use that water, then to revive the forfeited right by legislative decree would be to divest the juniors of vested rights unlawfully. Huang²¹²² explains that in the rare case where courts recognise a vested property right in a riparian right to future use, courts attempt to reconcile the future right in the light of the purposes and benefits of the new system of water law. He suggests that state legislatures may continue to strengthen water laws. With adequate safeguards for due process, payment of just compensation for the enactment of environmentally protective measures can be minimised. It appears from *Lingle v Chevron USA Inc.*²¹²³ that the fact that a regulation is in breach of the due process clause, does not mean that private property has been taken for purposes of the *Fifth Amendment*. A due process inquiry is prior to and distinct from the question whether a regulation effects a taking, as the *takings clause* presupposes that the government has acted in pursuit of a valid public purpose.²¹²⁴ If due process had not been followed when water law was reformed, the legislation would be invalid and no taking would have taken place, unless a taking had been proven on the facts of the case.

5.10 Conclusion

When the history of South African water law was researched, it became clear that Cape judges like justice Bell had in the mid nineteenth century relied on American water law as a modern interpretation of Roman water law.²¹²⁵ The reform of water law in America was chosen as the topic of comparative legal research, because the concept of “public

2118 Neuman and Hirokawa 2000 *U Denv Water L Rev* 14.

2119 *House Bill* 2276.

2120 *San Carlos Apache Tribe v Super. Ct* 972 P.2d 179, 189 (Ariz. 1999).

2121 Neuman and Hirokawa 2000 *U Denv Water L Rev* 15.

2122 2007 *U Denv Water L Rev* 77.

2123 *Lingle v Chevron USA Inc.* 544 US 528, 542.

2124 *Lingle v Chevron USA Inc.* 544 US 528, 543.

2125 See para 2.6.1.

trusteeship" in section 3 of the *National Water Act*²¹²⁶ is similar to the public trust doctrine which has its roots in American law.²¹²⁷ The public trust doctrine with its underlying notion of custodianship is also firmly rooted in Roman water law.²¹²⁸ It is in accordance with the classification of water as a *res omnium communes* in Roman water law.²¹²⁹ The nature of water as common property meant that three separate interests in public trust resources were identified.²¹³⁰ They are the *ius publicum*, or public trust; the *ius privatum*, or private property right to use the water, and the *ius regium*, otherwise known as the police power or right to regulate the use of water. The public trust has to weigh the protection of individual rights, for example the right of a property owner to be free in excluding others, against the common good. The common good takes priority over all other individual goods. The private right to appropriate is subject not only to the rights of lower owners, but to the limitation that the right to use water may not materially diminish a great foundation of public welfare and health. The property of the water right is a use right in the water course and not property in the *corpus* of the water itself.²¹³¹ Prior to the appropriation of the water from the source, the proprietary right is *usufructuary* in character. After the separation of the water, the proprietary right is possessory.²¹³² A water right is real property and enjoys protection against takings like other non-possessory rights such as easements. Water rights are also subject to the doctrine of reasonable and beneficial use and the public trust.

One of the advantages of studying American water law is that it provides an excellent example of how the law prescribes the background conditions in terms of which property is owned. Some uses of water are more valued than other uses. Only beneficial uses are protected. The rule stated succinctly by Sax is that beneficial use is the "source, gauge, and limit" of property rights in water.²¹³³ Beneficial uses by their nature are those that are in the public interest. Because of the changing nature of the public interest, the nature of the concept "beneficial" keeps changing. California's law of beneficial use, for example, has always been that the range of private rights changes in response to a change in circumstances.²¹³⁴ When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use in America is adapted in accordance with a changing perception of what is in the public interest.

2126 See para 4.2.2.3.

2127 See para 5.4.

2128 See para 5.4.1.

2129 See para 2.2 and para 2.3.

2130 See para 5.4.2.

2131 See para 5.5.

2132 See para 5.5.

2133 See para 5.7.

2134 See para 5.9.2.

The trend in natural resources law in America is to wear away traditional concepts of "private property rights" in natural resources.²¹³⁵ There is a new view on the sovereign power that exists over those resources. Natural resources law is responding to current social beliefs and the physical characteristics, like the quality, of the resource. The history of water law relates the story of the change happening in society.²¹³⁶ Land is being viewed more often as being a part of the community rather than merely a combination of isolated, personalised pieces of land.²¹³⁷ Much of the value of property that property owners enjoy is the product of public investment in infrastructure like transportation and utilities, and not the product of individual enterprise. The individual claim of land owners is thus not as robust as one would imagine. Sax calls the shift in priorities regarding resources the move from a cowboy economy to a spaceship economy where accomplishment is measured by the ability to maintain the stock of the resources at our disposal. Resources have to be put to effective and sustainable use. It impacts on the water right of the individual. It also causes governments to turn toward the control of pollution and water marketing as ways to reallocate supplies and meet new demand.²¹³⁸ In 1886 the results of the dumping of coal in a river was seen as a mere personal inconvenience to the complainant whose interests were expected to yield to the necessities of a great public industry which served a great public interest.²¹³⁹ When the public interest was developmental, property rights to water, like the right to a natural flow, yielded to what was perceived to be the public interest of the time. As growth and development become less valuable to our survival, softer values like sustenance, continuity, adaptation and evolutionary change become more valued.

Sax is of the opinion that the "essence of property law is respect for reasonable expectations".²¹⁴⁰ The principal idea of the public trust is to prevent the disrupting disappointment of expectations held in common by water users, but that are not formally recognised in the way of a title. The explanation is that stability is a rudimentary and tenacious concern of the legal system. Only reasonable expectations are protected. It is not reasonable to expect complete freedom from all government regulation. The two interests in property protected by American courts that are most relevant to water are the interest of physical control and the investment interest.²¹⁴¹ The investment or economic interest is divided into the economic impact of the regulation and respect for reasonable expectations. The expectations concept of "property" protects the property owner's

2135 See para 5.4.4.

2136 See para 5.7.

2137 See para 5.8.

2138 See chapter 7 on water entitlement or allocation trading.

2139 See para 5.9.

2140 See para 5.8.2.3

2141 See para 5.8.2.

investment-backed expectations.²¹⁴² These expectations are limited by regulatory schemes for which the owner is on notice when investing in property.²¹⁴³ Property owners are not entitled to the most profitable use of their land. Significant reductions in value caused by government regulation are tolerated. Where a water rights holder tries to prove frustration of investment backed expectations by a reduction in his beneficially used water rights, the court would look at the effect of the so-called taking on the rights holder in the context of the background-restrictions that the rights holder knew had been imposed by the public trust.²¹⁴⁴ Government's right to constrain the use of property without paying compensation to the owners is limited by what it withheld from the owner at the outset.²¹⁴⁵ The physical impounding of water amounts to a physical taking.

The takings clause implies that property may be taken but property owners must be compensated. A "partial taking" occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community. The water user's ability to use water is sometimes restricted by government regulation, rather than physically taken by the government.²¹⁴⁶ In the case of temporary restrictions on water use, the property is not valueless as the property rights will regain value as soon as the temporary restrictions are lifted.²¹⁴⁷ The lack of economic impact in the case of temporary restriction precludes a successful regulatory takings claim. The difference between physical and regulatory takings is the difference between government acquisition and government control.

Where water deliveries are restricted because of the environment,²¹⁴⁸ the enactment and enforcement of legislation are sovereign acts of government. Arnold's metaphor²¹⁴⁹ of property as a web of interests which consists of a set of interconnections among people, groups, and entities each with a stake in an identifiable tangible or intangible object, which is at the centre of the web, should be supported. All of the interest-holders are connected both to the object and to one another. It is supported by the argument that restrictions on water rights for environmental protection purposes are unlikely to constitute a regulatory taking when the primary interest holder is aware of the various interests existing in addition to her own.

²¹⁴² See para 5.8.2.2.

²¹⁴³ See para 5.8.2.2.

²¹⁴⁴ See para 5.9.2.

²¹⁴⁵ See para 5.9.2.

²¹⁴⁶ See para 5.9.2.1.

²¹⁴⁷ See para 5.9.2.1.

²¹⁴⁸ See para 5.9.2.3.

²¹⁴⁹ See para 5.9.2.3.

When a state reforms the system in terms of which water is allocated, it is exercising its police power.²¹⁵⁰ Every major change in water law in the Western states of America has been sustained as a valid regulation for which no compensation was payable.²¹⁵¹ Riparian and appropriative law states have the legislative authority to modify their water administration systems in order to move to a statutory permit scheme to conserve scarce water resources by way of regulation. Because riparian rights have always been incomplete property rights, the expectations of riparians to the enjoyment of these rights are weaker than the expectation of the right to exploit the full value of dry land.²¹⁵²

A common thread in this type of case in some states was that riparians had to be given a reasonable time to exercise their previously unused rights.²¹⁵³ In the case of *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*²¹⁵⁴ the court held that, after notice and upon reasonable terms, the termination of the riparian's continuous non-use of water is not a taking of their property. The court used the language of the Supreme Court of Oregon in *In Re Willow Creek*²¹⁵⁵ when it held that the Texas legislature's statutory mechanism for transition cannot be arbitrary,²¹⁵⁶ unreasonable, or unduly burdensome. The importance of due process of law when reforming water law systems should not be underestimated.

The public trust doctrine gives natural resources a conceptual standing that it might not have had if the environment or water had been merely protected as human rights.²¹⁵⁷ The danger in merely protecting a right of access to sufficient water as a human right is that it often is one of many rights that are weighed up against one another. The advantage of the public trust doctrine is that it gives natural resources an elevated standing in law that should be beyond the reach of corrupt officials. Unlike the position in South Africa, access to water is not a human right in America.²¹⁵⁸ However, the public trust doctrine that envelops water use rights in America is a sophisticated mechanism that secures the place of water as the public property of the nation.²¹⁵⁹ The state, as sovereign, acts as trustee of public rights in natural resources. The public trust doctrine in America in a sense operates as a fiction, as there is no real trust figure. This fiction, however, serves to draw the attention to the fact that water is all important and deserves special treatment.²¹⁶⁰ The

2150 See para 5.9.3.

2151 See para 5.9.

2152 See para 5.9.3.1.

2153 See para 5.9.3.3.

2154 *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* 642 S.W.2d 438, 444 (1982).

2155 *In Re Willow Creek* 74 Or 592 (1914).

2156 See the discussion of s 25(1) of the SA Constitution of 1996 in para 4.3. above.

2157 See para 5.4.5.

2158 See para 5.3.

2159 See para 5.4.

2160 See para 5.4.4.

public trust doctrine gives water a standing that it would not have had if water had been merely protected as a human right.²¹⁶¹ Water is too important to be only one of many human rights. If a right of access to water had been merely protected as a human right, the human right of access to sufficient water would have been one of many human and other economic rights that had to be weighed against one another. There would have been the risk that political influences on the courts meant that material concerns weighed more than the right to clean water. The public trust doctrine places an obligation on the government to use only the property subject to public trust purposes. The state retains the authority needed to assure the continued existence and beneficial application of the resource for the common good.²¹⁶²

Where the understanding of a concept in American law is consistent with our constitutional notion of the same concept, like the understanding of the concept "water use right" in South Africa and America, it may be of assistance to South African courts to consider the understanding of the foreign concept when making its decision.²¹⁶³ The fact that the water use right may be limited by a concept of "public trusteeship" in South Africa and the "public trust doctrine" in America means that both countries have a concept of "custodianship" of the water resources in common in addition to their understanding of the water use right. Furthermore, the concept "water use right" must be understood in the context of each country's constitutional property clause. Although these property clauses are not identical, they each contain a due process clause²¹⁶⁴ as well as a compensation clause.²¹⁶⁵ The fact that the compensation clauses have their roots in Cornelius van Bijckershoek's²¹⁶⁶ thoughts on Roman Dutch law explains why American case law on regulatory takings makes sense to South African lawyers. A court would be wise to at least consider American water law to determine whether the law on a particular matter is distinguishable from South African law or not.

South African courts may develop the law on the concept "public trusteeship" from scratch. It may also borrow those elements that it considers useful from the public trust doctrine. The advantage of the public trust doctrine is that it enables various stakeholders in public trust resources to have *locus standi* before the courts to defend their interest in natural resources.²¹⁶⁷ The public trust can be used *firstly* by private parties against the government where proposed government action threatens the public trust or its values; *secondly* it can be used by government to prevent private parties from infringing on trust

2161 See para 5.4.5.

2162 See para 5.4.2.

2163 See para 1.4.2.

2164 See para 4.3.4 and para 5.8.

2165 See para 4.3.6 and para 5.8.

2166 See para 4.3.6.

2167 See para 5.4.3.

values; and *thirdly* it can be used by private parties against other private parties where trust values are infringed. It would greatly assist environmental protection groups if South African courts were to conceptualise that the public trust protects the environment by allowing private parties to use the public trust concept against the government where proposed government action threatens the public trust or its values, as when it gives a mine a licence to mine without a water licence. Government should be allowed to use the public trust to prevent private parties from infringing on trust values, by, for example, polluting water. Private parties should be allowed to use the public trust against other private parties where trust values are infringed. An example would be where members of the public obtain an interdict when a mine is mining without a water licence. In a country where the environment is under pressure because of ill-managed development, allowing members of the public to act on behalf of the public trust will allow the concepts of "custodianship" and *res omnium communes* to take hold in the public imagination.

The hypothesis that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right has been proven to be very true. The concept "beneficial use" is used in America to determine the existence of the right to use water. The public interest moreover plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property. When some private rights in a water resource are in competition with other private rights, beneficial use is the tool that is used to determine which uses are to be preferred to others. When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

The question was asked what should be the construction put on the water use right by the property clause in the *Constitution* of 1996 when compared to the protection, if any, the American property clause affords water use rights when unused riparian rights are forfeited. It appears that when the limitation of beneficial use is not adhered to, the water right in America is not protected as a property right anymore. The same is not true in South Africa, as was concluded in Chapter 4.²¹⁶⁸ In the next chapter the question will be discussed whether anything similar to the concept "beneficial use" exists in Australian natural resource law. Furthermore, the question of whether compensation is payable for the regulatory deprivation of water use rights in Australia will be discussed.

2168 See para 4.6.1.

CHAPTER 6

REDUCTION IN AUSTRALIAN WATER ENTITLEMENTS

6.1 Background

6.1.1 Introduction

The value of studying Australian water law is twofold: *Firstly*, there is an established jurisprudence²¹⁶⁹ that deals with the characteristics of a right to a natural resource and the consequences of limiting that right where the resource is under stress. *Secondly*, in Australia, where statutory law has already replaced the riparian system, water reform is an ongoing process. The Australian Commonwealth has entered into an agreement with the states, known as the *National Water Initiative*, in terms of which the problems of water scarcity and especially the risk of reduction are being dealt with. The development of water entitlement or allocation trading²¹⁷⁰ as a way to ensure that water as a resource is used to its best value forms a part of the initiative.

6.1.2 Overview

In this chapter the history of Australian water law will be discussed to see whether it was influenced by circumstances similar to those affecting South African water law. In the previous two chapters it was explained that both South Africa²¹⁷¹ and America²¹⁷² have a *Bill of Rights*, as well as either a public trust concept or a public trust doctrine. This influences the background principles of their water law. Both systems make use of the concept "beneficial use". It is necessary to determine whether a *Bill of Rights*, a public trust concept or a beneficial use concept exists in Australia so that the background limitations on its water law can be determined. The question whether the regulation of rights to natural resources in general, and water rights in particular, might lead to a compensable taking forms a major part of this chapter. The content of the concept "water entitlement" and the effect of the separation of rights to land and water are also discussed. The final matter investigated is whether there is a plan to manage the risk of reduction in water entitlements because of *inter alia* global warming. Water entitlement or allocation trading is discussed in the next chapter.²¹⁷³

2169 See para 6.6.

2170 See Chapter 7.

2171 See para 3.2 and para 3.7.

2172 See para 5.3.

2173 See Chapter 7.

Up to this point, the hypothesis that has been tested, is that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right. One of the main hypotheses underlying this hypothesis is that the concept "beneficial use" should be used to determine the existence of the right to use water. Other hypotheses to be tested is that when some private rights in a water resource are in conflict with other private rights, beneficial use is the tool that is used to determine which uses are to be preferred to others. Furthermore, the public interest plays a larger role in the allocation of rights to a natural resource than in the allocation of rights to other forms of property. The hypothesis that follows on this is that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. The final hypothesis to be tested is that when it is necessary to discourage people to use water for low value and to encourage them to use water for high value uses, water trading will be an effective way to encourage them to use water for purposes with a high value.

Because of the link in South African and American law between the concept *res omnium communes* and the public trust concept on the one hand and the link between the public trust concept and the beneficial use concept on the other hand, it is necessary to investigate the background principles of Australian water law.

6.2 History of water law

6.2.1 *Institutes of Justinian*

As discussed in Chapter 2, the 533 AD *Institutiones*²¹⁷⁴ of Justinian (482-565 AD) stated that in ancient Rome running water was common to mankind. Although almost 1 500 years have passed since the *Institutes* were first published, this proposition has influenced the development of English,²¹⁷⁵ American,²¹⁷⁶ South African²¹⁷⁷ and Australian²¹⁷⁸ water law.

2174 *Et quidem naturali juria communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris.*

Just 2.1.1.

See discussion of *Retief v Louw* 4 Buch 165, 176 (1874) in para 2.6.1 and discussion of *Hough v Van der Merwe* 1874 Buch 153 in para 2.6.2.

2175 See para 2.5.1.

2176 See para 2.6.

2177 See para 2.6.

2178 See para 6.2.

6.2.2 Anglo-American common law

The rules of the common law²¹⁷⁹ are the foundation of water law in Australia.²¹⁸⁰ However, the common law borrowed substantially from Roman water law. The common law of England adopted an approach similar to Justinian's approach that the air and running water were *res omnium communes*.²¹⁸¹ Bracton,²¹⁸² in *De Legibus et Consuetudinibus Angliae*, stated that by natural law running water and air are common to all. When the courts in England developed the common law relating to water, discussion *inter alia* revolved around the *Institutes of Justinian*, the *Commentaries of Blackstone* and the institutional writers in Scotland and America.²¹⁸³ The court of the Exchequer in *Embrey v Owen*²¹⁸⁴ referred to a Scottish case *Linlithgow Magistrates v Elphinstone*.²¹⁸⁵ At the time the law of Scotland tended to "subscribe to the principles of Roman law rather than those of the common law."²¹⁸⁶ Lord Kames in *Linlithgow*²¹⁸⁷ held that:

A river which is in perpetual motion is not naturally susceptible of appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is authorised with respect to every subject that is best enjoyed separately; but barred with respect to every subject that is best enjoyed in common. Water drawn from a river into vessels or into ponds become private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country.

The reception of a principle of civil law by an English court referring to a Scottish case in 1851 means that civil law also influenced water law in England in more modern times.

2179 See para 2.5 for background on the English common law on water.

2180 Fisher *Water Law* 64.

2181 See para 2.2.3 for a discussion of Justinian's *Institutes*.

2182 *Bracton on the Laws and Customs of England* attributed to Henry of Bratton 1210-1268 Vol 2 on 39. English translation's copyright 1968-1977 by the President and Fellows of Harvard College. <http://hls15.law.harvard.edu/bracton/Unframed/English/v2/39.htm>.

2183 Fisher *Water Law* 65. See para 2.6.1 for a discussion of the influences on American and South African water law in the 19th century.

2184 *Embrey v Owen* (1851) 6 Exch 353. See Anderson 2007 *McGeorge L Rev* 471.

2185 *Linlithgow Magistrates v Elphinstone* (1768) 3 Kames 331. This case was also quoted by De Villiers CJ in *Hough v Van der Merwe* 1874 Buch 148 (see para 2.6.2). The case is another common influence on South African and Australian water law.

2186 Fisher *Water Law* 65.

2187 *Linlithgow Magistrates v Elphinstone* (1768) 3 Kames 331. See Gray 2006 *Transforming Cultures eJournal* 70 <http://epress.lib.uts.edu.au/journals/TfC>. This case was also quoted by De Villiers CJ in *Hough v Van der Merwe* 1874 Buch 148 (see para 2.6.2). The case is another common influence on South African and Australian water law. See para 2.2.3 on post classical Roman law and para 2.3 on Roman Dutch law.

In *Ballard v Tomlinson*²¹⁸⁸ the court held that:

This percolating water below the surface of the earth is therefore a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole.

In *Allen v United Carpet Mills*²¹⁸⁹ the Supreme Court of Victoria held that both air and water were “in the nature of common property, as distinct from property held in private hands”. Baron Parke in the court of the Exchequer in *Embrey v Owen*²¹⁹⁰ held that, although flowing water is not the subject of rights of property, ownership of land provides a right of access to water. The water was *publici iuris*.²¹⁹¹ It is not a *bonum vacans*, to which the first occupant may acquire an exclusive right. It is public and common in the sense that all may reasonably use it, who have a right of access to it. None can have any property in the water except in the portion that has been abstracted from the stream and possessed.²¹⁹²

...each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it...

This right is not an absolute and exclusive right to the flow of all the water in its natural state. The right is to the flow of water and the enjoyment of it. It is subject to “similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence”. The limitation of reasonable use is nothing but a condition that use must be beneficial. The difference between the *Linlithgow* and *Embrey* cases is that in the *Linlithgow* case common property confers rights that are available to all members of the community. According to the *Embrey* case, the right is restricted to those who have a right of access to it. The right of access arises from ownership of the bank of the river. Both judges acknowledged that flowing water does not belong to anyone. It is Baron Parke’s formulation in the *Embrey* case that is the foundation of the common law doctrine of riparian rights.²¹⁹³

2188 *Ballard v Tomlinson* (1885) 29 Ch D 115

2189 *Allen v United Carpet Mills* [1989] VR 323, 330.

2190 See fn 287 in para 2.6.1.1.

2191 Gray 2006 *Transforming Cultures eJournal* 75.

2192 Fisher *Water Law* 67.

2193 See the discussion of the Enclosure Movement in para 5.6.1.

It is interesting to note that Baron Parke²¹⁹⁴ quoted the author Kent²¹⁹⁵ on American law. Kent referred to the “strict rule of the civil law laid down by Pothier,”²¹⁹⁶ commentator on the civil law, when he wrote that the upper proprietor should use the water in a reasonable manner. He should not materially injure the proprietors below the stream. It appears that civil law influenced American and then English law to make use of the concept “reasonable” or “beneficial use.”

Fisher²¹⁹⁷ is of the opinion that the principle in *Embrey v Owen* represents a compromise among the users of the water resources based on the usufructuary²¹⁹⁸ interests of each of them. Water in a state of flow is common property in the sense that any person can use it for their own purposes. The owners or occupiers of the banks of rivers can enjoy this right, but it is not restricted to them. This right is, therefore, a right of access and a usufructuary right and not ownership of the water. As discussed above, the foundation for this approach is the proposition found in the *Institutes of Justinian*.²¹⁹⁹ This approach corresponds with the approach in America²²⁰⁰ and South Africa. The American approach was followed in South Africa in *Retief v Louw*²²⁰¹ where Justice Bell relied on *Tyler v Wilkinson*,²²⁰² where the court held that a riparian owner had “no property in the water itself; but a simple use of it, while it passes along”.²²⁰³

6.2.3 Australian history

Access to water resources in Australia over a period of about 250 years was governed by three different legal regimes.²²⁰⁴ Indigenous Australians had a form of communal property rights to land and water.²²⁰⁵ When the English common law²²⁰⁶ was received into Australia, the colonisers instituted a regime of access to water based on a different sort of common property regime.²²⁰⁷ Riparian rights were restricted to a select group of people who

2194 *Embrey v Owen* (1851) 6 Exch 353 at 370 and 371. Hulsebosch 2002 *Cardozo L Rev* 1084 writes that courts on the British Isles embraced the riparian doctrine of reasonable use of water-flow as articulated by Kent and Story. See discussion of the development of ‘reasonable use’ in England in Scott and Coustalin 1995 *Nat Resources J* 871.

2195 3 *Kent’s Commentaries* Lecture 51 2006 www.lonang.com.

2196 Tarlock *L of Water Rights and Resources* § 3:7 states that *Tyler v Wilkinson* 4 Mason 397 (1827) was the basis for Chancellor Kent’s statement of the common law. He distilled the essential principles of riparian rights from *Tyler* and earlier cases in a section of his treatise that remained unchanged through thirteen editions in the nineteenth century. It is clear that American, South African and Australian water law have common roots.

2197 *Water Law* 70.

2198 See the discussion of the *profit à prendre* and *usus fructus* in para 6.6.2. See also para 2.2.3 and para 5.5.

2199 Fisher *Water Law* 66.

2200 See para 5.5 for the concept “water use right” in America.

2201 *Retief v Louw* 4 Buch 165 (1874). See the discussion in para 2.6.1.

2202 *Tyler v Wilkinson* 4 Mason 397 (1827).

2203 Gray 2006 *Transforming Cultures eJournal* 71 <http://epress.lib.uts.edu.au/journals/TfC> reminds one that although Roman law concepts sometimes influenced English (and by association) Australian law, Roman law did not form the foundation of either post feudal English law, or Australian law. Both legal systems are common law systems.

2204 For more about the history of the evolution of water rights in Victoria, see Harris “State Administration” 3 and 8-32.

2205 See Brennan 2004 *Melb U L Rev* 32 and *Yanner v Eaton* [1999] HCA 53.

2206 See para 2.5 on common property in terms of the English common law.

2207 Tan “Diving” 2.

occupied land next to rivers.²²⁰⁸ In the 1880's Australia realised that riparian principles were not suitable for the development of its water resources.²²⁰⁹ A regulatory regime then vested use and control of water resources in the state. Incremental changes were made to that regime for the next 100 years.

6.3 Human rights

The Australian water law regime is governed by the background principles of Australian law. The background principles should be viewed *inter alia* in the light of the fact that Australia does not have a *Bill of Rights*.²²¹⁰ Because there is no *Bill of Rights*, a right of access to sufficient water is not a human right. When the Australian Constitution was drafted in the 1890's, consideration was given at constitutional conventions to inserting guarantees of human rights.²²¹¹ One of the reasons why comprehensive rights guarantees were not included in the Australian Constitution was that the framers allegedly wanted to give the new federal and state parliaments the power to pass racially discriminatory laws.²²¹² Although Australia may not have a *Bill of Rights*, it is a democracy and it protects property in its Constitution, as discussed at 6.5 below. The background principles of its legal system and its culture support civil and political rights. The High Court of Australia in the 1992 *Australian Capital Television case*²²¹³ held that freedom of communication is so indispensable to the working of the system of representative government that it is necessarily implied in the making of a provision.²²¹⁴ The court held that the *Australia Act* of 1986 recognised that ultimate sovereignty resides in the Australian people and that the Australian government and legislature are accountable to the Australian people.²²¹⁵ Finn²²¹⁶ explains that because sovereign power resides in the people, where the public's power is entrusted to institutions and officials for civil governance, those institutions and officials hold the power of the people to be exercised for the people. They are trustees and are accountable to the public for the exercise of their trust. Finn²²¹⁷ ponders whether a parliament's trustee obligation to serve the people precluded it from acting to offend grievously against the human rights that are deeply rooted in the society the Australians have created. He argues that some values are so basic to Australia 'that to offend

2208 See Harris "State Administration" 8-17 for a discussion of riparian rights in Victoria.

2209 Tan "Diving" 2; Harris "State Administration" 17.

2210 Williams 2006 *Melb U L Rev* 883.

2211 Williams 2006 *Melb U L Rev* 884.

2212 Williams 2006 *Melb U L Rev* 884. S 51(xxvi) enabled the federal Parliament to make laws with respect to the people of any race, other than aboriginal people, in any state, for whom it was deemed necessary to make special laws. In terms of s 127, aboriginal natives were not to be counted when counting the numbers of people of *inter alia* the Commonwealth.

2213 *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45

2214 *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45 para 42.

2215 *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45 para 37.

2216 Finn 1994 *Griffith L Rev* 227-228.

2217 Finn 1994 *Griffith L Rev* 232.

grievously against them could not be accepted as being in the “public’s interests”.²²¹⁸ It speaks for itself that reading fundamental rights into a constitution does not give the same level of protection as having a *Bill of Rights*. This, however, opens the door for fundamental values and shows in which direction the court is moving. The reading in of fundamental rights is important for the interpretation of property rights, including supposed property rights in water.

Although the Australian Commonwealth has no *Bill of Rights*, Victoria has a *Charter of Human Rights and Responsibilities Act 2006* (Vic), also known as the *Victorian Charter of Rights*.²²¹⁹ It is the first such instrument in an Australian state.²²²⁰ Williams²²²¹ writes that the real focus of the *Victorian Charter of Rights* is to ensure that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy. The charter states that aboriginal people have distinct cultural rights.²²²² They may not be denied their cultural rights to maintain, with other members of their community, their distinctive spiritual, material and economic relationship with the land and waters. Other resources with which they have a connection under traditional laws and customs are also protected. The *Victorian Charter*²²²³ also protects property against deprivation other than in accordance with law. Particular mention will be made in the present and next chapter of the role of the Victoria legislature in enacting legislation to deal with water scarcity and in adopting mechanisms to trade in water entitlements or allocations in Victoria.

6.4 Vesting of water

What then, if not to protect human rights, was the function of the Australian Commonwealth Constitution? It was meant to federate the six British colonies in the late 1800’s, and has been substantially modified since then. The Australian Commonwealth Constitution is aimed at upholding the structure of the federation, and is more involved with dividing federal and state powers than with protecting individual rights.²²²⁴ Management of water resources is considered a state,²²²⁵ and not an Australian

2218 Finn 1994 *Griffith L Rev* 232 fn 20.

2219 *Charter of Human Rights and Responsibilities Act* 43 of 2006.

2220 Williams 2006 *Melb U L Rev* 880-881.

2221 Williams 2006 *Melb U L Rev* 903.

2222 *Charter of Human Rights and Responsibilities Act* 43 of 2006 s 19.

2223 *Charter of Human Rights and Responsibilities Act* 43 of 2006 s 20.

2224 Du Plessis *Compensation for expropriation* 186.

2225 In six of the eight jurisdictions in Australia the right to the use, flow and control of water is either vested in the Crown, the state or an agency of the state. In the other two jurisdictions a right to take water is conferred on the Crown (or its agency), but is limited to the “right of primary access to water”. Fisher *Water Law* 201. The first enactment dealing comprehensively with the public management of water resources was the New South Wales (NSW) *Water Rights Act* of 1896. Fisher *Water Law* 90. In terms of the act the right to the use and flow and control of the water in all rivers and lakes which flow through the land of two or more occupiers and of water in works vest in the Crown. Fisher states that although certain rights were vested in the Crown, the act said nothing about divesting rights. Fisher *Water Law* 92.

Commonwealth, matter.²²²⁶ The Commonwealth government is responsible only for environmental matters that are of national significance.²²²⁷ Fisher²²²⁸ states that the Commonwealth's role in the management of water resources is to oversee the arrangements put in place by the states to ensure that they are consistent with Australia's legal obligations in terms of its constitution. Another role is to encourage the development of sustainable water resources management by means of policy initiatives and consensual administrative arrangements. According to the *Intergovernmental Agreement on a National Water Initiative* (hereafter referred to as *NWI*), water resources in Australia is vested in state governments that allow other parties to access and use water for a variety of purposes – whether irrigation, industrial use, mining, servicing rural and urban communities, or for amenity values.²²²⁹ The *NWI* also recognises that states retain the vested rights to the use, flow and control of water.²²³⁰ The phrase has been used in Australia for some years.

Pigram²²³¹ explains that Alfred Deakin, the Attorney General of Victoria, in 1880 studied the water law of the American West. When he returned to Australia he emphasised the responsibility of the state to control water resources. By 1881 Victoria had already acquired public rights to riparian land along most streams. Victoria's *Irrigation Act* of 1886 stated that all streams should be public property. The *Irrigation Act* of 1886 and the *Water Act* of 1905 vested the right to the use, the flow and the control of water in watercourses in the Crown. The Californian system of "first in time of beneficial²²³² use, first in right" was not considered an acceptable solution. It was regarded to have developed as a result of a weak or disorganised government, with the courts eventually apportioning water. The resultant cost, delay and uncertainty did not appeal to Deakin. According to Pigram,²²³³ Australia was spared many typically American legal arguments over water use rights

2226 The Commonwealth is the Australian federal government. McKay "Marketisation in freshwater and fisheries management regimes" in Dovers and Wild River (eds) *Managing Australia's environment* 367 states that s 100 of the Australian Constitution was inserted because NSW, Victoria and South Australia feared Commonwealth laws under s 51 may affect their common interest in water for irrigation. S 100 states that the Commonwealth shall not, "by any law or regulation of trade or commerce", restrict the right of a State or its residents to the reasonable use of the waters of rivers for conservation or irrigation. See Fisher *Water Law* 37. Compare para 5.4.1 on the role of the *Commerce Clause* in America.

2227 Productivity Commission *Water Rights Arrangements* xvii

2228 Fisher *Water Law* 62. See Fisher 2000 *Sing J Int'l & Comp L* 36.

2229 National Water Commission 2004 *NWI* para 1. See also s 100 of the Commonwealth of Australia Constitution Act. The fact that water in South Africa is vested in the national government and water in Australia is vested in "governments" does not alter the fact that water does not vest in individuals. This thesis concentrates on principles that have universal value.

2230 National Water Commission 2004 *NWI* para 27.

2231 Pigram *From use to management* 44.

2232 The concept "beneficial use" is sometimes found in Australian water legislation, although it does not play the same role in establishing or ending a water use right as in the West of America. Davis 1968 *Boston College LR* 662 writes that in 1946 New South Wales abandoned its then system of prior appropriation because it was unworkable. The state returned to a nonpriority permit system and adopted beneficial use classifications for various irrigation diversion licenses. Beneficial use was defined as irrigation of improved pasture or higher-value crops. They were preferential use classifications for irrigation, giving greater security to well-established irrigators growing high-value crops.

2233 Pigram *From use to management* 44.

because other Australian states followed the Victorian model where the right to the use, the flow and the control of water in watercourses vested in the Crown.²²³⁴ This model was also followed by the *NWI*.²²³⁵ However, what does the statutory vesting of property involve? In *Yanner v Eaton*²²³⁶ the court held that the “statutory vesting” of property in the Crown by Queensland *Fauna Acts* are nothing more than a fiction in legal shorthand of the importance to the people of a state that the state has the power to preserve and regulate the exploitation of an important resource. Water is similarly an important resource where the “statutory vesting” of property in the Crown is a fiction in legal shorthand of the importance to the people of a state that the state has the power to preserve and regulate the water resources. However, does the statutory vesting of water resources mean that there is a concept of a “public trust” in Australia?

Some argue that early cases prove that the idea of a public trust²²³⁷ was part of Australia’s popular, political and legal culture. Tan²²³⁸ declares that the public trust doctrine as recognised in America has not been specifically applied. Tan²²³⁹ writes that there may be grounds for arguing that a public trust arises over these resources. The public trust has, however, been criticised as archaic and amorphous, and a distinctly American creation with no foundation in the English common law.²²⁴⁰ The criticism centres on four main grounds: *firstly*, that the doctrine is vague and indeterminate; *secondly*, that the statements of Roman law on which it is based, receive more authority than they deserve because they were meant as mere introductory comments, or as normative statements of what the Emperor wished the law to be; *thirdly*, that enactment of environmental legislation has rendered the doctrine obsolete; *fourthly*, that the doctrine results in the overturning of serious legal processes, and conflicts with fundamental legal institutions such as the takings clause.²²⁴¹ The courts may not be the best legal institution to protect environmental flows in water. Courts are ill-suited to be policy makers.²²⁴² Tan²²⁴³ argues that it would be preferable to have a clear legislative expression of public property and provision for its protection in a framework of property rights.

2234 S 7(1) of the *Victoria Water Act* 1989 today states that the Crown has the right to the use, flow and control of all water in a waterway and all groundwater.

2235 National Water Commission 2004 *NWI* para 27.

2236 *Yanner v Eaton* [1999] HCA 53 on 11. Access to the natural resources land and water for hunting and fishing was at stake. See Bennett Moses 2008 *Sydney L Rev* 652-653.

2237 See para 5.4.

2238 Tan “Diving” 5-6.

2239 Tan “Diving” 6 fn23.

2240 Tan “Diving” 6.

2241 Tan “Diving” 6 fn23 *inter alia* quotes Lazarus 1986 71 *Iowa L Rev* 631. See criticism of the public trust doctrine in America in para 5.4.4. Criticism that the public trust doctrine conflicts with the takings clause is not justified. See the discussion of Arnold’s metaphor of property as a web of interests in para 5.9.2.3

2242 Tan “Diving” 7.

2243 “Diving” 7.

Even that stalwart of the English common law and an anchor of the public trust doctrine, the *Magna Carta*,²²⁴⁴ does not have unlimited application. Clark²²⁴⁵ explains that the *Magna Carta* of 1215 was invoked to protect a public right to fish in tidal waters. However, the court in *Harper v Minister for Sea Fisheries*²²⁴⁶ made it clear that the right to fish in tidal waters may be abrogated or regulated by a competent legislature. In *Harper*²²⁴⁷ the High Court of Australia held that a limited natural resource which is otherwise available for exploitation by the public can be said truly to be public property. It does not matter whether or not the Crown has the radical or freehold title to the resource. One may thus conclude that limited natural resources in Australia are recognised and protected as public property, even though there is no mention of a public trust. The meaning of the concept "public property" will be explained after the concept "property,"²²⁴⁸ as found in the Australian property clause, has been discussed below.

6.5 Regulation of property rights

Although Australia does not have a *Bill of Rights*, the Australian Constitution protects property against acquisition without the payment of compensation.²²⁴⁹ Global warming and a predicted water scarcity make it likely that water will have to be reallocated or water rights readjusted in future.²²⁵⁰ Because property rights to water are affected by water reform,²²⁵¹ it is essential to understand the way the regulation of property rights in natural resources, as public property, is viewed in Australia. The law regarding rights in natural resources in particular helps to identify the issues and principles that should be taken into account when planning for the management of natural resources like water. Ideally the rules relating to the regulation of water rights (and the circumstances in which water rights may be lost or diminished) should be known to the public in advance. The Australian property clause will be discussed in general first. General principles regarding just terms, acquisition and statutory property will then be explained. The concept "property" in natural resources and principles regarding the regulation of rights in natural resources and water will thereafter be explained. The concept "water entitlement" and the result of the separation of land and water will thereafter be discussed. Finally, management of the risk of reduction is discussed.

2244 Van der Schyff *Constitutionality of the MPRDA* 108-109 explains that the public trust doctrine was *inter alia* anchored in the *Magna Carta*. See also Sax 1980 *UC Davis L Rev* 185.

2245 2000 *Melb U L Rev* 888.

2246 *Harper v Minister for Sea Fisheries* [1989] HCA 47 in para 10. See discussion in para 6.6.3.

2247 *Harper v Minister for Sea Fisheries* [1989] HCA 47 in para 19.

2248 See para 6.6.1.

2249 Section 51(xxxi) of the Commonwealth of Australia Constitution Act 1900.

2250 See para 6.9.

2251 See para 4.5 and 5.9.

6.5.1 Property clause

Section 51(xxxi) of the Australian Constitution²²⁵² was recognised by Justice Ackermann in the *FNB*²²⁵³ case as the oldest constitutional property guarantee in a written British Commonwealth Constitution. The clause²²⁵⁴ reads that:

51

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

xxxi

the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

It states that when the Australian federal government makes laws with regard to the acquisition of property, the laws must be on “just terms”.²²⁵⁵ Although the property clause is not part of a traditional *Bill of Rights*, it serves that purpose by constraining the power of the federal government.²²⁵⁶ Van der Walt²²⁵⁷ comments that section 51(xxxi) does not contain all the standard provisions usually associated with a property clause. He emphasises that there is no regulation clause in section 51(xxxi).

6.5.2 ‘Just terms’

Du Plessis²²⁵⁸ explains that in terms of the property clause compensation is paid because the government acquired a benefit at the cost of an individual. In Australia “just terms”²²⁵⁹ means “just compensation”. In 1942 the High Court of Australia²²⁶⁰ held that *placitum* xxxi (the Australian property clause) was taken from the *Fifth Amendment* of the American Constitution, which provides that private property shall not be taken for public use without

2252 Commonwealth of Australia Constitution Act 1900.

2253 *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 4 SA 768 (CC) 2002 4 SA 768 (CC) para 79. See Van der Walt *Constitutional Property Clauses* 39.

2254 Commonwealth of Australia Constitution Act 1900.

2255 Clark 2000 *Melb U L Rev* 887 writes that the argument is that the *Magna Carta* is the first step in the claim that the government may not take property without just compensation.

2256 The constitutional guarantee that property cannot be acquired other than on just terms does not apply to the states. State governments are, therefore, free to extinguish or acquire any property right, including a formal estate or proprietary right, from any person within their respective jurisdictions without providing compensation. See Macintosh, Denniss and the Australia Institute *Property rights and the environment* 18; Van der Walt *Constitutional Property Clauses* 43. The guarantee also does not apply to the exceptional power to acquire from the Australian territories or from a person in the territories. *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 19; *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38 See *obiter* remark in *Airservices Australia v Canadian Airlines* [1999] HCA 62 para 8; Van der Walt *Constitutional Property Clauses* 43.

2257 Van der Walt *Constitutional Property Clauses* 40.

2258 *Compensation for expropriation* 200.

2259 S 51(xxxi) does not apply to an agreed acquisition. When property is acquired by negotiation and agreement, it is assumed that the terms are “just terms”.

2260 The judicial power of the Commonwealth is vested in a Federal Supreme Court, called the High Court of Australia. S 71 Australian Constitution.

just compensation.²²⁶¹ The same court in 1994 stated that section 51(xxxi), unlike the *Fifth Amendment*, was not written into the Australian Constitution for the purpose of protecting the subject or citizen, but primarily to ensure that the Commonwealth possessed a power to acquire property compulsorily, particularly from the states!²²⁶²

Terms are “just” only when disputes may be referred to a court. In the *Australian Apple and Pear*²²⁶³ case the Commonwealth acquired apples and pears during the Second World War, not for its own use, but in order that they might be disposed of in such a way as not to glut the local market. Justice Williams held that the terms could only be just if the regulations provided a means of having disputes referred to a court. Except where the assessment is made as a mere matter of calculation prior to the taking, just compensation requires that the determination of the amount must be made by a court. Van der Walt²²⁶⁴ explains that just terms can be established with regard to market value, but need not be equal to it.

Although there is no regulation (otherwise known as deprivation) clause in section 51(xxxi), Van der Walt²²⁶⁵ explains that regulatory takings must comply with two requirements before they are subjected to “just terms”. *Firstly*, the deprivations will have to be connected to some benefit for the state. *Secondly*, the deprivation will have to result from a police power measure that is inappropriate for the purpose or is disproportionate in that it causes more harm than is justified by the public interest served.

6.5.3 ‘Acquisition’

The first requirement before a regulatory taking is subjected to just terms, as stated above, is that it must be connected to some “benefit” by the state. The requirement of a “benefit” follows from the concept “acquisition” in section 51(xxxi), where it is stated that the Parliament shall, subject to the Australian Constitution, have power to make laws for the Commonwealth with respect to the *acquisition* of property on just terms. “Acquisition” implies more than a mere forfeiture of a right; it implies that the state acquires the right or the benefit of the right.²²⁶⁶ In the *Mutual Pools*²²⁶⁷ case the court held that the mere extinguishment by the Commonwealth of a right enjoyed by an owner in relation to his or

2261 *Australian Apple and Pear Marketing Board v Tonking* [1942] HCA 36.

2262 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 17. *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9; *Ex part Lawler and Georgiadis v Australian and Overseas Telecommunications Corporation* were decided on 9 April 1994 and set out in detail some of the principles contained in the property clause. (See discussion in Van der Walt *Constitutional Property Clauses* 39-40 and Du Plessis *Compensation for expropriation* 187.)

2263 *Australian Apple and Pear Marketing Board v Tonking* [1942] HCA 36 on 9.

2264 *Constitutional Property Clauses* 59.

2265 Van der Walt *Constitutional Property Clauses* 55-56.

2266 See *Brian Clarence Bienke, Irene Anne Bienke and Brian Trevor Bienke v the Minister of Primary Industries and Energy; Australian Fisheries Management Authority and Commonwealth of Australia* [1996] FCA 1220 para 58.

2267 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 25.

her property does not amount to an acquisition of property in the absence of an acquisition of a benefit or an interest in property, however slight or insubstantial. Allen²²⁶⁸ explains that an acquisition of property not only occurs when the Commonwealth takes the property, but also occurs when the Commonwealth manages to secure the advantages of the property without acquiring the entire bundle of rights. It is clear from the Australian case law that if the Commonwealth secures the economic power of the property, there has been an acquisition, even if the title were to remain with the original owner.²²⁶⁹

Van der Walt²²⁷⁰ points out that there is no acquisition if a deprivation of property was not effected by a law with respect to the acquisition of property but was effected by an incidental, appropriate and reasonably proportionate side-effect of a law that serves a different purpose and falls under another constitutional head of power.

Van der Walt²²⁷¹ distilled the following principles from the High Court's distinction between deprivations and acquisitions of property in Australia:

6.5.3.1 Not every deprivation an acquisition

Not every deprivation of property leads to an acquisition of property, even if the right was completely extinguished. Where the rights holder is merely prevented from dealing in his property, there is no acquisition of the property by the state. In *Australian Prudential Regulation Authority v Siminton*²²⁷² the Federal Court of Australia held that a freezing order did not cause the Commonwealth to acquire anything. The order prevented the applicant from dealing with certain identified property pending the hearing and determination of a proceeding or until further order of the court. The result was that there was no alteration to the ownership of the property.

6.5.3.2 Nobody acquires property

There are cases where the property is taken without the state or anybody else acquiring it. Van der Walt uses the example of *Mutual Pools* where the state wanted to ensure that a

2268 Allen 2000 *Sydney L Rev* 355 reminds one of *Pennsylvania Coal Co v Mahon* 260 US 393, 415 (1922) where the court held that if a regulation were to go too far, it would be regarded as a taking. See para 5.8.2.3.

2269 In *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 349 the court held that provisions giving the Treasurer the power to replace a bank's directors with his nominees were unconstitutional. The provisions were described as a circuitous device to acquire indirectly the substance of a proprietary interest without providing the required just terms. See Du Plessis *Compensation for expropriation* 188.

2270 *Constitutional Property Clauses* 55.

2271 Van der Walt *Constitutional Property Clauses* 53-54

2272 *Australian Prudential Regulation Authority v Siminton* (No 6) [2007] FCA 79 para 17.

refund²²⁷³ was paid to Y and not to X, although the debt was owed to X, but he had passed it on to Y. The debt was extinguished²²⁷⁴ to make sure the right person was paid.

6.5.3.3 No acquisition without a benefit

A deprivation of property is not an extinguishment of property if the state does not gain a benefit from it. The reduction of shares in a fishery did not lead to an acquisition of property in the *Bienke* case²²⁷⁵ where the appellants submitted that a compulsory fishery restructuring programme (NPF 11) in the Northern Prawn Fishery (NPF) in terms of which all unit holders suffered a proportionate reduction of units, was a device for compulsorily acquiring the appellants' property, without providing for the just terms required by section 51(xxxi) of the Constitution.²²⁷⁶ The court held that the compulsory surrender of units effected by NPF 11 did not result in the Commonwealth, or anybody else, acquiring an identifiable proprietary interest in the NPF. Nor did the Commonwealth (or anybody else) acquire a direct financial benefit commensurate with any interest that was extinguished.²²⁷⁷ An example of a scheme that was more than a mere extinguishment of a right that is inherently susceptible to being extinguished, is provided by the *Elliott*²²⁷⁸ case. The Northern Territory Supreme Court held that there was an acquisition of property where the plaintiffs' taxi licences, (a monopoly right shared by a restricted number) was cancelled and a right to operate a taxi for reward was given to any number of the public upon application and payment of a prescribed fee.²²⁷⁹

6.5.3.4 Benefit received not same as benefit taken

If there was some benefit, what was gained does not have to be the same as that which was lost. The Commonwealth's interests in property can also be enhanced by the sterilisation of somebody's interests. In the case of *Newcrest Mining (WA) Limited v Commonwealth*²²⁸⁰ the court held that when land was included in Kakadu National Park, Newcrest's rights to carry on operations for the recovery of minerals were extinguished.

2273 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 32.

2274 Van der Walt *Constitutional Property Clauses* 54.

2275 *Brian Clarence Bienke, Irene Anne Bienke and Brian Trevor Bienke v the Minister of Primary Industries and Energy; Australian Fisheries Management Authority and Commonwealth of Australia* [1996] FCA 1220, hereafter referred to as *Bienke*. See para 6.6.3.

2276 See *Bienke* [1996] FCA 1220 para 37 and para 59.

2277 *Bienke* [1996] FCA 1220 para 58.

2278 *Elliott v Minister for Transport and Infrastructure Development & Northern Territory of Australia; Perperiadis v Minister for Transport and Infrastructure Development & Northern Territory of Australia; Walters & Walters v Northern Territory of Australia* [2000] NTSC 91.

2279 Compare this to the fact that compensation is payable in terms of s 22 of the South African *National Water Act* 36 of 1998 if a water entitlement had been used, but a water licence has not been awarded. See para 4.5.1.

2280 *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38. *In casu* Newcrest, in terms of its mining leases, had the right against the Commonwealth to mine for, extract and take away minerals from the leased land during the term of the lease. Storey 2006 *ARELJ* 54 states that although the Northern Territory statutory mining lease was not explicitly described as a common law mining lease, the acquisition in Newcrest was distinguished from *Peverill* (see para 6.5.4.3 below and the statutory privilege under a licensing system such as that in the *Bienke* case (see para 6.6.3)).

The Commonwealth's interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests therein because the Commonwealth acquired property from Newcrest. *In casu* section 51 (xxxi) did not apply because the land was in an Australian territory.

6.5.4 Reform, regulation and statutory property

In this section the question to be investigated is whether the regulatory deprivation of statutory property, like rights to use or exploit natural resources, obliges the state to pay compensation to the deprived rights holder. It is characteristic of statutory property that they consist of authorisations conferred by the state to individuals in terms of licences.²²⁸¹

It is important to establish whether compensation should be paid for regulatory deprivations of statutory property. It is likely that water entitlements, that are a form of statutory property, may be reduced by water reform necessitated by water scarcity. It was explained above²²⁸² that where the main purpose of a law is to regulate and not to acquire property, an incidental acquisition of property does not lead to an obligation by the state to pay compensation. The following principles arising from case law on legislation made under other powers are especially relevant to statutory property:

6.5.4.1 Right solely created by statute extinguishable

In the case of state largesse, there is no acquisition of property when a right, which has no basis in the general law and is by nature susceptible to be modified, is modified or extinguished. The High Court of Australia in the *Georgiadis v Australian & Overseas Telecommunications Corporation*²²⁸³ case held that a right that has no existence apart from the statute creating it, is one that is by nature susceptible to be modified or extinguished.

6.5.4.2 Adjusting competing claims not acquiring property

Where a law resolves or adjusts competing claims, obligations or property rights, the law is not a law for the acquisition of property within the meaning of section 51(xxix). The High Court of Australia in the *Mutual Pools*²²⁸⁴ case held that where a law resolves or adjusts competing claims, obligations or property rights, the law under discussion was not a law for the acquisition of property within the meaning of section 51(xxix). The adjustment of competing claims and legislating regulatory schemes are instances of the state's exercise

2281 See para 4.4.6.

2282 See para 6.5.3.

2283 *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] HCA 6 para 13. See Storey 2006 ARELJ 52.

2284 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 23. Van der Walt 2002 *THRHR* 454 states that there was no benefit for the state in *Mutual Pools*.

of police power, according to Van der Walt.²²⁸⁵ The adjustment of competing claims or property rights is of great importance when global warming and growing water scarcity lead to conflict with regard to water.²²⁸⁶ A law that reforms a water permit system can be characterised as a law that adjusts competing property rights in the water resource.

6.5.4.3 Law under another power not acquiring property

An example of a law made under express terms in which a specific power²²⁸⁷ is conferred is the specific power in section 51 (xxxiii) to make laws with respect to the acquisition of state railways on terms arranged between the Commonwealth and the state.²²⁸⁸ A law, which provides for the sequestration of the property of a bankrupt and its vesting in the official receiver, is not a law with respect to the acquisition of property within the property clause.²²⁸⁹ Taxation presupposes the absence of the kind of *quid pro quo* involved in the just terms prescribed by Section 51(xxxi). There was no compensable acquisition of property where the extinguishment of an earlier right to receive payment of a larger amount was an element in a regulatory scheme for the provision of welfare benefits from public funds.²²⁹⁰ An example of a law made under another power is that of *Health Insurance Commission v Peverill*.²²⁹¹ The extinguishment of the earlier right to receive payment of a larger amount was also an element in a regulatory scheme for the provision of welfare benefits²²⁹² from public funds.²²⁹³

6.5.4.4 Compensation where common law rights modified

Rights that are regarded as having been created by statute had no antecedent existence in terms of the common law. On the other hand, where common law rights were modified, the High Court of Australia held in *Smith v ANL Ltd*²²⁹⁴ that the guarantee in section 51(xxxi) is there to protect private property.²²⁹⁵ It prevents the expropriation of the property of Australians without adequate compensation, even where the expropriation is intended

2285 Van der Walt *Constitutional Property Clauses* 44-45.

2286 See para 4.4.6 and Roux "Property" 46-15, as well as para 5.9.

2287 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 31 held that when the Commonwealth compulsorily acquires property by a law of the Parliament in circumstances which make the notion of fair compensation to the transferor irrelevant or incongruous, s 51(xxxi) has no operation. For example, in *Re Director of Public Prosecutions; Ex Parte Lawler* [1994] HCA 10 the lessee of a boat was convicted of an offence under the *Fisheries Management Act* 1991. The magistrate ordered the forfeiture of the *Jay Angela*. Justice McHugh (in para 32) held that when the forfeiture of property is a reasonably proportional consequence of a breach of a law passed under a power conferred by s 51 of the Constitution, no acquisition of property for the purpose of s 51(xxxi) takes place.

2288 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 21.

2289 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 para 22.

2290 *Health Insurance Commission v Peverill* [1994] HCA 8 para 8.

2291 *Health Insurance Commission v Peverill* [1994] HCA 8 para 8.

2292 See Van der Walt *Constitutional Property Clauses* 69 fn 171 for a comparison between the Australian and German approaches to welfare rights. The German property clause is not discussed in this thesis as water scarcity is not as great a threat for the Germans.

2293 *Health Insurance Commission v Peverill* [1994] HCA 8 para 8.

2294 *Smith v ANL* [2000] HCA 58 para 9. See also the discussion of s 51 (xxx) as a source of power and a limitation of that power in Anet "Acquisition of Property" 6.

2295 See Du Plessis *Compensation for expropriation* 188.

to serve the public interest. The circumstances in *Smith v ANL Ltd*²²⁹⁶ were that the *Transitional Provisions Act* replaced common law rights, which had been unlimited in time, with a right to bring an action within six months of 24 June 1993.²²⁹⁷ The court held that the Act brought about an acquisition of property that did not provide just terms. The court held that the right to bring an action without the defendant being in a position to plead a time bar was a significant and essential element of the cause of action itself. The court distinguished *Smith's* case from the *Peverill* case. *Smith* complained of the legislative impairment of his common law rights, but in *Peverill's* case the rights that were impaired were the statutory rights of patients to payment of Medicare Benefits.

In *Australian Capital Territory v Pinter*²²⁹⁸ the *Criminal Injuries Compensation Act 1983* (ACT) purported to extinguish the statutory right of the respondents to have their application for compensation for criminal injury, including a component for pain and suffering, determined under the *Compensation Act* by the court.²²⁹⁹ In the court's opinion, the scheme might have had a discretionary nature, but the rights held by the respondents were neither ephemeral nor prone to ready variation.²³⁰⁰ What distinguished the case was that where the statutory right exists where the common law would provide a cause of action and would hold that a plaintiff was entitled to a fair and reasonable amount to compensate her or him for the injury suffered, the statutory right is far removed in content and durability from mere "statutory entitlements to receive payments from consolidated revenue not based on antecedent proprietary rights recognised by the general law".²³⁰¹

The court distinguished *Peverill* from *Pinter's* case and concluded that the respondents' interests were not outside the protection of the guarantee because their source was in statute or because of any inherent defeasibility of their nature.²³⁰² The amending act that purported to withdraw the power to make an award for pain and suffering led to a direct financial gain to the Territory. The gain could be measured by the reduction of the liability to make payment to the respondents of a component for pain and suffering, and this constitutes an acquisition.²³⁰³ The right of the respondents to have their application determined according to law is definable, identifiable by third parties and stable.²³⁰⁴ The court compared this to common law *choses*²³⁰⁵ in action and stated that the value of the right lies in the respondents' ability in the exercise of the right to invoke the jurisdiction of a

2296 *Smith v ANL* [2000] HCA 58 para 9.

2297 *Smith v ANL* [2000] HCA 58 para 45.

2298 *Australian Capital Territory v Pinter* [2002] FCAFC 186.

2299 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 24.

2300 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 68.

2301 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 69.

2302 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 73.

2303 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 74.

2304 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 81.

2305 A chose in action is essentially a right to sue. It cannot be protected by taking physical possession of anything. Latimer & CCH Ltd *Australian Business Law* 108.

court of law and to prosecute their claims. The fact that a right is not assignable does not mean that it is not a proprietary right.²³⁰⁶

6.5.4.5 Requirements for non-compensable regulatory deprivation

Van der Walt²³⁰⁷ suggests that the following requirements need to be met by a regulatory deprivation:²³⁰⁸

- i. It has to serve a “legitimate public interest”.
- ii. It has to be authorised by another constitutional head of power.
- iii. The regulatory measure must be appropriate and adapted for the police power purpose.
- iv. The deprivation will have to be reasonably proportionate to the purpose served by the police power measure.
- v. It is suggested that a deprivation has to be imposed in terms of a law of general application.

6.5.4.6 Resolving competing visions of property

As in South Africa the question in Australia sometimes is whether property rights should be protected at all costs or whether property rights should sometimes be redistributed. The best choice is not always obvious. This might explain why it is not always easy to reconcile judgments of the High Court in Australia. Competing visions of property are inherent in property law reform. Evans²³⁰⁹ explains that section 51(xxxi) operates in the context of competing visions of the functions of property and the state. On the one hand property is seen as inviolable and on the other hand property is seen as subject to redistribution in the public interest. Evans²³¹⁰ suggests that the first step in reconstructing section 51(xxxi) jurisprudence is to acknowledge those competing visions. The second step is to decide how to resolve conflicts between them. He suggests a compromise because the modern liberal-democratic state requires stability of property for its markets and assumes the legitimacy of the redistribution of property to support (amongst many other things) welfare programmes and environmental regulation. Evans²³¹¹ argues that section 51(xxxi) involves fundamental issues about the proper role of the Australian federal state in distributing and redistributing property. It determines the extent of the Commonwealth’s legislative power to redistribute property directly and without

2306 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 86.

2307 Van der Walt *Constitutional Property Clauses* 48.

2308 Van der Walt *Constitutional Property Clauses* 48.

2309 Evans 2000 *PLR* 32.

2310 Evans 2000 *PLR* 32.

2311 Evans 2000 *PLR* 26.

compensation. Unfortunately these issues rarely figure in the High Court's discussion of section 51(xxxi). He argues that it is unlikely that everybody agrees that just terms are irrelevant, for example, in relation to laws that confiscate the proceeds of crime when that property belongs to a person other than the offender. Evans pleads for the development of rules that attempt to balance the competing visions.²³¹² However reluctant the High Court is, while seeing the section as a constitutional guarantee, to refer to moral and political precepts not within the text and structure of the constitution, it is difficult to see how the court can avoid the questions.²³¹³ The finer points involved in adjusting the competing claims in statutory property crystallise when one studies the approach of the Australian courts to the regulation of rights in natural resources in the next paragraph²³¹⁴ as well as the approach to the concept "water entitlement" in the *National Water Initiative*,²³¹⁵ the result of the removal of the *nexus* between land and water,²³¹⁶ and the approach in the *National Water Initiative*,²³¹⁷ the *Victoria Water Act*²³¹⁸ and the *Commonwealth Water Act 2007*²³¹⁹ towards the risk of a reduction in water entitlements.

6.6 'Property'

The concept "property"²³²⁰ in the Australian property clause has also given rise to litigation, like the concept "acquisition". In this paragraph rights to natural resources will be discussed. They are rights of a particular kind. The question will be discussed whether and to what extent rights to natural resources, like water use rights and rights to exploit a fishery, are property rights. Grafton & Peterson²³²¹ point out that the mobility of fish and the fact that they differ in size and type depending on when and where they are caught, mean that they have parallels with water. The "capture" of the resource often imposes costs on others. The environment is affected by how it is appropriated. Connell, Robbins and Dovers²³²² also stress the many similarities between fish stock management and the management of water resources. Similarities include the need to ensure the sustainability of the resource and the need to avoid over allocation. Fish stock management provides useful lessons for water managers who are trying to use property instruments as incentives to encourage the holders of water entitlements to manage the resource

2312 Evans 2000 *PLR* 33.

2313 Evans 2000 *PLR* 36.

2314 See para 6.6.

2315 See para 6.7.

2316 See para 6.8.

2317 See para 6.9.4.

2318 See para 6.9.6.

2319 See para 6.9.7.

2320 See para 4.3 and para 5.5.

2321 Grafton & Peterson "Water trading" 79.

2322 Connell, Robbins and Dovers "Delivering the NWI" 134 write that social interests that lack economic power may disrupt arrangements from which they are excluded. They have to be included if users want a stable investment environment.

sustainably. It is *inter alia* important that the biophysical condition of the resource, in both the case of a fishery and the case of water, is stable and that its condition is politically acceptable to the community. Water is, after all, a part of the *res omnium communes*.²³²³ The community has a definite interest in the biophysical condition of natural resources because natural resources have two characteristics:²³²⁴ *Firstly*, the maximum amount or stock of the resource is influenced by the impact of geologic events that occurred millennia before man attached value to the resource. *Secondly*, if the amount of the resource changes, humankind has no or limited control over the rate of change. The fact is that all natural resources need to be managed to ensure their sustainability. Water is a natural resource like many others, but it cannot be substituted by alternatives, which makes it different from other natural resources.²³²⁵ Water is needed to sustain life. Water has therefore been called a heritage resource or people's birthright.²³²⁶

In this paragraph, the concept "property" as it relates to rights to use or exploit natural resources, like fisheries, will be discussed. Similarly to rights to fauna, the right to the use, the flow and the control of water in watercourses vest in the Crown. It was explained above²³²⁷ that the "statutory vesting" of property in the Crown by Queensland Fauna Acts was nothing more than a fiction in legal shorthand of the importance to the people of a state that the state has the power to preserve and regulate the exploitation of an important resource. It was argued that water is similarly an important resource where the "statutory vesting" of property in the Crown is a fiction in legal shorthand of the importance to the people of a state that the state has the power to preserve and regulate water.

Storey²³²⁸ writes that property has six attributes, namely, it is definable; identifiable; permanent; connotes a right to use and enjoy, as well as a right to exclude; and is alienable. Lord Wilberforce's definition in the House of Lords in England in *National Provincial Bank Ltd v Ainsworth*²³²⁹ is often used as a yardstick in Australian case law.²³³⁰

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

2323 See para 6.2.

2324 Tarlock *L of Water Rights and Resources* § 3:10.

2325 Hilderling 2004 *International Law* 1.

2326 Thompson 1998 *Ecology LQ* 368.

2327 See para 6.4.

2328 Storey 2006 *ARELJ* 53.

2329 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 para 19. See Bennett Moses 2008 *Sydney L Rev* 647-648; Hepburn 2009 *Sydney L Rev* 239 fn 12 and McKenzie 2009 *Sydney L Rev* 452-453.

2330 See *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69 para 27-30; *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 79; para 83 and para 84; *Tasmanian Seafoods Pty Ltd v MacQueen* (No 2) [2004] TASSC 40 para 47.

6.6.1 Statutory property

As far as land²³³¹ is concerned, "property" in section 51(xxxi) of the *Constitution* is *inter alia* interpreted to include land itself and also proprietary rights in respect of land.²³³² Although the right to use water in Australia is not a riparian right or linked to land, rights to use land are in many ways similar to rights to use water. The right to use is the common denominator. It is the extent of the protection the law is willing to afford the right that is important to determining its existence. For example, a right in land needs to be protected by the law to the extent that it is stable. A right in terms of a licence that can be cancelled at the will of the Minister does not have the required degree of permanence or stability to be an interest in land. In *R v Toohey; Ex parte Meneling Station Pty Ltd*²³³³ the court held that the rights of the holder of a grazing licence created under the Crown Lands Act fell short of the concept of "property" or "proprietary rights" expressed by Lord Wilberforce. It was an obstacle to the required degree of permanence that the Minister was enabled to cancel a licence, without any default on the part of the licensee. It suggested that the licensee had no interest in the land at all. The Minister was able to terminate the right to graze stock, which is also a right to a natural resource. It was beyond the control of the licensee. A right terminable in that manner lacks the degree of permanence of which Lord Wilberforce spoke. The intention of the *Crown Lands Act* and the *Crown Lands Regulations* is that all that should pass to a grazing licensee is a personal right. No right of a proprietary nature was intended to pass to the licensee.²³³⁴ A grazing licence in this case was not a *profit à prendre* or usufruct because of its inherent revocability. *In casu* the right owed its origins to a licence. In this section statutory rights to natural resources are discussed.²³³⁵

Justice Brennan in *Harper v Minister for Sea Fisheries*²³³⁶ held that a statute that prohibits the public from exercising the common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent, confers on them a "privilege analogous to a *profit à prendre* over the property of another". A fee paid to obtain such a privilege is analogous to the price of a *profit à prendre* as it is a charge for

2331 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 12 explain that in Australia the government is the ultimate owner of the land in the sense that it holds 'radical title' and a farmer's interest in the land is held 'of the Crown'. Farmers' interests in land are subject to the government's underlying interests in the land and its rights to regulate how the land is used. This is the "basis of the doctrine of tenure" that underpins Australia's system of land law.

2332 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290. See the discussion of the case in Allen 2000 Sydney L Rev 351; Brennan 2004 Melb U L Rev 41 and Van der Walt *Constitutional Property Clauses* 49.

2333 *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69.

2334 *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69 para 34.

2335 The case is different where the right owes its origin to a usufructuary right. Common law rights to exploit a resource are usufructuary in nature. The concept *profit à prendre* or "usufructuary right" will be discussed in paragraph 6.6.2.

2336 The judgement of the court was delivered by Brennan. See *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 19.

the acquisition of a right akin to property. The court in the *Harper*²³³⁷ case drew a distinction between a fee to make use of a resource and a fee for a licence to do something that would otherwise have been forbidden (like selling liquor). In the latter case there is no resource to which a right of access is obtained by payment of the fee. In the *Harper*²³³⁸ case the court held that a limited natural resource, like a fishery, which is otherwise available for exploitation by the public, could be said truly to be public property, whether or not the Crown has the radical or freehold title to the resource.²³³⁹ In the *Yanner v Eaton*²³⁴⁰ case the court held that *regulating* the way in which rights and interests may be exercised, is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised, presupposes that the right exists. The High Court²³⁴¹ made findings that are very relevant to an understanding of the property concept. *Firstly*, it found that it could be that property does not really exist but is a mere illusion.²³⁴² *Secondly*, the court stated that an extensive frame of reference is created by the notion that "property" consists primarily in control over access.²³⁴³ Much false thinking about property stems from the perception that "property" is a thing or a resource rather than a legally endorsed concentration of power over things and resources.

6.6.2 *Concept profit à prendre*

An aspect of the statutory vesting of natural resources in the Crown that needs to be investigated is what the content of the right of the individual to make use of those resources used to be in terms of Australian common law. The latter makes use of the concept *profit à prendre* which American²³⁴⁴ law also uses. According to the Australian authors Price and Griggs,²³⁴⁵ a *profit à prendre* is "a type of personal right to take something of the land of another". It can be considered an interest in land. It does, however, not necessarily confer exclusive possession, because no possessory interest is granted in the land. The right that is granted is a "right to enter the land and take away part of the soil or its produce". This fits in with the Roman law concept of *usus fructus*.²³⁴⁶

2337 *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 19.

2338 *Harper v Minister for Sea Fisheries* [1989] HCA 47 in para 19.

2339 See para 6.4 and para 6.6.3.

2340 *Yanner v Eaton* [1999] HCA 53 para 37.

2341 *Yanner v Eaton* [1999] HCA 53 on 9. See Gray 1991 *CLJ* 252-307.

2342 *Yanner v Eaton* [1999] HCA 53 on 9.

2343 McKenzie 2009 *Sydney L Rev* 449 asserts that to claim property rights in relation to the water resource is to assert a significant degree of control over the resource.

2344 See the discussion of the *profit à prendre* in America in para 5.5.

2345 *Property Law - In Principle* 294. See Hepburn 2009 *Sydney L Rev* 257-261.

2346 Because rivers do not have fruits, the Roman concept of *usus* is more correct in the case of the use of water. See para 2.3.3 on the classification of water in the *Digest*, as well as the discussions on water as property concept in South Africa in para 4.2.2 and America in para 5.5. The study into the concept *profit à prendre* relating to natural resources in Australia aims to see whether South African law can extrapolate certain principles from the way the Australians developed the concept *usus fructus*. Were *usus fructus* to be inadequate, the way the Australians handle statutory grants would still be relevant.

According to the *Digest* 7.1.1.²³⁴⁷

Usufruct is the right to use and enjoy the things of another without impairing their substance.

Hepburn²³⁴⁸ distinguishes an easement (or a servitude) from a *profit à prendre*. According to her, a *profit* is “essentially a right to take tangible produce from the land itself rather than a right of usage”. It cannot exist unless it directly relates to the character of the land or the flora, fauna or produce of the land. It is not a right to produce on the land, because it is a right to take from the land. In Australia an easement is an additional right that attaches to one piece of land in order to confer a specific privilege or additional benefit over another piece of land.²³⁴⁹ Easements are the same as incorporeal hereditaments, an old Roman term. These are proprietary rights. Easements have been recognised since medieval times. The social developments of the 18th and 19th centuries made the introduction of legal principles for the creation of additional rights over land necessary. An easement confers an enduring and enforceable right on the holder against the rest of the world. A licence is non-proprietary and merely confers permission to enter land. It is not a proprietary right to use the land. A licence may be revoked, where an easement, once properly created, cannot be unilaterally revoked. An easement does not confer a right to possession.²³⁵⁰

The concept of a “servient and a dominant tenement”²³⁵¹ appears from the books of Australian writers.²³⁵² The concept “easement,” however, has also been developed in Victoria by statute in 2005. In cases where property²³⁵³ is transferred from an authority to a licensee in terms of the *Victoria Water Act*²³⁵⁴ and if the licensee were to acquire any right in the nature of an easement:

... that right must be taken to be an easement even though there is no land vested in the licensee which is benefited or capable of being benefited by that right.²³⁵⁵

Similarly, if an authority acquires any right in the nature of an easement, that right must be taken to be an easement even though there is no land vested in the authority that is

2347 Translation edited by Watson.

2348 *Principles of Property Law* 313.

2349 Hepburn *Principles of Property Law* 311.

2350 Hepburn *Principles of Property Law* 313.

2351 This concept is also found in servitudes in South Africa. See De Waal *Vestiging van Grondservitude* 4 and para 2.3.5 for the position in Roman-Dutch law.

2352 See Hepburn *Principles of Property Law* 311 and Price & Griggs *Property Law - In Principle* 296.

2353 In terms of s 115D *Victoria Water Act* 80 of 1989 “property” means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description.

2354 Division 6B *Victoria Water Act* 80 of 1989.

2355 S 115N of Division 6B *Victoria Water Act* 80 of 1989.

capable of being benefited by that right.²³⁵⁶ However, where the right to a natural resource, which used to be a *profit à prendre*, is governed by a statute, the right to use the resource has been modified by the statute, as the next paragraph will show.

6.6.3 *Privilege analogous to a profit à prendre*

In the *Harper v Minister for Sea Fisheries*²³⁵⁷ case the High Court of Australia dealt with fisheries. The court called fisheries a natural resource that is limited. Exhaustion or destruction would follow the uncontrolled exploitation of the resource by the public. Chief Justice Mason and Justices Deane and Gaudron²³⁵⁸ explained in an additional judgement that the general public is now deprived of the right of unfettered exploitation of the abalone fisheries. A right that was in the public domain is converted into the exclusive but controlled preserve of licensees. The right of commercial exploitation of a public resource has been turned into a privilege confined to commercial licensees.²³⁵⁹ In the *Harper*²³⁶⁰ case the court held that the privilege is an entitlement of a new kind. It was created as part of a system to preserve a limited public natural resource in a society that has come to recognise that to fail to protect²³⁶¹ may destroy. To protect the right of everyone to take what he wants may eventually strip the right of all content.²³⁶² McKenzie²³⁶³ argues that the same analysis is applicable in respect of a statutory right to take water.

The case of *Brian Clarence Bienke, Irene Anne Bienke and Brian Trevor Bienke v the Minister of Primary Industries and Energy; Australian Fisheries Management Authority and Commonwealth of Australia* [1996] FCA 1220²³⁶⁴ is authority for the concept of "shares" in a natural resource – units of fishing capacity. The compulsory fishery restructuring programme (NPF 11) in the Northern Prawn Fishery (NPF) had the outcome that all unit holders suffered a proportionate reduction of units.²³⁶⁵ The appellants submitted that it was a device for compulsorily acquiring the appellants' property, without providing for the just terms required by section 51(xxxi) of the Constitution.²³⁶⁶ Section

2356 S 130(3) *Victoria Water Act* 80 of 1989.

2357 *Harper v Minister for Sea Fisheries* [1989] HCA 47.

2358 *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 2.

2359 See Sen, Kaufmann and Geen 2000 <http://oregonstate.edu/dept/iifet/2000/papers/sen.pdf> C2-3.

2360 *Harper v Minister for Sea Fisheries* [1989] HCA 47 para 2.

2361 Compare Lynch 2007 *NYU Env'tl LJ* 312-313.

2362 According to Bates, "Legal Perspectives" 297 modern fisheries management legislation is now going beyond this scheme to create privately tradeable shareholdings in certain fisheries. This is underpinned by a system of strong regulatory management and enforcement.

2363 2009 *Sydney L Rev* 451.

2364 [1996] FCA 1220

2365 *Bienke* [1996] FCA 1220 para 59. According to Grafton & Peterson "Water trading" 79, the Australian fishing industry has experimented with the use of market based instruments. They are defined as share of the allowable catch and are called individual transferable quotas (ITQ's). In relation to water reform, they provide insights into over-allocation, incentives and third party effects. More profitable fishers can acquire more harvesting rights. This leads to the exit of less profitable operators. In the SA context this would mean that traditional fishermen would be forced out of the industry. The total harvest must be set to ensure sustainability and profitability. (Grafton & Peterson "Water trading" 80.)

2366 *Bienke* [1996] FCA 1220 para 37.

7B(1) of the *Fisheries Act* 1952 (Cth) authorised the Minister to determine a plan of management for a fishery in proclaimed waters.²³⁶⁷ That plan included procedures for the issue of units of fishing capacity and also for their surrender. There was a market for units in the fishery, in accordance with legal mechanisms prescribed in the NPF Plan.²³⁶⁸ The appellants' principal argument was that their right to fish was a proprietary right, which had been acquired without compensation as a result of the operation of NPF 11.²³⁶⁹ The fishing boat licence, issued to Mr Bienke Senior in respect of the Deb-Rene-Adele, was the property right. The appellant argued that its right to reap a resource was analogous to a *profit à prendre* or to a cause of action.²³⁷⁰ The court limited the content of the right to reap a resource when it held that a fishing boat licence does not vest in the holder a cause of action under the general law, nor does it create an interest based on antecedent rights recognised by the general law.

In the *Bienke*²³⁷¹ case the court held:

The right is not a common law right, but rather a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation.

In *Bienke* the court held that the effect of this is that the licence is capable of modification or extinguishment without constituting an acquisition of property, if that course is permitted by its terms.²³⁷² The declaration on the face of the licence specified that the licence was subject to the limitations contained therein and to any prohibitions in force from time to time.²³⁷³ The effect of this declaration was that the licence was subject to change in the NPF plan. The plan did not change the terms of the licence. It is of material importance for the state to be able to adjust rights in natural resources in the case of scarcity, even though these rights may be based on common law rights. Although the concept "beneficial use" was not used by the court, the implication is that the state should be able to adjust rights in natural resources to ensure what South Africans would term their continued beneficial use. It could be argued that the principle in the *Mutual Pools*²³⁷⁴ case applies in

²³⁶⁷ *Bienke* [1996] FCA 1220 para 7.

²³⁶⁸ *Bienke* [1996] FCA 1220 para 9.

²³⁶⁹ *Bienke* [1996] FCA 1220 para 38.

²³⁷⁰ *Bienke* [1996] FCA 1220 para 53.

²³⁷¹ *Bienke* [1996] FCA 1220 para 54.

Sen, Kaufmann & Geen 2000 <http://oregonstate.edu/dept/iifet/2000/papers/sen.pdf> 3 state that it is likely that other fishing rights in Individual Transferable Quotas or ITQs, in similar circumstances, would also be considered proprietary in nature, but not equivalent to a common law property right.

²³⁷² Storey 2006 *ARELJ* 56 states that the essence of this class of property is that *firstly*, the form of property replicates a known common law interest (the matter does not suggest a limitation to profits); *secondly*, the subject matter of the right must be unknown to the common law (an exclusive fishery in tidal waters); and *thirdly*, the statute establishing the regime needs to contemplate an ongoing regulatory control over the exercise of the right.

²³⁷³ *Bienke* [1996] FCA 1220 para 48.

²³⁷⁴ *Mutual Pools* [1994] HCA 9 para 23. Van der Walt 2002 *THRHR* 454 states that there was no benefit for the state in *Mutual Pools*.

casu, namely that where a law resolves or adjusts competing claims or property rights, the law under discussion is not a law for the acquisition of property within the meaning of section 51(xxxi).

The court in *Bienke* also held that the compulsory surrender of units brought about by NPF 11 did not result in the Commonwealth, or any other person, acquiring an identifiable proprietary interest in the NPF²³⁷⁵ or a direct financial benefit or gain commensurate with any interest of the appellants that was extinguished or terminated.²³⁷⁶ In the *Bienke* case the court relied on *Mutual Pools and Staff Pty Ltd v The Commonwealth*,²³⁷⁷ where it was stated that the mere extinguishment by the Commonwealth of a right enjoyed by an owner in relation to his or her property does not amount to an acquisition of property in the absence of an acquisition of a benefit or an interest in property. In particular, the complete extinguishment of contractual rights does not amount to an acquisition. The result is that even if water rights were property, a change in the plan of a statute does not necessarily mean that it would be acquired as a result of a regulatory deprivation.

6.6.4 Change in government policy

It is not only when the law changes for objective reasons, but when it changes for political reasons that the right of someone, who holds a right in a fishery, may likely be affected. *South Australian River Fishery Association & Warrick v State of South Australia*²³⁷⁸ is a South Australian Supreme Court case in which government policy was changed as a result of political coalition forming. It resulted in making a fishery economically unviable. A licensing system was introduced in 1997 as part of an agreement made between the government and the fishing industry (via the plaintiff). The court *a quo* reiterated that the plaintiff held a statutory licence coupled with an interest in the reach is a right (analogous to that which under the general law is called a *profit à prendre*) to capture and take away fish for sale. These licences were subject to conditions.²³⁷⁹ In February 2002 the incoming government had to enter into a political compact before it could form a government. It committed itself thereby to banning the use of gill nets immediately in the Murray Riverine corridor²³⁸⁰ and to phasing out the commercial fishery of native species in the river within 12 months.²³⁸¹ What it did was in effect to ban uses of the river that in South African terms

2375 The court relied on *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151,162-163. See Brennan 2004 *Melb U L Rev* 48-49 and 71.

2376 *Bienke* [1996] FCA 1220 para 58.

2377 *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9 at 172-173.

2378 *South Australian River Fishery Association & Warrick v State of South Australia* [2003] SASC 38 para 20.

2379 *South Australian River Fishery Association & Warrick v State of South Australia* [2003] SASC 38 para 16.

2380 Draper 2009 *N Geog Mag* 55 explains that at *The Coorong*, at the Murray River's mouth, there is not a single silver perch or Murray cod or bony bream to be caught because of the salty water that was caused by the river having been brought to a virtual standstill. Over allocation of irrigation water and drought have brought this about.

2381 *South Australian River Fishery Association & Warrick v State of South Australia* [2003] SASC 38 para 20.

were not regarded as beneficial anymore. The plaintiff, who was a fisher in the River Murray commercial fishery called in question the validity of variations to the regulations. They rendered the fishery economically unviable and they have been introduced without reasonable notice. They had the effect of frustrating the common intention of the government and the industry when the licences were granted by regulation in 1997. The plaintiff complained that the licences were being devalued.²³⁸² The court held that legislation (in the absence of a clear statement to the contrary) “is presumed not to authorise the alienation or restriction of vested proprietary interests without adequate compensation”.²³⁸³

However, in the appeal, *South Australian River Fishery Assoc & Warrick v State of South Australia*²³⁸⁴ Justices Doyle, Gray and Besanko held that the question of policy, whether the commercial taking of Murray cod and callop could safely continue or not, was not for the courts to decide.²³⁸⁵ Warrick's rights are to be found in the Act and in the regulations. Warrick held a renewable licence. The licence was transferable and gave him the exclusive right to exploit his reach or reaches for commercial purposes. His rights were subject to the powers conferred on the director of fisheries by the Act and other statutory provisions.²³⁸⁶ The court did not dispute that the licence and associated rights may be regarded as a valuable form of property.²³⁸⁷ It, however, held that there was no basis for a conclusion that the licences were to be of indefinite duration or that the rights of licence holders would be permanent.²³⁸⁸ Reliance on the expenditure by licensees might have the potential to make many licensing schemes unalterable to the detriment of licence holders or alterable only after a substantial period of notice has elapsed.²³⁸⁹ The arrangement of 1997 was not a transaction between individuals under the law of contract and the law of property.²³⁹⁰ It was an arrangement with a Minister of the government. It involved the Minister deciding to exercise the available statutory powers²³⁹¹ and promoting a particular amendment to the regulations. It is implicit that the policies of the government may change, and that the relevant statutory powers should remain available to be

2382 *South Australian River Fishery Association & Warrick v State of South Australia* [2003] SASC 38 para 4.

2383 *South Australian River Fishery Association & Warrick v State of South Australia* [2003] SASC 38 para 5.

2384 *South Australian River Fishery Association & Warrick v State of South Australia* [2003] SASC 174 an appeal to the full court of the Supreme Court of South Australia, hereafter called Warrick Appeal.

2385 *Warrick Appeal* [2003] SASC 174 para 59. Doyle wrote the opinion of the court. Compare with the section on the separation of powers in South Africa in para 3.5.

2386 *Warrick Appeal* [2003] SASC 174 para 74.

2387 *Warrick Appeal* [2003] SASC 174 para 75.

2388 *Warrick Appeal* [2003] SASC 174 para 82. See the discussion of *Duncan v Minister of Environmental Affairs and Tourism* [2009] ZASCA 168 para 17 in para 4.4.6.

2389 *Warrick Appeal* [2003] SASC 174 para 89.

2390 *Warrick Appeal* [2003] SASC 174 para 90.

2391 See para 4.3.1.

exercised.²³⁹² Statutory powers can be exercised to the disadvantage of affected individuals, even though the exercise of power represents a distinct change of policy.²³⁹³ A person, who purchases a licence granted in terms of a statute and delegated legislation, is likely to hope and expect that the licensing scheme will not be altered to his/her disadvantage. The fact that the person spent money as a result of the hope, cannot limit the power to alter the statutory scheme.²³⁹⁴ There was no constitutional obligation on the state government to provide just terms for the acquisition of property.²³⁹⁵ McKenzie²³⁹⁶ writes that rights in relation to resources can amount to a right of property, despite the existence of "regulatory machinery" that may limit the exercise of the rights and its liability to defeasance. Whether a statutory right is property will depend on the nature of the rights under the legislation.

6.6.5 *Need for property rights in natural resources*

Harris²³⁹⁷ explains that from an economic perspective the creation of property rights in natural resources prevents overuse of resources or the tragedy of the commons. This tragedy occurs when no one owns a resource. Competition²³⁹⁸ is characterised by a race for resources, as users act to exploit as much of the good as possible before others do. Collective action when people band together to prevent over use can prevent the tragedy.²³⁹⁹

Harris²⁴⁰⁰ describes property rights in economic terms as social or legal institutions that provide an individual with authority over a particular asset allowing him exclusive access to the stream of rents created by ownership as well as the right to exclude others from accessing these rents. Defined and defensible property rights are the basic requirements for markets to develop. The creation of property rights and rules of use can ensure efficient levels of exploitation of natural resources. A resource can be propertised only if it is *excludable*.²⁴⁰¹ A resource is *excludable* only if a legal person can exercise regulatory control over the access of strangers to the benefits inherent in the resource. In this notion there is a hidden structure of rules.²⁴⁰² A resource may be non-excludable for any or all of

2392 Draper 2009 *N Geog Mag* 55 writes that drought has led to the disappearance of black swan eggs, freshwater mussels and other sacred totems that are vital to the Ngarrindjeri' Aboriginal people's spiritual and physical nourishment.

2393 *Warrick Appeal* [2003] SASC 174 para 92. See also *Altamura v Director of Fisheries Policy, South Australia* [2003] SASC 277 in para 36 where it was held that it could not be argued that the *Fisheries Act* of 1982 is a special act that authorises the acquisition of land and to which the *Land Acquisition Act* applies (in para 38).

2394 *Warrick Appeal* [2003] SASC 174 para 94.

2395 *Warrick Appeal* [2003] SASC 174 para 123.

2396 2009 *Sydney L Rev* 451.

2397 Harris "State Administration" 4.

2398 See para 4.4.2.5.

2399 Harris "State Administration" 4.

2400 Harris "State Administration" 1-2.

2401 Gray 1991 *CLJ* 268. See also Weimer and Vining *Policy Analysis* 73.

2402 Gray 1991 *CLJ* 269.

three types of reason - physical, legal and moral. A resource cannot be “propertised” if, on any of these grounds, it is not excludable.²⁴⁰³ When setting the moral limits of property, the courts in effect recognise that there is some serial ranking of legally protected values and interests.²⁴⁰⁴ Claims of property may sometimes be overridden by more highly rated social goals. The public interest determines which uses of water, for example, are protected and which are not. The goals to which property defers often relate to fundamental human freedoms. Moral non-excludables are essentially concerned with the furtherance of constructive interaction, purposive dialogue and decent (or “moral”) communal living. Economists have argued that one is unable to allocate property rights for many natural resources because these goods cannot be broken up into units that can be bought and sold.²⁴⁰⁵ Water is a natural resource that has been subject to this argument. Economists claimed that water is an impure public good and that this is the reason why property rights cannot be allocated to it. It is rivalrous,²⁴⁰⁶ but non-excludable, thereby preventing the courts from enforcing exclusivity of ownership.²⁴⁰⁷

Harris²⁴⁰⁸ explains that property rights are evolutionary in nature. They can be defined, reorganised, or redistributed. Definition occurs when property rights are absent. Reorganisation and redistribution will occur when rights already exist. The definition, reorganisation and redistribution of property rights are determined by the increasing value of a good that encourages users to create property rights, reorganise existing rights or lobby for redistribution as entitlements become more valuable. Goods become more valuable as scarcity increases. Reorganisation and redistribution are determined by the increasing value of water. In creating a property right to increasingly scarce goods, rights holders are able to exclude those who are not rights holders from use and extract “rents” associated with a property right in a unique asset. Entitlements allow exclusion of others from an asset.²⁴⁰⁹ There is a correlated duty or responsibility on the part of others not to use the asset. It is backed up by the possibility of “coerced restraint” by civil courts. An entitlement facilitates the security of resource access that individuals and businesses need to invest and create income in the economy.²⁴¹⁰ Tan²⁴¹¹ is of the opinion that the absence of rights simply signals that scarcity has not yet become an issue. The mainly

2403 See Gray 1991 *CLJ* 274.

2404 Gray 1991 *CLJ* 281-283.

2405 Harris “State Administration” 8.

2406 A good is considered either *rivalrous* (rival) or *nonrival*. Rival goods are goods whose consumption by one consumer prevents simultaneous consumption by other consumers. Weimer and Vining *Policy Analysis* 72. Television is an example of a nonrival good: when a consumer turns on a set, this doesn't prevent the TV in another consumer's house from working. Wikipedia 2008 www.wikipedia.com.

2407 Harris “State Administration” 8.

2408 Harris “State Administration” 4.

2409 Coggan, Whitten & Abel “Accounting” 8.

2410 Coggan, Whitten & Abel “Accounting” 8.

2411 Tan “Diving” 7.

economic theories explained in this paragraph have influenced the direction the statutory water entitlement is taking. Lately the concept "water entitlement" as a tradeable unit has been analysed into the smallest of its constituent parts by Australian government reports and economists. It is discussed in paragraph 6.7, but first background is given on whether a right to use water is property.

6.6.6 *Are rights to use water rights in property?*

There were instances where water use rights were regarded as property, for example, they were property for the purposes of the payment of stamp duty. In *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue*²⁴¹² the Supreme Court of Victoria in the context of pre-reform water rights in Victoria considered whether the rights conferred by water licences under the Victoria *Water Act* amounted to a right of property for the purposes of the payment of stamp duty. The court held that they were a right of property, stating that the rights granted to a licence holder displayed the *indicia* of property as they had value, they could be renewed and transferred (although only with approval), they were well defined, and they had a degree of stability. McKenzie²⁴¹³ points out that the case demonstrates that statutory water rights can amount to a right of property. It is notable that pre-reform, less robust water rights were at issue. This case does not address the question whether regulatory reform would lead to an acquisition by government or whether compensation would be payable for such an acquisition. McKenzie²⁴¹⁴ explains that:

Looking at all the characteristics together, there is probably enough to suggest that the water rights under access licences do amount to rights of property. However, depending on the context and the type of access licence, it would not be such a surprise if a court found otherwise.

The remark can be explained by reference to the fact that a law that adjusts a right - such as a statutory water use right, that is inherently susceptible of variation, leads to a reduction in entitlement and is retrospective - is not a law with respect to the acquisition of property.²⁴¹⁵ It has to be said that water use rights are inherently susceptible to variation as not only the quantity of the resource is susceptible to change, but so is the number of users.

2412 *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue* (2001) 48 ATR 498 para 28.

2413 2009 *Sydney L Rev* 451.

2414 McKenzie 2009 *Sydney L Rev* 463. See para 6.7.4 on the elements a water entitlement should have.

2415 *Health Insurance Commission v Peverill* [1994] HCA 8 para 10.

The application of the *obiter* remark in *Commonwealth v WMC Resources Ltd*²⁴¹⁶ might provide a wise solution. The court held that where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition when it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject.²⁴¹⁷

Rights arising from the common law are afforded more protection by Australian courts than rights created by statute.²⁴¹⁸ If water rights were to be regarded to be similar to common law rights, the acquisition of the water rights might bring about an acquisition of property. This would be constitutional if there were provision for the payment of compensation. On the other hand, if water rights were to be regarded as created by statute, they might be liable to be amended and no compensation would be payable. However, one of the distinctions between welfare rights, which are easily adjustable by the state, and water rights, is that water rights can be quite substantial. "Welfare benefits" are individually small in size.²⁴¹⁹ Bates²⁴²⁰ explains that licensees are apt to regard their entitlements under a statutory licence as in the nature of property rights, even though in law they are more in the nature of personal arrangements. For example, a person with a licence to take water might agitate to be able to sell the entitlement to a neighbour. In the past, regulators have allowed the entitlements to mature into *de facto* property rights, with consequent claims for compensation for modification or removal. This led to regulators effectively losing control of the resource. The answer to the question whether water use rights are property rights now that the water law system has been reformed by agreement, will become clear when the concept "water entitlement" is discussed next. The risk of a reduction in water entitlements, the *Victoria Water Act*²⁴²¹ and the *Australian Water Act* 2007 are discussed thereafter. The question whether compensation is payable for the regulatory deprivation of water entitlements will only be answered in the conclusion to this chapter.

2416 *Commonwealth v WMC Resources Ltd* [1998] HCA 8 para 17. The court in *Commonwealth v WMC Resources Ltd* [1998] HCA 8 para 24 held that *in casu* the statutory extinguishment of an interest in a permit is not an acquisition of property by the Commonwealth. The Commonwealth had no reciprocal duty in terms of the interest and acquired no benefit by the modification or extinguishment. The case turned on the fact that although the Commonwealth had sovereignty, it did not have property in the continental shelf at common law (see para 23).

2417 *Commonwealth v WMC Resources Ltd* [1998] HCA 8 para 17.

2418 See para 6.5.4.4.

2419 *Australian Capital Territory v Pinter* [2002] FCAFC 186 para 71.

2420 "Legal perspectives" 280.

2421 *Victoria Water Act* 80 of 1989.

6.7 The concept "water entitlement"

6.7.1 Framework

Although it is not clear from case law whether or when a regulatory taking of a water right would be compensable, Australian Commonwealth and state governments are attempting to tackle the problem of climate change within a framework agreement. The importance of Australia for the study of water reform is that it has concluded an *Intergovernmental Agreement on a National Water Initiative (NWI)*. It is Australia's blueprint for national water reform.²⁴²² When the Council of Australian Governments (hereafter referred to as COAG) in 1994 agreed to reform the water industry, water use was inefficient; river systems were seriously degraded; and a better balance in water resource use was required.²⁴²³ The COAG endorsed a strategic framework as its water resource policy. This involved the clarification of property rights;²⁴²⁴ the allocation of water to the environment; the adoption of trading arrangements in water; institutional reform, and public consultation and participation.²⁴²⁵ The state members of the COAG undertook to implement comprehensive systems of water allocations or entitlements that were also backed by the separation of water property rights from land title.²⁴²⁶ It appears from the above that water use rights in Australia are regarded to be property rights.

Australians have recognised that water is a social as well as an economic good. The COAG decided that water should be used to maximise its contribution to national income (economic good) and welfare (social good), within the social, physical and ecological constraints of catchments.²⁴²⁷ The maximisation of the water resource's contribution to national income and welfare is nothing but the promotion of the more beneficial use of the water resources. The COAG also decided that where it is not already the case, trading arrangements²⁴²⁸ in water allocations or entitlements should be instituted once the entitlement arrangements have been settled.²⁴²⁹ This should have occurred by no later than 1998. In Australia there must be a clear specification of entitlements in terms of ownership, volume, reliability, transferability and quality. Where they have not already

2422 The NWI agreement was signed by all governments at the 25 June 2004 COAG meeting (with the exception of Tasmania who signed the Agreement on 3 June 2005 and Western Australia who signed the Agreement on 6 April 2006). National Water Commission 2008 *Communiqué*.

2423 Tan "Diving" 1.

2424 McKenzie 2009 *Sydney L Rev* 444 explains that there exists tension between property rights and the flexibility required for adaptive management.

2425 COAG 1994 *Communiqué*. See also McKay "Marketisation" 372.

2426 COAG 1994 *Communiqué*.

2427 COAG 1994 *Water Resource Policy* para 5(a).

2428 See Chapter 7.

2429 COAG 1994 *Water Resource Policy* para 5(b).

done so, states would give priority to formally determining allocations or entitlements to water, including allocations for the environment as a legitimate user of water.²⁴³⁰

Although the terms allocations and entitlements to water have been used loosely above, these terms have a certain technical meaning that will be discussed in detail below. Keep in mind that in many instances economists have conceptualised the term “water entitlement” for purposes of water trading. It is important for a government to be aware of the rights and obligations, characteristics and elements flowing from the term water entitlement when it wishes to regulate water trading.²⁴³¹

6.7.2 *Rights and obligations*

Fisher²⁴³² is of the opinion that the structure of a water right has changed to include a right in the nature of an interest in a water resource.²⁴³³ A right to take, extract, use or receive water may be linked to this right. From the definition of water access entitlement in the *National Water Initiative*²⁴³⁴ as a perpetual or ongoing entitlement to exclusive access to a share of water in a specified consumptive pool as defined in a water plan, Woolston²⁴³⁵ comes to the conclusion that water entitlements confer a number of rights and obligations: The “entitlement” is the long-term interest²⁴³⁶ (share) in a varying stream of periodic allocations.²⁴³⁷ The “allocation” is a unit of opportunity (usually a volume or quantity of water) as distributed periodically.²⁴³⁸ The actual volume of water may vary year by year depending on water availability. “Delivery” is the right to have an allocation of water delivered to a certain off-take location or obtain water from a particular location.²⁴³⁹ “Use” is the permission to use allocations with specified conditions²⁴⁴⁰ and obligations to third parties.²⁴⁴¹ “Transfer” is the right to be able to transfer all or part of the entitlement or

2430 See also Fisher *Water Law* 50-51. McKay “Marketisation” 374 explains that this does not always play out the way intended. Most of the water in South Australia had been sold upstream, which caused reduced flows and higher salinity levels lower in the river. Together with the fact that only 30% of growers have irrigation and drainage management plans, the situation is an example of regulatory failure.

2431 See para 6.6.6 for a discussion of the question whether water entitlements are property.

2432 “Innovative legal doctrine” 116.

2433 See para 2.3.3; para 2.6.1; para 4.2.2 and para 4.4.2.1; para 5.5 and para 6.6.3.

2434 National Water Commission 2004 *NWI* 6 para 28.

2435 Woolston “Registration” 7. Fisher “Innovative legal doctrine” 119 writes that in terms of the 2005 arrangements in Victoria the regulatory instruments will consist of a water share, a water allocation and a water use licence or water use registration.

2436 For a comparison of the components of the interest in a water resource in a number of jurisdictions, see Productivity Commission *Water Rights Arrangements* 52-53.

2437 Woolston “Registration” 7. Young & McColl *Robust Separation* 22 write that the interest in the stream of periodic allocations should be defined as a proportional share of the “net” opportunity in the same manner that companies define ownership in their equity. One should trade only the interest. See Fisher *Implementing the National Water Initiative* 4-5.

2438 Woolston “Registration” 7. Young & McColl *Robust Separation* 22 write that “periodic distributions of allocations” are similar to a stream of dividends and should be managed using transparent double accounting systems like those used by banks.

2439 Woolston “Registration” 7.

2440 “Obligations and conditions pertaining to use” should be managed in a system that resembles the current licence system. Conditions should be written more like development approvals. Young & McColl *Robust Separation* 22.

2441 Woolston “Registration” 7.

allocation.²⁴⁴² "Obligations" are the responsibilities associated with the holding of an entitlement.²⁴⁴³

Fisher²⁴⁴⁴ is of the opinion that the allocation and use licence are by implication transferable, but not fully tradeable. Trading requires a market, transferring does not. He expects that water access entitlements should be fully tradeable in a market, while water allocations and use conditions should be transferable in terms of prescribed rules or by the grant of an approval. The advantage of a separated system is that each component can be managed independently without consideration of what is happening to the other component.

6.7.3 *Fundamental characteristics*

Young and McColl²⁴⁴⁵ adapted a list of fundamental characteristics of individual transferable quotas (ITCs) in rights-based fisheries management to propose characteristics for water entitlements. They are as follows:

Universality – The share entitlement is long-term, non-extinguishable and would remain even if no allocations are made for a number of years. Allocations, when made, are provided for a specified period and are extinguished at the end of that period. The use licence includes conditions of use and obligations to third parties.

Flexibility – The share entitlement provides for a pro-rata share of a variable resource. Allocations are in proportion to the number of shares held. Use licence conditions can be varied via a management plan. Permission to use water is similar in style to a development approval. Risks are assigned and responsibility specified. For those risks assigned to the government, compensation is payable and a process for redress identified.²⁴⁴⁶

Exclusivity – The holder has exclusive access to the benefits of the use of the resource either directly or indirectly by sale to others. The use licence does not guarantee the right to harm others. The system is designed to allow the creation of shares and allocations for salinity emissions and channel capacity.²⁴⁴⁷

2442 Woolston "Registration" 7.

2443 Woolston "Registration" 7.

2444 Fisher *Implementing the NWI* 3 and 12.

2445 The list of fundamental characteristics in relation to individual transferable quotas in rights-based fisheries management has *inter alia* been adapted from papers about water rights by the Productivity Commission and the National Farmers Federation. Young and McColl *Robust Separation* 41. Compare the Productivity Commission's ideal attributes for a water right in *Water Rights Arrangements* xxiv.

2446 Scott & Coustalin 1995 *Nat Resources J* 831 explain that the flexibility of the individual right in a particular system of water law refers to the extent to which the holder may change the mode or purpose of water use without forfeiting the right.

2447 Young and McColl *Robust Separation* 42.

*Quality of title*²⁴⁴⁸ – Interests are defined on a register. Mortgages can be registered. It is impossible to transfer the interest without first clearing all registered interests. Allocations are managed via a bank-like accounting system. Formal settlement procedures are used. Brokers are licensed.

Transferability – Both share entitlements and periodic allocations are fully tradeable. Exchange rates are pre-specified. No trade can be “undone”. Internet-based trading of allocations is possible. Cheque-like transactions are possible.²⁴⁴⁹ Scott and Coustalin²⁴⁵⁰ explain that transferability has two meanings. It can mean the rights of the holder of an interest in water to grant away some or all entitlements to use, divert, receive and sell water. This may be measured by the potential number of parties eligible to acquire such a right. The same word can refer to rights to transfer water physically away from its natural course, perhaps into another basin.

Divisibility – Periodic allocations can be sold in whole or in part down to the smallest unit of allocation in the register. A single share can be sold.²⁴⁵¹

6.7.4 Elements of entitlements, allocations and use licences

The water use right can be seen as consisting of three elements from which legal consequences flow, namely the entitlement, the allocation and the use licence.

6.7.4.1 Entitlement

The Australian *NWI*²⁴⁵² states that water access entitlements will, *firstly*, specify the essential characteristics of the water product; *secondly*, be exclusive, *thirdly*, be able to be traded, given, bequeathed or leased; *fourthly*, be able to be subdivided or amalgamated, *fifthly* be mortgageable (and in this respect have similar status as rights in land when used as collateral for accessing finance)²⁴⁵³ *sixthly*, be enforceable and enforced; and *finally*, be recorded in publicly accessible reliable water registers that foster public confidence and state unambiguously who owns the entitlement, and the nature of any encumbrances on

2448 Scott & Coustalin 1995 *Nat Resources J* 832 state that *quality of title* measures the ease of establishing rights for purposes of enforcing the other characteristics. Governmental systems of water rights can provide a quality of title better than or similar to that of traditional systems, particularly when rights are regularly monitored by a dedicated bureau. They unfortunately may be instruments of unpredictable government water-policy changes that can upset and erode the “quality” of individual licenses and permits.

2449 Fisher *Implementing the NWI* 27 states that it appears that the *NWI* makes a distinction between transferable and non-transferable water access entitlements, but not in so many words.

2450 1995 *Nat Resources J* 831.

2451 Scott & Coustalin 1995 *Nat Resources J* 831 state that the divisibility of a water system's rights can be measured by the individual's freedom to break an interest into its component rights. One of the problems of the riparian system is its excessive divisibility: when riparian land is subdivided, new water rights are automatically created. (See *Hexvallei Besproeiingsraad v Geldenhuys* [2008] ZASCA 69 para 7.) The amount of divisibility in a system governs how automatically it adjusts to new economic and social circumstances. The divisibility of a right can increase or reduce the exclusivity of the other users' rights. Divisibility may change the available flow through the numbers of users of the right.

2452 National Water Commission 2004 *NWI* 6 para 31.

2453 See discussion of collateral in para 7.3.3.

it.²⁴⁵⁴ The holder of a water access entitlement holds a share in the water resource created in accordance with the relevant water plan.²⁴⁵⁵ The Australian *Water Act* 2007 (dealing with the Murray Darling Basin) defines water access entitlement to mean a perpetual or ongoing entitlement, by or under a law of a state, to exclusive “access to a share of the water resources of a water resource plan area”.²⁴⁵⁶ Water access entitlements will only be able to be discretionally cancelled where the responsibilities and obligations of the entitlement holder have clearly been breached.²⁴⁵⁷

a) Sleeper and dozer rights

A contentious matter in the initial allocation of water rights has been the case of offering the new water entitlements to current holders of so called “sleeper” (never used) and “dozer” (sometimes used) rights.²⁴⁵⁸ These are cases where the land had a water right, but the right to use water had not been exercised, or only infrequently, in recent years.²⁴⁵⁹ McKay²⁴⁶⁰ stressed its negative environmental effects. The result is that allocations need to be reduced and existing irrigators need to buy unused water rights from their neighbours.

b) Duration

Perpetual (or long-term) rights improve the certainty of users’ benefits over time. Lesser terms may create disincentives for efficient investment in activities in which water is used, depending on the renewal process. Short-term water rights allow for adaptive management of water for environmental purposes by the re-allocation of rights.²⁴⁶¹

6.7.4.2 Allocations

Fisher²⁴⁶² suggests a description of a water allocation associated with a water access entitlement that states the water access entitlement with which it is associated; the quantity of water comprising the share of the water resource created by the water access entitlement, as well as the period of time during which the person or institution exercising the rights associated with the water access entitlement has access to this quantity of water. It must also state whether this quantity of water may be used for either

2454 See discussion of registries in para 7.3.

2455 Fisher *Implementing the NWI* 14.

2456 S 4 of the *Water Act* 2007, also see National Water Commission 2004 *NWI* para 28.

2457 National Water Commission 2004 *NWI* 6 para 32.

2458 Freebairn “Principles” 10.

2459 Conningarth Economists *Facilitation of trade* 90 state that the activation of sleeper entitlements leads to adverse effects on all other water users when they were activated in areas already under stress.

2460 McKay 2003 “*Marketisation*” 373. See also Grafton & Peterson “Water trading” 80.

2461 Productivity Commission *Water Rights Arrangements* xxvi.

2462 *Implementing the NWI* 15.

consumptive or environmental purposes. This must be complemented by a “general duty of compliance” on the part of the rights holder.

In an environment of scarcity where future allocations are uncertain, interests should be expressed in proportional and not absolute terms. Transaction costs are lower if periodic allocations (dividends) are managed totally separately from trading in shares. Shares define interests in the receipt of future allocations, not allocations made in the recent past.²⁴⁶³ Shares fluctuate annually in response to water conditions and all shareholders benefit or lose each year in a similar fashion. Allocations should be managed like bank accounts with debits, credits and balances. An allocation may be traded. It may also be used, but only in a way consistent with the conditions and third party obligations on a use licence. When used or at the end of the period, the unit of allocation is extinguished.²⁴⁶⁴

The initial allocation of property rights (for water and for delivery) is a contentious political issue everywhere. A competitive market is supposed to reallocate well defined property rights to achieve an efficient allocation regardless of the initial pattern of rights allocation, but the initial allocation will affect the distribution of wealth.²⁴⁶⁵ Although periodic allocations vary over time, an important question is that of whether the interest to be traded is expressed as “gross” (volume pumped) or “net” (volume consumed).²⁴⁶⁶ The difference between gross and net reflects the effects that water use efficiency has on the volume of water returned to the system for use by others.

Two approaches are possible, either the sum of gross entitlements should never be allowed to exceed the cap or, alternatively, only that which has been consumed may be traded. Real gains from trade occur only when there is improvement in net use.²⁴⁶⁷ If trading in gross entitlements is allowed in a fully allocated system where technical water use efficiency is low, the system will become over-allocated as irrigators improve efficiency. This situation can be addressed by across the board proportional reductions in periodic allocations per share or defining and managing the interest and allocations as “net”. On the other hand, there are systems where “gross” is close to “net”, with little or no return flow. A reduction in return flows can also cause an increase in river salinity (dilution effect). One should manage salinity and other water quality issues separately from the management of volume.

2463 Young & McColl *Robust Separation* 23.

2464 Young & McColl *Robust Separation* 8.

2465 Freebairn “Principles” 10.

2466 Young & McColl *Robust Separation* 8.

2467 Young & McColl *Robust Separation* 9.

6.7.4.3 Use licence

Fisher²⁴⁶⁸ suggests that a water use approval (associated with a water allocation) should state the associated water allocation, the location of the infrastructure authorised to be constructed and used by the approval; and the purpose for which the quantity of water stated in the water allocation may be used. Although the concept "beneficial use" does not play a role in Australian water law establishing or forfeiting water use rights, the principle is that water should not be wasted, misused or excessively consumed. The *Victoria Water Act*,²⁴⁶⁹ for example, states that a person who receives a supply of water must not, after having received a warning notice, deliberately cause or negligently allow the water to be wasted, misused or excessively consumed.

Young and McColl²⁴⁷⁰ stress that the holding of entitlements (shares) or even the holding of a distributed allocation as such provides no permission to use the resource. To use an allocated resource, the use licence is required. A use licence would state conditions of use and obligations to third parties. The total volume of water that may be applied, would be stated as an upper limit.²⁴⁷¹ Regulatory approvals enabling water use at a particular site for a particular purpose will be specified separately to the water access entitlement.²⁴⁷² There is a need for water use approvals to be variable. The reason is that the water resource itself may change and the impacts of its use may change. The relevant public agency should review the circumstances of water use approvals on an ongoing basis. The procedures for variation of a water use approval should be the same as for the granting of a water use approval. The criteria should be the same.²⁴⁷³ The conditions of use should reflect the requirements of the management plan. They may include pumping limits and drainage disposal requirements, possibly certain restrictions on practice, and reporting requirements.²⁴⁷⁴ In Victoria the Minister may issue a licence on an application, but s/he may also sell a licence at auction; or by inviting tenders; or in any other manner that he or she thinks fit.²⁴⁷⁵ A licence holder may do the same.²⁴⁷⁶ A licence issued on application may be transferred to another person.²⁴⁷⁷ Such a transfer may be either permanent or temporary.²⁴⁷⁸ On the transfer or conveyance of land on which water is taken under a

2468 Fisher *Implementing the NWI* 16. See also Fisher "Innovative legal doctrine" 118 on the various statutes requiring licences to take water in West Australia, South Australia and the Northern Territories.

2469 S 143(1)(a) *Victoria Water Act* 1989

2470 Young & McColl *Robust Separation* 10.

2471 Young & McColl *Robust Separation* 11.

2472 National Water Commission 2004 *NWI* Sched D 34.

2473 Fisher *Implementing the NWI* 52.

2474 Young & McColl *Robust Separation* 11.

2475 S 57(1) *Victoria Water Act* 1989. Compare para 7.5.5.

2476 S 62(8) *Victoria Water Act* 1989.

2477 S 62(1) *Victoria Water Act* 1989.

2478 S 62(2) *Victoria Water Act* 1989.

registration licence, the registration licence is deemed to be transferred to the successor in title of that land.²⁴⁷⁹

One of the important duties of the water rights authority is to protect innocent third parties from the negative effects of water use. Third-party impacts arise from resource use and not the action of holding an entitlement or allocation.²⁴⁸⁰ The bottom-line statement of obligations should indicate the maximum degree of impact on others that is allowable. For example, the user may be obliged to rectify damages imposed on others and/or the environment. Water use licences provide one way to internalise the pollution costs. The licence could take the form of regulation, for example requirements to treat sewage and blocking the transfer of irrigation water from low-impact to high-impact regions, or of taxes on the externality.²⁴⁸¹ Third party obligations may possibly be met wholly or partly through the use of market based instruments (for example salinity credits).²⁴⁸²

6.8 Removing the nexus between land and water

It was explained above²⁴⁸³ that the state members of the COAG undertook to implement comprehensive systems of water entitlements that were backed by the separation of water property rights from land title.²⁴⁸⁴ The *Victoria Water Act*,²⁴⁸⁵ for example, removed the *nexus* between land and water and introduced to farmers the ability to sell their water rights either permanently or temporarily. Harris²⁴⁸⁶ concern is that the Act did nothing to alter the nature of water rights regardless of its provisions to allow trading. The government²⁴⁸⁷ still controls water rights in Victoria. It has the ability to qualify these rights when there is a water shortage.²⁴⁸⁸ The argument is that it prevents individuals from having exclusive rights to the goods they traded.²⁴⁸⁹ The counterargument is that if there is too little water in the resource, the goods have been impacted on by events, not the government. Harris argues that the qualification of water use rights undermines one of the basic requirements for markets to evolve successfully, namely defined and defensible property rights. Without a more secure right in water, the impact of reforms will be limited as people are unsure about their ability to exclude others.²⁴⁹⁰ The introduction of trading

2479 S 62(2AA) *Victoria Water Act* 1989. It is a licence to take and use water from a spring or soak or water from a dam for a use that is not domestic or for stock purposes. [S 51(1A)].

2480 Freebairn "Principles" 9.

2481 Freebairn "Principles" 9.

2482 For more on this topic see the recommendations of the Water Productivity Commission *Water Rights Arrangements* 24.

2483 See para 6.7.

2484 COAG 1994 *Communique*.

2485 See s 8(7) *Victoria Water Act* 80 of 1989.

2486 Harris "State Administration" 32.

2487 S 7(1) *Victoria Water Act* 80 of 1989 states that the Crown has the right to the use, flow and control of all water in a watercourse and all groundwater.

2488 See s 13(1) and s 13(2) *Victoria Water Act* 80 of 1989.

2489 See Harris "State Administration" 32.

2490 Harris "State Administration" 33.

without clarification of water rights has resulted in uncertainty as to what bundle of rights farmers are exchanging when they sell their water rights. This limits the capacity of current reforms to ensure that long run sustainable water use is achieved.

According to Bjornlund,²⁴⁹¹ dealing in water rights will become increasingly complex as the various rights embedded in water entitlements are unbundled²⁴⁹² and made tradeable.²⁴⁹³ In Victoria the decision to maintain water as part of the property value was challenged in court by irrigation rate payers.²⁴⁹⁴ They were upset because of increases in rates associated with water rights. The case was settled out of court. The Valuer General and the State Revenue Office also differed on whether water entitlements were to be included in land for rating purposes.²⁴⁹⁵ The State Revenue Office argued in favour of the personal nature of water entitlements and excludes them from the valuation for purposes of stamp duty. Bjornlund²⁴⁹⁶ notes that if water rights are taken away from land with irrigation infrastructure, the infrastructure will lose its value. Should the value of the infrastructure be added to the value of the water or stay with the land? Water that supports farm improvements also has a higher value than unused water. What value should be used for purposes of valuation? The value of the water also depends on the value of the plantings and their quality and the region. In Victoria, the valuer will have to evaluate whether a property has a sufficient water delivery share, as well as an adequate water use licence. If the delivery share is too low to supply sufficient water to the property, the risk associated with the value of the property is increased.²⁴⁹⁷

However, it was explained above that the COAG's water resource policy involved the clarification of property rights²⁴⁹⁸ and the adoption of trading arrangements in water rights, entitlements and licences.²⁴⁹⁹ This means that the existence of property rights in water for the purposes of water right; water entitlement, water allocation and water licence trading is accepted by implication. It is the extent of property rights that are not that clear. The question of what happens to property rights in water entitlements when those entitlements are reduced because of water scarcity has not yet been answered. The section below deals with plans to address the risk of water scarcity.

2491 Bjornlund 2008 *Austl & NZ Prop J* 1.

2492 See para 7.2.

2493 See Chapter 7.

2494 Bjornlund 2008 *Austl & NZ Prop J* 2-3.

2495 Bjornlund 2008 *Austl & NZ Prop J* 4.

2496 Bjornlund 2008 *Austl & NZ Prop J* 3.

2497 Bjornlund 2008 *Austl & NZ Prop J* 5.

2498 McKenzie 2009 *Sydney L Rev* 444 explains that there exists tension between property rights and the flexibility required for adaptive management.

2499 COAG 1994 *Communique*. See also McKay "Marketisation" 372.

6.9 Risk of reduction

6.9.1 Climate change

Climate change²⁵⁰⁰ is a worldwide reality and adaptive management of water resources is needed. The challenge lies in finding the appropriate balance between providing security for entitlement holders and providing for adaptive management of the resource in the light of emerging scientific knowledge.²⁵⁰¹ A distinction should be made between a reduction in water entitlements to be redistributed for socio-economic reform purposes or to be given to another sector in the economy and a reduction in water entitlements due to hydrological conditions. The latter might be because the water in the resource backing up those entitlements does not exist anymore, as in the case of water scarcity; or a reduction might be the only way to comply with the Reserve or to rectify an over-allocation of water use from the resource in question. When a government takes water entitlements from one person to give to another, it burdens the person who lost his water entitlements more than his neighbour.²⁵⁰² A reduction in water allocations due to hydrological conditions normally does not burden one person more than his neighbours. A reduction to rectify a disproportionate water use,²⁵⁰³ as in the case of water being wasted, might be more contentious, but is also relevant.²⁵⁰⁴

6.9.2 Framework for risk assignment

The Australians have done much research on the existence of interests in natural resources and the risks associated with climate change. Young and McColl²⁵⁰⁵ have suggested that the risk of change in entitlements and allocations needs to be divided between the entitlement holders and the government. Summarised below in tabular format is a framework for risk assignment.²⁵⁰⁶

2500 See also para 5.9.2 on water reductions in America.

2501 See ACIL *Tasman Water Trading in Australia* C2. Tarlock 2001 *Nat Resources J* 785-786 is of the opinion that the law of water rights in the Western USA has always been a risk allocation scheme rather than a system of absolute property rights. One should focus on protecting the expectations of water rights holders rather than their actual entitlements. Although the formal entitlement is the basis of the expectation, it only submerges risk allocation.

2502 S 22(6) of the *National Water Act* 36 of 1998 provides for compensation when a water licence is not granted for an existing lawful water use.

2503 See s 22(7) of the *National Water Act* 36 of 1998.

2504 See para 4.2.2.

2505 Young and McColl *Robust Separation* 9.

2506 Young and McColl *Robust Separation* 9.

TABLE 6.1 ASSIGNMENT OF RISK

Financial risk of change met entirely by entitlement holder. (<i>Adaptive risk</i>)	Compensation claim may be made against administering agency. (<i>Duty of care in managing the interests of all parties.</i>)	Financial risk incompletely specified or shared (<i>Uncertainty</i>).
Natural variations in periodic allocations (e.g. seasonal fluctuations).	Administrative error associated with a transaction. An adjustment judged by the courts to be capricious.	Catastrophes such as the failure of a dam.
Change in mean annual rainfall (e.g. effect of climate change).	Issuance of new entitlements once the system is known to be fully allocated.	
Revised estimate of the capacity of the resource that is the result of an adaptive process (e.g. improved scientific knowledge – adaptive management, proper process, relatively small changes over time).	Rapid and unexpected administrative change resulting in a sudden and significant reduction in the value of share entitlements. ^{b)}	
Land use change ^{a)} (e.g. pastures replaced by forestry).		

- a) For significant land use changes it is possible to require that any negative impacts be offset via the purchase and surrender of an entitlement equivalent to the size of the expected impact. Similarly, it is possible to allow issuance of entitlement shares when land-use change results in a positive contribution.
- b) For example, resulting from initial over-commitment and failure to allocate in a precautionary manner.

The table suggests a way to divide risks into those met by entitlement holders; those where compensation claims can be made against the government; and those unspecified. Compensation would be payable when risk turns to reality. Compensation would also be payable in circumstances that might be reasonably described as failure by the administrative agency to exercise an adequate duty of care or diligence in managing the interests of all parties. Compensation could also be payable in the case of a sudden and dramatic change in policy direction. It is thus necessary to set out policy in a transparent

manner.²⁵⁰⁷ Fisher²⁵⁰⁸ explains that liability may arise as a result of the exercise of a power by a public agency. If a public agency exercises a statutory power in conformity with the legislation and the effect is an impact upon or an interference with the existing rights and duties of a particular individual or organisation, then normally the risk lies where it falls, unless the legislation provides otherwise. What legislation should provide, is essentially a political question. If compensation is to be provided the legislation must state the conditions of eligibility for compensation clearly.

Greater security of equity and investment may be achieved through focusing on specifying the risk rather than a formal share to the environment.²⁵⁰⁹ It seems reasonable to expect a government to be able to manage and plan the transition from development of a resource to sustained use. It must also be able to signal the extent of the change and not drift into situations that result, for example, in gross over-allocation or a need for a sudden precipitous change. Risks associated with changes in the natural functioning of an ecosystem (like drought) are best managed if made a full cost to business (adaptive management). On the other hand, if government is to bear the full costs of arbitrary decisions and is required to compensate for them, it will have a strong incentive to avoid making them. This supposes that government officials are skilled and experienced.

6.9.3 *Clear rules*

ACIL Tasman²⁵¹⁰ is of the opinion that one may define a secure entitlement that is also readily tradeable, which is still subject to being modified via regulatory processes. It is, however, important that the rules and processes by which such changes will occur, should be understood. The risk of dilution of an entitlement as a result of scientific advancement leading to regulatory change is not fundamentally different from the security of a mining company's exploration rights. It may be efficient to allow trade in entitlements where there is substantial uncertainty regarding the long term underlying quantity of resources to which the entitlements afford access – but the rules must be understood and capitalised into the value of the entitlement.²⁵¹¹ The rules may mean monitoring and review processes, adjustments to the balance between environmental and other uses based on inter alia cost effectiveness. They may include the specification of circumstances in which compensation would be payable – the theory does, however, not require that compensation is payable. An interference with rights as opposed to the acquisition of rights has

2507 Young and McColl *Robust Separation* 9

2508 *Implementing the NWI* 70.

2509 Young and McColl *Robust Separation* 34.

2510 ACIL Tasman *Water Trading in Australia* C3.

2511 See also Fisher *Implementing the NWI* 66.

generally not been compensable.²⁵¹² This remains the position adopted by the NWI. Bates²⁵¹³ suggests that it may be argued that compensation should only be provided for a transitional period as an equitable means of bringing about a rapid and irreversible transition from unacceptable to more preferred management practices. Where rights of natural resources management that only affect some are modified, claims for compensation are more difficult to resist. The public should be expected to pay for the future denial of existing rights currently being exercised in a lawful manner.²⁵¹⁴ Bates' remark reminds one of the South African *National Water Act's*²⁵¹⁵ definition of "existing lawful water use". It is another name for the requirement of beneficial use. The corollary is that unless procedures for compensating a modification of rights are set out in a statute, the courts will prefer a construction that does not allow the rights to be unduly restrained.²⁵¹⁶ This will not be the case if the clear intention of the legislature is not to compensate. This is new to the political culture and the expectation of compensation.

6.9.4 Framework in the NWI

Natural systems are constantly changing, as is our knowledge of these systems and their capacity to withstand the impacts of human activities.²⁵¹⁷ This makes it inevitable that there will have to be changes in water allocations to achieve environmental and other public benefit objectives. There is evidence, for example, that flows in the Murray Darling Basin could drop by 25% by 2050, and by 50% by 2100.²⁵¹⁸ In the case that current climate and flow impact predictions are accurate, the state will be required to expend large amounts of money to recover flows for the environment to protect and conserve these values. As water becomes scarcer, it is likely that irrigators will use it more efficiently, thereby diminishing the amount of water that is returned to rivers, wetlands and aquifers for use by other people and the environment.

There should be clarity around the assignment of risk arising from future changes in the availability of water in the resource for the consumptive pool.²⁵¹⁹ The *NWI* sets out a risk assignment framework that is intended to apply to any future reductions in the availability of water in the resource for consumptive use.²⁵²⁰ The reductions are additional to those

2512 See para 5.9.2 on a regulatory reduction in water rights in America.

2513 See Bates 2003 "Legal perspectives" 281. He discusses the South Australian experience where the government spent about \$70 million from 1985-1991 to compensate landowners for refusing permission to clear native vegetation.

2514 Bates "Legal perspectives" 282.

2515 S 32 of the *National Water Act* 36 of 1998.

2516 Bates "Legal perspectives" 282.

2517 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 32.

2518 See Macintosh, Denniss and the Australia Institute *Property rights and the environment* 32.

2519 National Water Commission *NWI* para 23.

2520 National Water Commission *NWI* para 46.

identified for the purpose of addressing known over allocation²⁵²¹ and/or overuse.²⁵²² Water access entitlement holders are to bear the risks of any reduction or less reliable water allocation arising from reductions to the consumptive pool as a result of seasonal or long-term changes in climate; and periodic natural events such as bushfires and drought.²⁵²³ Users are to bear the risks of any reduction or less reliable water allocation arising as a result of *bona fide* improvements in the knowledge of water systems capacity to sustain particular extraction levels up to 2014. Risks arising under comprehensive water plans commencing or renewed after 2014 are to be shared over each ten year period in the following way.²⁵²⁴

- i) Water access entitlement holders are to bear the first 3% reduction in water allocation under a water access entitlement.
- ii) State governments and the Commonwealth government are to share one-third and two-thirds respectively reductions in water allocation under water access entitlements of between 3% and 6%; and
- iii) State and Commonwealth governments are to share reductions in water allocation equally under water access entitlements greater than 6%.²⁵²⁵

Governments have to bear the risks of any reduction or less reliable water allocation resulting from changes in government policy (for example, new environmental objectives).²⁵²⁶ In such cases, governments may recover this water in accordance with the principles for assessing the most efficient and cost effective measures for water recovery.²⁵²⁷ Where affected parties (including water access entitlement holders, environmental stakeholders and the relevant government) agree to a different risk sharing formula, this will be acceptable.²⁵²⁸

2521 National Water Commission *NWI* Sched B(i):

Over allocation – refers to situations where the total volume of water able to be extracted by *entitlement holders* at a given time exceeds the *environmentally sustainable level of extraction* for that system.

Overuse – refers to situations where the total volume of water actually extracted for consumptive use in a particular system at a given time exceeds the *environmentally sustainable level of extraction* for that system.

2522 Compare the discussion of beneficial use in *Joubert v Benede Blyderivier Watergebruikersvereniging* 2007 4 SA 80 (SCA) para 13 in para 4.3.2.1.

2523 National Water Commission 2004 *NWI* para 48. See Macintosh, Denniss and the Australia Institute *Property rights and the environment* 11.

2524 National Water Commission 2004 *NWI* para 49.

2525 COAG *Communique* 2008 para 35-37. In March 2008 the Commonwealth agreed to bring forward the risk assignment framework in the *National Water Initiative* and the *Water Act* 2007 to commence from the date at which existing water resource plans in the Murray-Darling Basin cease to have effect. (This is between 2012 and September 2014. The new arrangement would apply to these plans.) The Commonwealth has further agreed to amend Division 4 of Part 2 of the *Water Act* 2007 such that the Commonwealth's share of any reduction in water availability (and therefore responsibility for compensation liability) includes 100 % of the new knowledge components of those reductions in long-term sustainable diversion limits that exceed 3% of the relevant diversion limit. The Commonwealth also agreed to honour all existing water resource plans in all jurisdictions, including Victoria's plans that continue until 2019.

2526 See McKenzie 2009 *Sydney L Rev* 459 and s 87AA(3) of the *Water Management Act* 2000 (NSW).

2527 National Water Commission 2004 *NWI* para 50.

2528 National Water Commission 2004 *NWI* para 51.

Macintosh and Denniss²⁵²⁹ explain that the compensation framework proposed under the *NWI* hinges on the concept of "sustainability" and "environmentally sustainable" levels of extraction.²⁵³⁰ What constitutes "sustainable" levels of extraction for a particular water system is highly subjective and cannot be resolved solely by reference to science. The counter argument is that the creation of additional statutory rights to compensation may actually improve the willingness of governments to act by lowering the political costs and certain other transaction costs (for example consultation costs) that are associated with the introduction of new environmental restrictions.

The *National Water Initiative*²⁵³¹ explicitly provides that farmers will not have a statutory right to compensation for a reduction or less reliable water allocation that results from reductions to the consumptive pool as a result of seasonal or long-term changes in climate;²⁵³² and periodic natural events such as bushfires and drought. All currently overallocated or overused systems are also supposed to be returned to environmentally-sustainable levels of extraction.²⁵³³ Macintosh and Denniss²⁵³⁴ explain that there are two instances where the *National Water Initiative*²⁵³⁵ requires farmers to be compensated for reductions in water allocations that are over and above those that are specified as being necessary to address known over-allocation and/or overuse. *Firstly*, farmers will have a right to be compensated where water allocations are reduced by more than three per cent in a ten-year period under a water plan that commenced or was renewed after 2014 because of "*bona fide* improvements in the knowledge of water systems' capacity" to sustain certain extraction levels. *Secondly*, farmers will have a right to be compensated for reductions in water allocations that have not been previously provided for and that arise from changes in government policy, for example, where new environmental objectives are specified in a water management plan.

The long-term costs associated with the decision-making barriers created by the requirement to pay compensation may cancel out the economic benefits of the *NWI* to farmers.²⁵³⁶ *Firstly*, the *NWI* does not give sufficient flexibility to the relevant governments to make uncompensated reductions in consumptive water allocations to achieve new environmental and other public benefit objectives that arise as a result of changes in social values or the recognition of existing social values. *Secondly*, the *NWI* does not provide sufficient scope for uncompensated reductions to water allocations that arise 'as a

2529 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 33.

2530 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 33. See para 3.1.4 and para 4.2.2.

2531 National Water Commission 2004 *NWI* para 48.

2532 See para 6.9.6 on the *Victoria Water Act* 80 of 1989.

2533 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 10.

2534 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 10.

2535 National Water Commission 2004 *NWI* para 46-51.

2536 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 30.

result of *bona fide* improvements in the knowledge of water systems' capacity to sustain particular extraction levels'. It is doubtful whether sufficient steps will be taken to address the over-allocation and over-use problems that exist in many catchments prior to the rights to compensation coming into operation.

An argument exists that if compensation were not payable, it would create uncertainty, distort the allocation of resources, lower investment and lead to less agricultural output.²⁵³⁷

The risk that new environmental restrictions will be introduced or applied to prevent the use or development of a farmer's land or water resources, reduces the incentive for farmers to invest in their properties. Financiers are less likely to invest in an agricultural undertaking if there is a significant risk that they would lose their money due to the operation of new or existing environmental laws. This can adversely affect agricultural productivity and can lead to the degradation of land and water resources.²⁵³⁸ Statutory rights to compensation also provide a degree of protection for the value of the farmer's land and water entitlements, which financiers often rely on as security for loans.

Macintosh and Denniss²⁵³⁹ argue that flexibility in the ability to renew licences and alter the size of the consumptive pool need not necessarily be associated with excessive uncertainty. Irrigators already have to deal with changes in the size of the consumptive pool caused by climate variation. The financial impacts of drought are often offset by government drought assistance. If the rules concerning licence renewals and changes to the consumptive pool are clear the scope for changes or non-renewals is confined within sensible limits. Freebairn²⁵⁴⁰ states that as long as future adjustments are explicit and accepted, property rights remain clear and markets can work.

The provision of additional rights to compensation could increase agricultural output (primarily by improving the allocation of resources and encouraging investment in agricultural infrastructure).²⁵⁴¹ It will also create barriers that will hinder the ability of governments to respond to future environmental, social and economic issues.

6.9.5 *State water plans*

According to the NWI, descriptions in state water plans are to include the risks that could affect the size of the water resource and the allocation of water for consumptive use. This includes the impact of natural events (such as climate change and land use change). It also includes limitations on the state of knowledge underpinning estimates of the

2537 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 25.

2538 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 25.

2539 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 26.

2540 Freebairn "Principles" 7.

2541 Macintosh, Denniss and the Australia Institute *Property rights and the environment* 30.

resource.²⁵⁴² The state water access entitlements and planning frameworks will clearly assign the risks arising from future changes to the consumptive pool.²⁵⁴³ An ongoing process will be in place to assess the risks of development and demand on resources in poorly understood or undeveloped areas, with a view to moving these areas to a full entitlement framework.²⁵⁴⁴ The parties to the NWI have also agreed to address significant adjustment issues affecting water access entitlement holders and communities that may arise from reductions in water availability as a result of implementing the reforms. States will consult with affected water users, communities and associated industry on possible appropriate responses, taking into account factors including.²⁵⁴⁵

- a) possible trade-offs between higher reliability and lower absolute amounts of water;
- b) the fact that water users have benefited from using the resource in the past;
- c) the scale of the changes sought and the speed with which they are to be implemented (including consideration of previous changes in water availability); and
- d) the risk assignment framework referred to above.

6.9.6 Victoria Water Act

The *Victoria Water Act*²⁵⁴⁶ was amended after the *NWI* had been entered into. In terms of section 7(1) of the *Victoria Water Act*²⁵⁴⁷ the Crown has the right to the use, flow and control of all water in a waterway and all groundwater. This right is not diminished by the fact that rights to water are conferred on other persons.²⁵⁴⁸ A person has the right to take water, free of charge, for that person's domestic and stock use from a waterway or bore to which that person has access.²⁵⁴⁹ A person also has the right to use water taken in accordance with a licence or other authorisation; water lawfully taken from the works of an authority; or rainwater or the like on land occupied by that person.²⁵⁵⁰ In terms of the *Victoria Water Act*²⁵⁵¹ an authority may reduce the quantity of or discontinue the water supplied to any person if the authority is, because of a shortage of water, unable to supply

2542 National Water Commission 2004 *NWI* Sched E (1)(iii).

2543 National Water Commission 2004 *NWI* para 25 (vi).

2544 National Water Commission 2004 *NWI* Sched para 33(ii).

2545 National Water Commission 2004 *NWI* Sched para 97(i).

2546 *Victoria Water Act* 80 of 1989.

2547 *Victoria Water Act* 80 of 1989.

2548 S 7(2) *Victoria Water Act* 1989.

2549 S 8(1).

2550 S 8(4). The rights to water conferred by the *Victoria Water Act* on a person who has an interest in land replace any rights to take or use water that the person might otherwise have been able to enforce against the Crown or somebody else [S 8(7)].

2551 S 141(1)(a).

the quantity of water which would otherwise be supplied to the person. The authority may also do so if the authority believes that the reduction or even discontinuance is necessary to avoid future water shortages.²⁵⁵² The authority has to reduce the water to all users proportionally unless the Minister is convinced by extreme circumstances to use another basis.²⁵⁵³ The water supply may also be restricted if legislation, regulations or by-laws have been contravened by the water user when misusing²⁵⁵⁴ or taking²⁵⁵⁵ the water. An authority that so reduces or discontinues the supply of water to a person is not liable in the case of any claim or demand in respect of the reduction, restriction or discontinuance.²⁵⁵⁶

6.9.7 Australian Water Act 2007

The problems in the Murray Darling Basin have led to the Commonwealth adopting the *Australian Water Act 2007* (hereafter referred to as "*Water Act 2007*"). It makes provision for the management of the water resources of the Murray-Darling Basin.²⁵⁵⁷ The basin water resources form part of a major Australian water resource. Because they are interconnected, they are the major Australian water resource in relation to which²⁵⁵⁸ tradeable water rights are able to be traded between states; and water is, pursuant to that trade, able to be delivered between states.²⁵⁵⁹ The *Water Act 2007* defines "tradeable water rights" to mean water access rights; or water delivery rights; or irrigation rights.²⁵⁶⁰

A "water access right" is not defined exhaustively. It is defined to mean any right conferred by or under a law of a state to hold either water from a water resource; and/or to take water from a water resource. A water access right includes (i) stock and domestic rights; (ii) riparian rights; (iii) a water access entitlement; and (iv) a water allocation. It also includes any other right in relation to the taking or use of water that is prescribed by the regulations.

The *Water Act 2007* does not state that a water right is property. It does state, however, that compensation is payable for the acquisition of property.

254(1)

2552 S 141(1)(b).

2553 S 141(2).

2554 S 141(1)(d).

2555 S 141(1)(e).

2556 S 141(4).

2557 It also provides for other matters of national interest in relation to water and water information.

2558 S 10(2)(b) of the *Water Act 2007*.

2559 The Basin water market and trading objectives and principles in Sched 3 Clause 3 of the *Water Act 2007* are based on those set out in clauses 58 to 63 and Sched G of the *National Water Initiative* Note 2, Sched 3, Clause 3 *Water Act 2007*. Compare the discussion of the *Commerce Clause* in America in para 5.4.1.

2560 S 4 of the *Water Act 2007*.

If the operation of this Act would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

It also states that:

254 (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

It might appear to the uninitiated as though this section authorises compensation for the acquisition of water rights, but all the problems with the interpretation of paragraph 51(xxxi) of the Constitution have been incorporated into section 254.²⁵⁶¹

The *Water Act* 2007 states that when the long-term average sustainable diversion limit for the water resources of a water resource plan area is reduced, the Basin Plan identifies the Commonwealth's share (if any) of the reduction.²⁵⁶² The Commonwealth's share includes reductions attributable to changes in Commonwealth government policy.²⁵⁶³ The acceptance of this type of risk means that one has to have confidence in the skills of one's officials. For reductions that occur on or after 1 January 2015, the Commonwealth's share may also include some part of reductions attributable to improvements in knowledge about the environmentally sustainable level of take for the water resources of a water resource plan area.²⁵⁶⁴ The Commonwealth²⁵⁶⁵ tries to manage the impact of the Commonwealth's share of the reduction on entitlement holders. It may take steps to ensure that entitlement holders do not suffer a reduction in their water allocations as a result of the Commonwealth's share of the reduction.²⁵⁶⁶ If, despite the Commonwealth's efforts, the water allocation of an entitlement holder is reduced and the reduction is reasonably attributable to the Commonwealth's share of the reduction, the holder may be entitled to a payment under section 77.²⁵⁶⁷ The holder qualifies for a payment²⁵⁶⁸ under section 77(1) if the entitlement holder holds a water access entitlement in relation to a water resource plan area. There must also have been²⁵⁶⁹ a reduction in the water allocations to be made in relation to the water access entitlement; or a change in the

2561 See for example para 6.6 on rights in natural resources.

2562 Simplified outline *Water Act* 2007 Division 4; Subdivision A; s 74.

2563 See McKenzie 2009 *Sydney L Rev* 460.

2564 Note 1 to the simplified outline; *Water Act* 2007 Division 4; Subdivision A; s 74. The date will probably have to be amended in the light of the March 2008 agreement.

2565 S 74(3)(a) *Water Act* 2007.

2566 S 74(3)(b).

2567 S 74(4) *Water Act* 2007.

2568 S 77(1)(a).

2569 S 77(1)(c).

reliability of those water allocations. The whole, or a part, of the reduction in the water allocations must also be reasonably attributable to the Commonwealth's share of the reduction.²⁵⁷⁰ Regard is to be had²⁵⁷¹ to:

- any steps taken by the Commonwealth to ensure that holders of water access entitlements do not suffer a reduction in their water allocations, or a change in the reliability of their water allocations, as a result of the diversion limit reduction; and
- the effect of those
- steps on the water allocations, or the reliability of the water allocations, made to the holders of water access entitlements; and
- the effect of the other provisions of the Basin Plan.

If changes in Commonwealth policy were to cause liability for the payment of compensation in the case of a reduction in diversions in a basin, the Commonwealth needs to have much faith in its officials. If regard were to be given to steps of the Commonwealth to ensure that a reduction is not suffered, the courts might read the measure of reasonability of the steps into the test. It is likely that this section will be interpreted and developed by the Australian courts in line with the jurisprudence arising from section 51(xxxi). Once again, the last word has not been spoken.

6.10 Conclusion

Despite water law in Australia being based on the proposition of Justinian that water is common to all, the conceptualisation of water as a public resource is not identical to the conceptualisation of either South African or American law. The discussion of Australian law shows that the right of access to water in Australia is not a human right, except in Victoria where aboriginal people may not be denied their cultural rights to maintain their distinctive spiritual, material and economic relationship with the land and waters. In Australia water is also not held by the Minister as public trustee and the concept "beneficial use" plays a peripheral role, if any at all. However, water is public property that vests in the state governments.²⁵⁷² According to the High Court of Australia, a limited natural resource can be said truly to be public property. The "statutory vesting" of property in the Crown is nothing more than a fiction in legal shorthand of the importance to the people of a state that the state has the power to preserve and regulate the exploitation of an important resource. Even though a right to use a natural resource was traditionally a usufructuary right or a *profit à prendre*, the right of commercial exploitation of a public

2570 S 77(1)(e).

2571 S 77(2). The Minister decides the claim.

2572 See para 6.4.

resource, like a fishery was turned into a privilege confined to commercial licensees. It is an entitlement of a new kind.²⁵⁷³ The effect of this is that the licence is capable of modification or extinguishment without constituting an acquisition of property, if that course is permitted by its terms. It must be kept in mind that the court in South Australia held that matters of policy were not for the courts to decide.²⁵⁷⁴ The court did not dispute that a licence and associated rights might be regarded as a valuable form of property, but there was no basis for a conclusion that the licences were to be of indefinite duration or that the rights of licence holders would be permanent.

It is important for the state to be able to adjust rights in natural resources in the case of scarcity, even though these rights may be based on common law rights. It could even be argued that the principle applicable in the case of a natural resource like water is that where a law resolves or adjusts competing claims or property rights, the law under discussion is not a law for the acquisition of property within the meaning of section 51(xxxi).²⁵⁷⁵ The principle that the compulsory surrender of shares in a resource did not result in the Commonwealth, or any other person, acquiring a direct benefit commensurate with any interest of the appellants that was extinguished or terminated is another factor that counts against compensation for the reduction in the case of water rights.²⁵⁷⁶

On the other hand, a court might consider the *obiter* principle of the High Court of Australia in *Commonwealth v WMC Resources Ltd*²⁵⁷⁷ that where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition when it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject. Such a court might rely on the principle in *Australian Capital Territory v Pinter*²⁵⁷⁸ that where the statutory right exists where the common law would provide a cause of action, the statutory right is far removed in content and durability from mere "statutory entitlements to receive payments from consolidated revenue not based on antecedent proprietary rights recognised by the general law".

It appears from the discussion of section 254(1) of the *Water Act 2007*²⁵⁷⁹ that a court might still be able to find that the entitlements were not acquired as the section transplants

2573 See para 6.6.3.

2574 See para 6.6.4.

2575 See para 6.5.4.

2576 See para 6.6.3.

2577 See para 6.6.6.

2578 See para 6.5.4.

2579 See para 6.9.7

the problems²⁵⁸⁰ with the interpretation of the property clause in the Commonwealth Constitution to the *Water Act* 2007. A court could alternatively find that the Commonwealth did everything it could to foretell and plan for the future and is not to be blamed for the reduction.²⁵⁸¹ The arrangements foreseen by the *National Water Initiative* to deal with the risk of reduction are an example of good planning and management of water resources, but might be prohibitively expensive and can still be interpreted by state water legislation. In terms of the *Victoria Water Act*,²⁵⁸² for example, an authority may reduce the quantity of, or discontinue the water supplied to any person, if the authority is, because of a shortage of water, unable to supply the quantity of water which would otherwise be supplied to the person or if the authority believes that the reduction or even discontinuance is necessary to avoid future water shortages. The authority normally has to reduce the water to all users proportionally. The expression *proportionally* might be a way in which the legislature has brought in the requirement that some people should not be expected to bear a heavier burden than others when it comes to takings by the government.²⁵⁸³

There is much truth in Evans²⁵⁸⁴ argument that section 51(xxxi) involves fundamental issues about the proper role of the Australian federal state in distributing and redistributing property. The interpretation of the section by the courts concerns the extent to which the Commonwealth has the legislative power to redistribute property directly and without compensation. A natural resource like water is vitally important. The interests of private individuals to use the resource and that of the public in the maintenance of the resource should be evaluated relative to the circumstances of each case. Courts are in a better position than the legislature to weigh the various interests when water entitlements in Australia are reduced. A court will give due deference to legislation, licenses and government policy. The best tactic for anybody claiming compensation for a reduction in water rights might be to prove that he or she suffered from a reduction in water rights that is not proportional to that of other users.

The recognition of water entitlements as property rights is important for the framework in the *National Water Initiative* in terms of which Australia wants to encourage trading in water entitlements.²⁵⁸⁵ The entitlements have been specified to have certain characteristics and to confer certain rights and obligations. The removal of the nexus between land and water has, however, created uncertainty as to the extent of the property

2580 See para 6.5.

2581 See para 6.9.

2582 See para 6.9.6.

2583 See para 4.3.7.

2584 See para 6.5.4.

2585 See para 6.7.

rights existing in either.²⁵⁸⁶ It is also not clear when compensation will be paid for a reduction in water entitlements. Some people are of the opinion that one may define a secure entitlement that is readily tradeable and is still subject to being modified via regulatory processes.²⁵⁸⁷ It is, however, important that the rules and processes by which such changes will occur should be understood. The importance of the debate on water reform in Australia is that it shows that government should keep water reform on the public agenda. The development of rules dealing with the risk of reduction enables the various stakeholders to plan for climate change and adapt the way water is managed to suit their purposes best.²⁵⁸⁸ It is true that in Australia, too, government's right to constrain the use of property without paying compensation is limited by what it withheld from the rights holder at the outset.²⁵⁸⁹

However, the hypothesis could not be proven that when a water law dispensation is reformed, the concept "beneficial use" sets the limits of the water use right as a property right. One of the main hypotheses underlying this hypothesis is that the concept "beneficial use" should be used to determine the existence of the right to use water. Although Australia in accordance with the *res omnium communes*' principle regards water to be public property, it did not receive the concepts "public trust" or "beneficial use" into its law in the manner that South Africa did. Although a concept like "wasting" or "misusing" water is used, the use, waste or misuse of water does not establish or forfeit the water use right like the concept "beneficial use" does. Some of the other hypotheses are partly true. It is indeed so that when some private rights in a water resource are in conflict with other private rights, the higher value use (not the beneficial use) is the tool that is used to determine which uses are to be preferred to others. Furthermore, the public interest plays a larger role in the allocation of rights to a natural resource than in the allocation of rights to other forms of property.²⁵⁹⁰ The final hypotheses to be tested in the next chapter is, *firstly*, that when water scarcity necessitates the reform of the water law dispensation, the definition of which uses are valued, is adapted in accordance with a changing perception of what is in the public interest. *Secondly*, when it is necessary to encourage water users to discard uses with a low value for uses with a higher value, trading in water entitlements or allocations will be an effective way to encouraging the discarding of uses with a low value for uses with a higher value. In the next chapter the benefits of considering the water entitlement by looking at its constituent parts and registering the entitlement is also

2586 See para 6.8.

2587 See para 6.9.3.

2588 See para 6.9.6.

2589 See para 6.6.3.

2590 See para 6.4.

discussed. Furthermore, the trading of the various products that can be developed from looking at the various competencies attached to the water entitlement is also discussed.

CHAPTER 7

WATER ENTITLEMENT OR ALLOCATION TRADING

7.1 Introduction

In the first five chapters of the thesis the role of the concept "beneficial use" in limiting the existence of a water use right and in conditioning the way it is used, historically and currently, was discussed. From the previous chapter it appeared that although Australian law does not require beneficial use to establish or forfeit a water use right, certain water uses are valued more than others. Water scarcity has motivated Australian governments to look into new ways to better use a scarce resource like water. The theory is that water markets would allow some farmers to intensify and expand irrigation and would open the door for new, high-value efficient irrigation enterprises.²⁵⁹¹

The hypotheses that are to be investigated in this section are, *firstly*, that when water scarcity necessitates the reform of the water law dispensation, the definition of which uses are valued is adapted in accordance with a changing perception of what is in the public interest. *Secondly*, when it is necessary to encourage water users to discard uses with a low value for uses with a higher value, trading in water entitlements or allocations will be an effective way to encouraging the discarding of uses with a low value for uses with a higher value.

The focus of this chapter will be on Australia. The chapter ends with a discussion of water entitlement or allocation trading in South Africa.

7.1.1 Background

The previous chapter dealt with the question whether a reduction in water entitlements should be compensated as a taking of property. Indications are that water entitlements that have been awarded in terms of licences in Australia are property rights.²⁵⁹² In 2001 the Supreme Court of Victoria in *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue*²⁵⁹³ considered that pre-reform water rights conferred by water licences under the Victoria *Water Act* of 1969 amounted to a right of property for the purposes of the payment of stamp duty. The *National Water Initiative*²⁵⁹⁴ (hereafter referred to as the *NWI*) that was entered into by the Council of Australian Governments' (hereafter referred to as COAG), is supposed to achieve the progressive removal of barriers to trade in water allocations or entitlements and to facilitate the broadening and deepening of the water

2591 See Bjornlund 2003 *Agr Water Manage* 58 and Bennett "Realising" 2-3.

2592 See discussion of property in para 6.6.1.

2593 *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue* (2001) 48 ATR 498 para 28.

2594 National Water Commission 2004 *NWI* para 28.

market. An open trading market should be in place.²⁵⁹⁵ The state members of the COAG as a result undertook to implement comprehensive systems of water allocations or entitlements that were also backed by the separation of water property rights from land title.²⁵⁹⁶ When the COAG agreed to do water trading they apparently had the trading of water entitlements or water allocations in mind. The definition of "water access entitlement" in the *National Water Initiative*²⁵⁹⁷ is that it is a perpetual or ongoing entitlement to exclusive access to a share of water in a specified consumptive pool as defined in a water plan. When one trades in water entitlements, one is trading the right to use a share in the resource. It was explained earlier that Woolston²⁵⁹⁸ found that the entitlement confers a number of rights and obligations: The "entitlement" is the long-term share in a varying stream of periodic allocations to water.²⁵⁹⁹ The size of the share of allocations will remain constant, but the size of the pool of water will vary constantly. The "allocation" is usually a volume of water that is distributed periodically, often yearly.²⁶⁰⁰ The actual volume of water may vary year-by-year depending on water availability. Trading of the water allocation is sensible, as one then knows exactly how much water one will receive when buying the allocation. On the other hand, trading the water entitlement permanently means that one will have long term use of the share in the resource.

7.1.2 Overview

In this chapter the possibilities inherent in the unbundling of the water entitlement, as analysed in the previous chapter,²⁶⁰¹ and the registration of water entitlements are discussed. When water entitlement or allocation trading in Australia is discussed, reference will be made to the position in Victoria, where an active, well discussed water entitlement or allocation exchange exists. Although water entitlement or allocation trading in South Africa is still in its infancy, provision for water entitlement or allocation trading has been made in legislation. This might in future be a way to allocate water for economic purposes in times of water scarcity.

2595 National Water Commission 2004 *NWI* para 23(v).

2596 COAG 1994 *Communiqué*. See para 6.7.

2597 National Water Commission 2004 *NWI* 6 para 28. See para 6.7 above.

2598 Woolston "Registration" 7. Fisher "Innovative legal doctrine" 119 writes that in terms of the 2005 arrangements in Victoria the regulatory instruments will consist of a water share, a water allocation and a water use licence or water use registration.

2599 Woolston "Registration" 7.

2600 Woolston "Registration" 7.

2601 See para 6.7.2 for rights and obligations conferred by water entitlements; para 6.7.3 for characteristics of water entitlements; para 6.7.4.1 for the elements of water entitlements and para 6.8 for the effect of the removal of the nexus between land and water

7.1.3 Shift from low to high value uses

A seven year drought has the Murray Darling Basin²⁶⁰² in Australia suffering from the effects of water shortage.²⁶⁰³ Irrigators from the river Murray in South Australia heard in September 2009 that they were getting a “doubling” of their water allocations.²⁶⁰⁴ The allocation was raised from 5 to 10 percent of their full entitlement! This means that the volume of water they were receiving was one tenth of what they were entitled to. One of the problems in the basin is that crops that generate little income, or a use with a low value, use much of the water. According to the *National Geographic*²⁶⁰⁵ magazine, cotton was the thirstiest crop in the basin and used 20% of the basin’s water in 2005-2006. Grapes, other fruits and vegetables use far less water, but generate more income for the region than cotton.²⁶⁰⁶ Several states in Australia have introduced water markets as a way to restructure water thirsty industries like irrigation. The commodification²⁶⁰⁷ of water entitlements is happening because policy makers want to encourage a shift in water use from low to high economic use purposes.²⁶⁰⁸ The adjustment is away from low valued output on marginal lands to higher valued production in more suitable areas.²⁶⁰⁹ Although the concept “beneficial use” does not establish or forfeit or limit the extent of the water use right, it is clear that all uses are not equal, because some are more “beneficial” or have a higher value than others. If water were to be more expensive to buy, the hope is that it would be treated with greater respect. The recovery of the full cost of water when setting prices is expected to encourage inefficient low-value users to stop irrigation, or to adjust to efficient and high-value use.²⁶¹⁰ Irrigators who are not able to pay prices that recover costs fully, and are not able to adjust, may sell their water and receive some compensation. Water allocation or entitlement markets allow some farmers to intensify and expand irrigation and open the door for new, high-value efficient irrigation enterprises.²⁶¹¹ Previously this was not possible because water use rights were tied to land, and could not be sold. Trade in water entitlements or allocations required water entitlements to be separated from land, and to be defined as a commodity by itself.²⁶¹² Harris²⁶¹³ explains that

2602 The basin is situated in South Australia, Victoria, New South Wales and Queensland.
2603 Draper 2009 *N Geog Mag* 50.

2604 ABC News 2009 <http://www.abc.net.au/news/stories/2009/09/01/2673009.htm>.

2605 Draper 2009 *N Geog Mag* 57.

2606 In arid countries certain water uses have often been valued more highly than others. See the discussion of the concept “optimum” use in South Africa in para 3.8.1 and para 4.4.2.4.

2607 See para 4.4.2.5. Wikipedia 2010 <http://en.wikipedia.org/wiki/Commodification> defines *commodification* as the transformation of goods and services (or things that may not normally be regarded as goods or services) into a commodity.

2608 Gray 2006 *Transforming Cultures eJournal* 66 <http://epress.lib.uts.edu.au/journals/TfC>.

2609 See also Tan “Diving” 1. The concept “beneficial use”, as discussed in the previous two chapters, might be refined into one of optimum use, should water scarcity become a problem.

2610 Bjornlund 2003 *Agr Water Manage* 58.

2611 See also Bennett “Realising” 2-3

2612 Tan “Diving” 1. See the discussion of the water entitlement in para 6.7.

2613 Harris “State Administration” 7.

exchange takes place when one person believes that an asset could be put to a higher-valued²⁶¹⁴ use and will use the market to obtain this asset from the current rights holder.

The difference between the marginal net values of a resource prior to and subsequent to market place reallocations is known as the gains from trade. These gains from trade provide a powerful rationale for society to ensure the definition and defence of property rights.²⁶¹⁵

In other words, the gains from trade in the case of water scarcity would be that water is not used for uses with a relatively lower value and a higher need for water, like cotton for clothing, but is used for a use with a relatively higher value, like vegetables that are food stuff. Vegetables need less water.

Bjornlund²⁶¹⁶ argues that permanent transfers of water entitlements are appropriate when irrigators are making adjustments to their operations in response to long-term changes in commodity prices, water supply, and personal circumstances. Temporary transfers of water entitlements or allocations are appropriate when irrigators respond to annual variations in these factors. Permanent trade in entitlements is essential in order to facilitate real structural change within the irrigation industry and to encourage people to exercise more efficient and higher-value uses. Irrigators are unlikely to invest significantly in irrigation infrastructure without the long-term security of water supply.²⁶¹⁷ Bjornlund²⁶¹⁸ argues that permanent transfers of water entitlements are appropriate when irrigators are making adjustments to their operations in response to long-term changes in commodity prices, water supply, and personal circumstances. Permanent trade is essential in order to facilitate real structural change within the irrigation industry and to encourage people to exercise more efficient and higher-value uses. Irrigators are unlikely to invest significantly in irrigation infrastructure without the long-term security of water supply.²⁶¹⁹ Temporary transfers of water entitlements or allocations on the other hand are appropriate when irrigators respond to annual variations in these factors

7.2 Unbundling

Water access entitlements themselves comprise various bundles of conditional rights to access water. They are *inter alia* the right to take or receive water;²⁶²⁰ the right to a defined

2614 See para 7.6.2 on an administratively determined economic charge where water is used predominantly for low value purposes in SA.

2615 Bennett "Realising" 1.

2616 Bjornlund 2003 *Agr Water Manage* 58.

2617 See para 7.5.5 on factors causing a preference for temporary trading.

2618 Bjornlund 2003 *Agr Water Manage* 58.

2619 See para 7.5.5 on factors causing a preference for temporary trading.

2620 See Fisher "Innovative legal doctrine" 118 on the various statutes requiring licences to take water in West Australia, South Australia and the Northern Territories.

quality of water;²⁶²¹ the right to have the water delivered; the right to use the water; the right to build, operate or have an interest in works to take and control the water; and the right to return the water.²⁶²² Each of these components may have value, which value may vary between users and uses. Many of the components of water use have been “bundled” together in one licence.²⁶²³ Lately unbundling of water entitlements extends beyond the separation of water from land, to separate property rights and instruments for each component of the water entitlement itself.²⁶²⁴ These components are sometimes traded in separate instruments. Similarly, various derivative products are likely to be of value to water users as a risk management tool.²⁶²⁵ This implies that there may be merit in “unbundling” the various constituent elements of the entitlement so that they can be traded separately. It affects the nature of the right that is being registered. This has implications for a registration system for those entitlements. It also raises the question whether there is a need to link the registration systems of unbundled rights. Separation of the interests into their component parts facilitates the development of more efficient management and accounting systems. It means that part of the system can be adjusted without one having to deal with the whole system. Risk management is more efficient when each type of risk is defined and assigned separately.²⁶²⁶ Issues associated with equity among aspiring users need to be managed separately from issues associated with management of the pool.

7.2.1 Divisibility

Water access entitlements that have been specified in volumetric terms are able to be amalgamated or subdivided.²⁶²⁷ Delivery capacity constraints may be an important issue. A water entitlement is of little value if the holder cannot ensure delivery of the water. Each component may have value and it may vary between users and uses. Hydro-electric generators and irrigators may place different value on the timing of releases from dams at different times.²⁶²⁸

2621 Fisher “Innovative legal doctrine” 118 states that a right or an expectation to receive water is usually conferred in relation to a supply of water for household purposes in urban communities or a supply of water for irrigation in rural communities. In Victoria the supplier has the power in prescribed circumstances to reduce, restrict or discontinue the water supply. See para 6.9.6.

2622 See s 21 of the NWA.

2623 Woolston “Registration” 8.

2624 Woolston “Registration” 8.

2625 Woolston “Registration” 9. Campbell “Water trading instruments” 6 explain that derivatives like options contracts for times of scarcity are a way to manage the risk of high prices for water.

2626 Young and McColl *Robust Separation* 6.

2627 ACIL Tasman *Water Trading in Australia* C-5. According to Fisher “Innovative legal doctrine” 117-118 the evolution of differently structured interests in water has become quite a subtle process.

2628 See Brennan & Scoccimarro 1999 *AJARE* 75. See also the discussion of the *Tulare* case in para 5.9.2.1. Note that the Corumana dam in the Sabie River in Mozambique can only generate electricity at night when the stream flow is stronger than during the day. South Africans use more water during the day than at night and this affects the quantity of water available to flow through the Kruger National Park into Mozambique. Anecdotal evidence is that irrigators use more water than they are entitled to because they believe that the water in any event just flows to the ocean if not used in South Africa.

7.2.2 Types of priority

Priority relates to the reliability of the allocation stream or volume of water over time. The criterion used, is the number of years in a hundred that periodic allocations will exceed the specified quantity. The regulator might issue different classes of entitlement shares, but if only one class of share is issued, the level of individual risk can be managed through investment or trading.²⁶²⁹ Two types of priorities in water systems may further complicate the sequential allocation problem that characterises water entitlements. *Firstly*, the fact that water flows downstream effectively grants prior entitlements to those upstream because their actions can be taken first. *Secondly*, the entitlements of some users may be given priority over other users.²⁶³⁰

For example, the environment or water used by urban areas and towns may be allocated before other allocations become available. Thus, in a sequential system, the impact on the downstream users may be cumulative. Brennan and Scoccimarro²⁶³¹ explain that priority rights are more effective when users are not alike, the disadvantage is that it is more difficult to organise a market for users who are not similar, because the rights are not homogeneous. A market should reveal the premiums and discounts associated with different levels of reliability.

Young and McColl²⁶³² illustrate a framework for the transformation of existing riparian licences into a separate system, as illustrated on the next page.²⁶³³

2629 Young and McColl *Robust Separation* 8.

2630 See para 3.1.4.

2631 1999 *AJARE* 83.

2632 Young & McColl 2003 *Austl Econ Rev* 230.

2633 Young & McColl 2003 *Austl Econ Rev* 230.

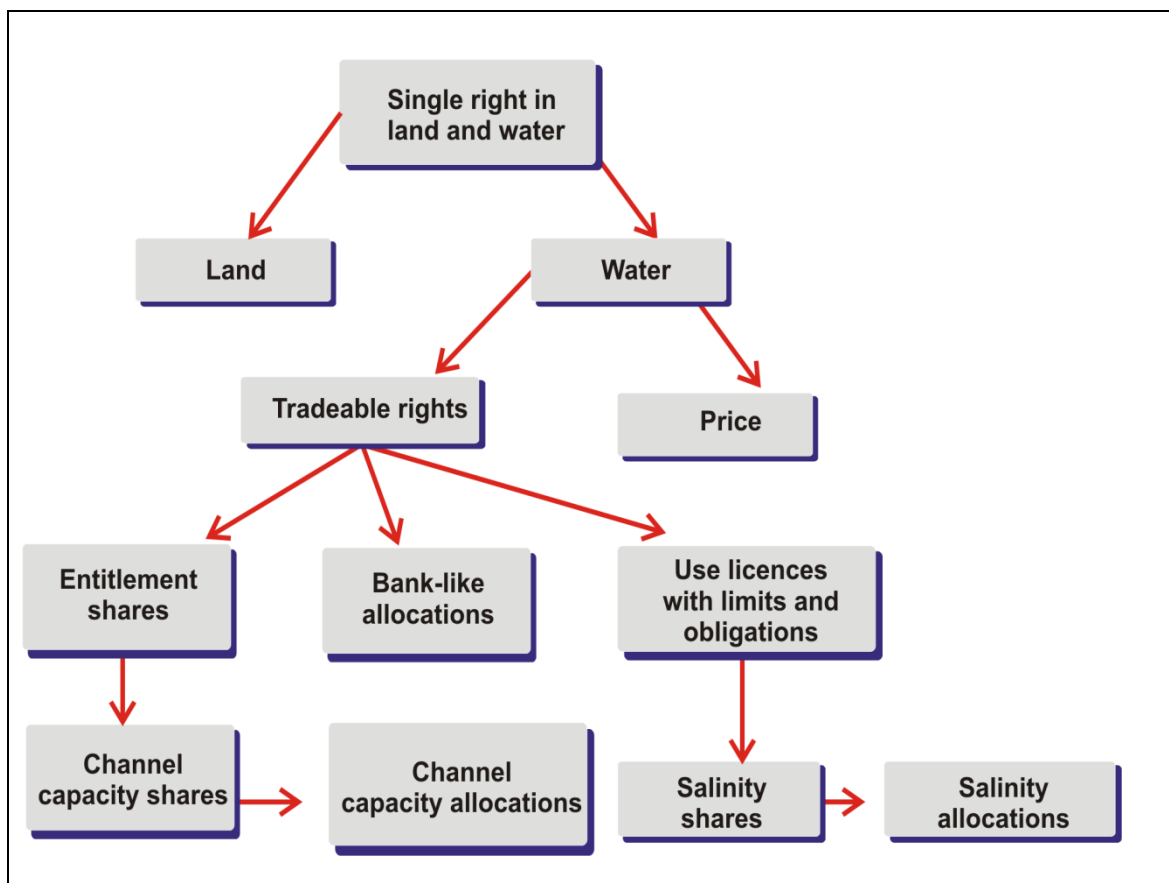


FIGURE 7.1 FRAMEWORK FOR THE TRANSFORMATION OF EXISTING WATER LICENCES INTO AN ACCESS ENTITLEMENT, ALLOCATION AND USE MANAGEMENT SYSTEM SEPARATED FROM LAND TITLE

2003 The University of Melbourne. Melbourne Institute of Applied Economic and Social Research

7.3 Registration of water entitlements

The registration of water entitlements *inter alia* assists in getting investment for going concerns by providing security to banks.²⁶³⁴ A registration system facilitates the ability to use water entitlements as collateral for loans. Something that jurists have given little attention to is that previously rural loans were secured against the combined assets of land and the water rights tied to it. With the separation of land from water, banks would be wise to secure loans against both assets. Key issues for the banks include the ability to register the interest, the ability to obtain security and the assurance that the right of the registered interest can be enforced without interference. There exists fear of a risk that rights can be altered without the knowledge or consent of the bank or compensation for the bank. A registration system plays a key role in the way in which transfers of property

2634 Woolston "Registration" 10.

rights are done. Unnecessarily cumbersome systems could add to the ‘transactions costs’ of market participants and discourage trading. While the overall value of land and water should be increased when both elements can be traded separately, the value of a piece of land may be diminished without an associated right to use water on that land. This has significant implications for the security of loans secured through mortgages on land rather than over the water entitlement. It also has implications for the transfer of water entitlements as a result of court orders in divorce courts or the provisions in wills. For example the intent of the deceased may not be fulfilled under wills. In Australia land is often left to the son and the residual to the daughter. Moreover, the rating base for local government is affected.

It is important to recognise that the property right held by users is a conditional one.²⁶³⁵ The right to manage and control water itself vest in the state, which then provides conditional rights to private users to use the water by issuing licences or entitlements. The rights conferred by these “access entitlements” typically encompass conditional rights to access or withdraw water. *Schedule G* of the *NWI* states that all trades should be recorded on a water register.²⁶³⁶ The Murray-Darling Basin water market and trading objectives²⁶³⁷ and principles reiterate this. In terms of the *Victoria Water Act* of 1989 the departmental head must cause a register to be kept of all entitlements granted.²⁶³⁸

7.3.1 Importance of registration

When property rights are noted in a register and the register’s integrity is guaranteed, the risk of fraud and the cost of negotiating a trade are considerably lower. Registration of third-party interests as mortgages lowers the cost of credit significantly as this makes the loans more secure.²⁶³⁹ Licensing of brokers and the development of formal settlement procedures lower transaction costs. Full specification of interests is best achieved by the guaranteed registration of all interests, including those of mortgagees, on a register rather than licences.²⁶⁴⁰ Transactions should be irreversible. No transaction should be completed until all third party interests have been cleared and arrangements put in place for all new interests to be registered fully as the transaction is executed. The *NWI* protocols comply with these requirements. The legal instrument is evidence of the right, rather than the

2635 Woolston “Registration” 7.

2636 National Water Commission 2004 *NWI* para 2 of Sched G refers to Sched E.

2637 Clause 4(3) of Sched 3 of the *Water Act* 2007.

2638 S 48(1) of the *Victoria Water Act*.

2639 Young and McColl *Robust Separation* 10.

2640 Young and McColl *Robust Separation* 23.

right.²⁶⁴¹ Evidence of a property right can play an important role in providing assurance to the right holder that the right is secure enough to warrant investment.

7.3.2 *Guidelines for water registries*

The use of water entitlements as collateral for loans is a development that is not familiar to most South African lawyers, but is accepted by the *NWI*. In terms of its guidelines for water registries²⁶⁴² the parties have agreed that water registers will contain protocols for the protection of third party interests that require the holder of a registered security interest to be notified prior to any proposed dealings in relation to the water entitlement. The consent of holders of such interests to any proposed transfers is required.

Permanent transfers of the water entitlement and encumbrances that affect the entitlement, such as mortgages and other security interests, should be registered.²⁶⁴³ Lenders should be enabled to procure the registration of their interest independently of the holder of the entitlement (to ensure the rights of the entitlement-holder are sufficiently protected).²⁶⁴⁴ Time lags between date of lodgement for registration and actual registration of dealings should be managed, as such time lags may affect priorities.²⁶⁴⁵ The discharge of the security interest, in conjunction with the transfer of the entitlement to a new registered holder, should be allowed.²⁶⁴⁶ Lenders should only be affected by a subsequently registered interest where the lender has consented to the subsequent dealing.²⁶⁴⁷ Protocols should assist in the process of identifying water specific or unregistered interests.²⁶⁴⁸

7.3.3 *Collateral*

Without formal notice and approval of dealings in water entitlements by parties with registered interests in those entitlements, there is a risk that water entitlements will be traded away by the entitlement holder without the knowledge of the security interest holder.²⁶⁴⁹ Additional risks may arise if there is lack of clarity regarding rights to take possession, power of sale, appointment of a receiver and remedy default. If there is uncertainty over the legal existence of a property right over an asset, or the ability to have and protect an interest (for instance a mortgage) in that asset, its ability to be used as

2641 See Woolston "Registration" 4. See also Freebairn "Principles" 9.

2642 National Water Commission 2004 *NWI* Sched F para 3(i).

2643 National Water Commission 2004 *NWI* Sched F para 3(iii).

2644 National Water Commission 2004 *NWI* Sched F para 3(iv).

2645 National Water Commission 2004 *NWI* Sched F para 3(vi).

2646 National Water Commission 2004 *NWI* Sched F para 3(vi).

2647 National Water Commission 2004 *NWI* Sched F para 3(viii).

2648 National Water Commission 2004 *NWI* Sched F para 3 (ix).

See also Fisher *Implementing the NWI* 23-24.

2649 See Woolston "Registration" 1.

collateral for financing productive activity will be reduced.²⁶⁵⁰ In some parts of Australia water entitlements represent very valuable assets, and underpin very large capital investments. The parties to the *NWI*²⁶⁵¹ agreed that registers should enable resource managers to monitor and accumulate trade in water entitlements and water use volumes accrued under water entitlements in a separate water accounting system. In terms of the *Water Act*²⁶⁵² 2007 water access rights; water delivery rights; irrigation rights and rights that relate to access to, or the use of, basin water resources²⁶⁵³ are registrable water rights in relation to basin water resources.

7.4 Indefeasibility

Indefeasibility means that the registered proprietor's title in that land is better than earlier, but unregistered, interests and is subject only to earlier interests noted in the register (and certain statutory exceptions).²⁶⁵⁴ Although the Murray-Darling Basin Water Authority may provide information that allows access to information included in the registers and other information about registrable water rights,²⁶⁵⁵ neither the authority nor the Commonwealth is liable to compensate a person for loss or damage that the person suffers because of an error in, or omission from, the Murray-Darling Basin Water Rights Information Service.²⁶⁵⁶

State governments have been reluctant to adopt indefeasibility into their water registration systems. Some argue that water access entitlements are statutory entitlements.²⁶⁵⁷ The concept of "indefeasibility" cannot apply to water entitlements as governments wish to retain the power to cancel an entitlement where the holder does not comply with the conditions of the entitlement or the requirements of the relevant governing legislation. A further argument against indefeasibility is the power of governments to regulate the resource by varying the allocation under an entitlement and other conditions of the entitlement.²⁶⁵⁸ Another concern is that a state guarantee has the potential to lead to additional costs through provision of an indemnity for loss suffered by reason of the malfunctioning of the register. A clear distinction must be made between the registration aspect of water entitlements and the management of the resource. If the entitlement is based on specified shares of a resource, the issue of indefeasibility is separate from the

2650 See Thompson "Legal aspects relevant to a market" 111.

2651 National Water Commission 2004 *NWI* Sched F para 6. See Young and McColl *Robust Separation* 10 and 24 on an accounting system. See also Fisher "Innovative legal doctrine" 123 on the duty to provide access to information.

2652 S 101 of Part 5 of the *Water Act* 2007.

2653 And are of a kind prescribed by the regulations.

2654 Woolston *Registration of Water titles* 11.

2655 S 103(1) of the *Water Act* 2007.

2656 S 103(3) of the *Water Act* 2007.

2657 See para 4.4.2.2 and Roux "Property" 46-15, as well as para 6.5.4.

2658 Woolston "Registration" 12.

issue as to whether compensation should be paid for attenuation in entitlements. A share of the available resource is not a guarantee to a defined volume of water in perpetuity.

7.5 Water allocation or entitlement trading

7.5.1 Reasons why governments regulate water markets

Markets generally have been used to transfer fairly small quantities of water allocations among similar users in close proximity to each other, such as between farmers within a single irrigation or water management district. The modern concern is to find ways to change many water uses from uses with a low value to uses that were not developed at the time the water was first allocated.²⁶⁵⁹ It is true that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

In Australia it means discouraging the use of water in the resource for agriculture and encouraging the use of water for the needs of growing cities, industries, or the environment. COAG policy calls for water in the resource to be *inter alia* allocated to the environment.²⁶⁶⁰ Water in the resource that is provided by the states and territories to meet agreed environmental outcomes is to be given statutory recognition.²⁶⁶¹ It should have at least the same degree of security as water access entitlements for consumptive use and should be fully accounted for. If rights to use water were set aside by the state to meet environmental outcomes and were held by the state in the form of a water access entitlement, it may be made available to be traded on the temporary market when not required to meet the environmental outcomes sought. It may be traded provided such trading is not in conflict with those outcomes.

Fisher²⁶⁶² states that an effective set of market arrangements not only requires rights in the asset to be traded. There must also be full information about the asset and the associated rights and duties attached to it, as well as a system of competitiveness. At the moment water allocation or entitlement trading in Australia is mostly limited to trading in water entitlements or allocations for irrigation.²⁶⁶³ Three elements that are vital to the creation of efficient markets are typically missing in the case of natural resources. They are the ability to exclude others from using the resource; the ability to ensure the rights holders in the resource internalise all the costs and benefits associated with the use of the

2659 See para 7.1.3.

2660 National Water Commission 2004 *NWI* para 23 (iii) and (iv).

2661 National Water Commission 2004 *NWI* para 35.

2662 See Fisher "Innovative Legal Doctrine" 119.

2663 Grafton and Peterson "Water trading and pricing" 73.

resource; and accurate information on the condition and the effects of using the resource.²⁶⁶⁴

Water allocation or entitlement markets depend on four fundamentals. There must be well defined rights to goods or resources; many buyers and sellers in the market; goods or resources which are mobile and easily shifted to different use and users; and reliable and adequate information about the market.²⁶⁶⁵ The Parliament of Victoria did an *Inquiry into the Allocation of Water Resources for Agricultural and Environmental Purposes* during which they investigated the underlying assumptions underpinning the theory on which market instruments are based.²⁶⁶⁶

TABLE 7.1 ASSUMPTIONS UNDERPINNING THE PURE MARKET CONCEPT AND THEIR RELEVANCE TO WATER ALLOCATION OR ENTITLEMENT MARKETS

Assumption	Theoretical requirement for water allocation or entitlement markets to meet requirements of a pure market	The situation of water allocation or entitlement markets and allocation in practice
The goods or services can be bought and sold and are traded.	All benefits provided by the legal object water can be bought and sold in the market place.	Most environmental goods and services, and many recreational and social ones are not provided through market transactions and commonly are not readily amenable to such transactions.
There are no transaction costs.	The unit cost to sell the legal object water will be the same whether a small or large volume is sold.	Transaction costs lead to economies of scale in supply of the legal object water.
All market participants have equal access to capital.	All buyers and sellers of water allocations or entitlements have equal bidding power in the market so that distribution of water allocations or entitlements is not biased towards those with greater access to capital.	Access to capital is not equal, and so those with more capital may gain greater access to water entitlements or allocations. This is particularly relevant to allocation of water to natural environments.

²⁶⁶⁴ Macintosh, Denniss and the Australia Institute *Property rights and the environment* 20.

²⁶⁶⁵ Tan "Diving" 9.

²⁶⁶⁶ Parliament of Victoria *Inquiry* para 7.6.

There are no barriers to competition.	There is perfect substitutability of goods or services. If one producer will not supply the legal object water at a certain price it, or a perfect substitute, can be bought from another supplier.	There is no substitute for the legal object water for most uses, although there may be the option of obtaining the legal object water from a reticulated supply, captured overland flows or groundwater.
All resources used in production are priced according to their opportunity costs.	Opportunity costs are the benefits forgone if resources had been used in another way. ²⁶⁶⁷ These include economic, social and environmental opportunities.	A simple market transaction does not take account of all opportunity costs of the legal object water, particularly environmental and social ones that are difficult to measure.
All market participants have access to perfect information.	Full information is required if decisions on sales and purchases of water allocations and entitlements are to take account of more favourable terms that might be offered by competitors.	Water markets are immature and information limited. In addition, uncertainty about the value of water is caused by variable prices for produce, inadequate information on land capability and the importance of water for the environment.
There is no monopoly, oligopoly or monopsony. ²⁶⁶⁸	A monopoly exists where there is only one seller but many purchasers; oligopolies have few sellers; monopsonies have only one purchaser. These situations prevent efficient allocation of resources through the free play of competition.	Supply of the legal object water involves installation and maintenance of expensive infrastructure and so is a natural monopoly.
There are no externalities.	In a perfect market all consequences of the transaction are felt by the parties to the transaction and by no one else.	Transactions in the legal object water can involve large externalities. Consequences of the allocation are experienced by the wider community, including future generations, through impacts on the environment, as well as social and economic impacts.

The inquiry found that the capacity of farmers to absorb increases in water prices is limited. An increase in water prices could lead to higher-priced farm products.²⁶⁶⁹ This has serious consequences for the security of food supply. Another finding is that the price of

²⁶⁶⁷ See GN 1353 in GG 20615 12 November 1999.

²⁶⁶⁸ The Financial Dictionary <http://dictionary.reference.com/browse/monopsony> defines *monopsony* as a market similar to a monopoly except that a large buyer, not seller, controls a large proportion of the market and drives the prices down.

²⁶⁶⁹ Parliament of Victoria *Inquiry* 222.

water, despite a move to cost recovery, does not always match the cost of supply. Furthermore, it is difficult to include non-market costs in the price of water.²⁶⁷⁰

An independent water exchange appears critical to effect market-based water allocation or entitlement trading.²⁶⁷¹ It was too early to measure whether trading in water allocations or entitlements is a successful mechanism to allocate water.²⁶⁷² A mixture of a competitive water market in allocations or entitlements and government intervention in response to market failures associated with pollution and with public good properties of some environmental uses of water will be required to achieve a close to efficient allocation of scarce water resources. Ecological economists consider that if regulatory instruments are used to “set limits that protect ecological sustainability and social well-being,” the market can be an “excellent servant to improve the efficiency of water allocation” within these limits. The inquiry found that market trading in allocations or entitlements, by itself, is inadequate to meet environmental needs. In some systems water use will need reduction and this will require legislative or regulatory provisions, such as claw back provisions or levies on trade. Freebairn²⁶⁷³ writes that a mixture of a competitive water allocation or entitlement market and government intervention in response to market failures associated with pollution and with public good properties of some environmental uses of water will be required to achieve a close to efficient allocation of scarce water resources.

McKay²⁶⁷⁴ also refers to non-economic failures in water allocation or entitlement markets. There may be a risk to public health by changes to performance standards and by third party access to pipes; scant consideration of social welfare and equity considerations; and regulatory and monitoring failure through inadequate funding or corruption. She mentions that water may be “stockpiled” and that “the long term social justice aspects of the trade in water are poorly researched”.²⁶⁷⁵ Godden²⁶⁷⁶ warns that trading and efficiency appear to have become social ends in themselves, which are not subject to an environmental ‘integrity’ rider. The identified need for security of access to the water resources involves a limitation on the goal of ecological integrity. There exist few technical legal impediments to state governments actively intervening to ensure that the environmental ‘allocation’ is given priority in the implementation of water reform.²⁶⁷⁷ The environment becomes a market player whose ability to engage in the water allocation or entitlement market depends upon financial support by governments. A greater reliance on the market means

2670 Parliament of Victoria *Inquiry* 222.

2671 Parliament of Victoria *Inquiry* 222.

2672 Parliament of Victoria *Inquiry* 390.

2673 Freebairn “Principles” 2-3.

2674 McKay “Marketisation” 371.

2675 McKay “Marketisation” 373.

2676 Godden 2005 *J Environmental Law* 203.

2677 Godden 2005 *J Environmental Law* 203-204.

a less overt role for the state in setting the ultimate 'outcomes' beyond a generalised prescription of efficiency. Many difficulties revolve around the fact that the understanding of an efficient use of water when short term market calculations are made, does not take future costs into account.²⁶⁷⁸ One might argue that had the concept "beneficial use" been central to Australian water law, it would have qualified the requirement of "efficiency". A use that is harmful to the environment, can by definition never be beneficial. On the other hand, despite the requirement of beneficial use in South Africa and the protection of the Reserve, water in South Africa is severely polluted.

For a market to be effective as an instrument of governance, the nature and subject matter of the rights must be clear, certain and predictable.²⁶⁷⁹ The conundrum is that consumptive use of water requires a security of supply and stability of legal arrangements, but security and stability conflict with the principle of adaptive management - when the water supply becomes less, rights should be adjusted.²⁶⁸⁰ Security and stability imply that legal rights are not interfered with, while adaptability by necessary implication means that legal rights are interfered with. Stability implies that government does not intervene while adaptability implies that government may or does intervene.²⁶⁸¹ The question that goes to the heart of this matter is how these conflicting requirements should be balanced.

Fisher²⁶⁸² recommends that the ways in which existing legal rights may be affected should be identified with clarity and precision so that one can predict in advance in which circumstances rights will be affected. Interference should be based on enforceable rules rather than on the exercise of discretion.²⁶⁸³ There also needs to be legal rules dealing with the issue of compensation.

7.5.2 *Water products*

In traditional water allocation or entitlement markets a person who needs a more reliable water supply can achieve this either by buying more water entitlements or allocations than he needs; or by buying temporary transfer entitlements when supply reliability becomes a concern.²⁶⁸⁴ Bjornlund²⁶⁸⁵ writes that water use efficiency and the securing of access to

2678 Godden 2005 *J Environmental Law* 205.

2679 Fisher "Innovative legal doctrine" 121.

2680 See para 6.8.

2681 Fisher "Innovative legal doctrine" 124.

2682 "Innovative legal doctrine" 124.

2683 Connell, Robbins and Dovers "Delivering the NWI" 127 are of the opinion that the reduced scope for discretionary decision making by administrative officials might mean that disputes end up in courts, rather than being solved at the outset by officials from local communities and politicians. The fact that administrators had similar aims to the communities reduced conflict. Now that there are so many more interest groups, such a consensus is no longer possible.

2684 Campbell "Water trading instruments" 5. If demand increases, a spot (or rental) market may develop in SA. Conningarth Economists *Facilitation of trade* 81.

2685 Bjornlund 2008 *Austl & NZ Prop J* 2.

water rights and water uses will become major issues across all the sectors of the economy in Australia. Information uncertainty, flexibility of strategy and the management of risk should be at the centre of the policy framework.²⁶⁸⁶ Water allocation or entitlement trading is a strategy to manage risk. A secondary market would attach more value to flexibility to reduce demands for water in times of drought. In the case of irrigated agriculture, the opportunity for better matching pastures and annual crops against perennial crops suggests opportunities to make money.²⁶⁸⁷ Price capping products would allow users to blend entitlement and differently configured caps to meet their own risk profiles. The evolution of market instruments, such as long-term leases, lease-back, weekly and continuous water exchanges, and futures contracts would improve irrigators' ability to manage fluctuations in supply, demand and prices.²⁶⁸⁸ It appears as if water scarcity necessitates not only a deepening in thought on which uses are more beneficial than others, but it also necessitates a consideration of when water entitlements or allocations should be used or traded. Options provide greater price certainty to users and allow them to manage their financial risks in a more efficient manner.²⁶⁸⁹ For a fraction of the cost of buying the underlying asset, the option holder can create an exposure similar to that of physical ownership.²⁶⁹⁰ A farmer can increase his exposure to the water allocation or entitlement market with limited capital so that he can make additional profit from favourable water price movements while minimising his potential losses. Schreider²⁶⁹¹ writes that water options can impact on the economy in positive and negative ways. According to him, the benefits of the introduction of water options to the market are:

- *Water price insurance for farmers.* By paying a relatively small up-front option price, farmers are protected against adverse water price movements in the future and allow themselves to benefit from potential favourable water price advances. No matter how unfavourable the water price movement might be, the loss is limited to the amount paid for the options.
- *More choices for farmers.* A farmer has the choice to participate in the physical water allocation or entitlement and options markets to achieve his purposes. As options are cheap compared to the price of their underlying assets, it is ideal to hold options rather than the underlying assets. By holding options, farmers could retain future water price certainty without actually trading their water allocation.

2686 See ACIL Tasman *Water Trading in Australia* 19.

2687 In the case of s 33(7) of the *Victoria Water Act*, recognition is given to the fact that perennial crops have more time and effort invested in them than annual crops. The water rights of the owners or occupiers of land planted with fruit trees, vines or the like may be qualified in a lesser proportion than the water rights of the owners or occupiers of land planted or sown with plants cultivated for a single year's crop only.

2688 Bjornlund 2003 *Agr Water Manage* 58.

2689 Schreider "Water price dynamics" 3640.

2690 Schreider "Water price dynamics" 3645.

2691 Schreider "Water price dynamics" 3646.

- *Advantages for perennial crops growers.* The options market gives farmers with perennial crops the opportunity to hedge against any adverse changes in water prices in advance, and to take advantage at the same time of favourable water price movements. This will reduce the cost of their business.

The negative impacts are:

- *Information gap.* As farmers generally do not fully understand the risks involved in trading options, there is an information gap that would need to be filled by the government or financial intermediates.
- *Potential water price distortion.* As the water allocation or entitlement trading market in Australia is not very large, and water price is determined by supply and demand, both supply and demand could decrease significantly if a large proportion of farmers use the options market instead of the water allocation or entitlement trading market.
- *Potentially speculative activities.* Although options can be used for hedging purposes, they can also be used for speculation and arbitrage. There is a need for government and financial institutions to set up controls to ensure that allocation or entitlement trading activities are closely monitored. This problem can also be minimised by restricting access to the options market.

Bjornlund and Rossini²⁶⁹² argue that high value users will start to look at alternative ways of securing their water supply with prices in the \$500+/Mℓ range in the allocation market. The purchase of additional water entitlements or allocations might not be the most viable or profitable of securing a water supply. They suggest that high value users might be better off either buying a risk sharing contract with lower value users, such as options or conditional leases, or buying access to intra-seasonal water storage enabling them to carry water over from one season to another. During years with a normal supply of water, users of water uses with a lower value are willing to sell at much lower prices than during drought years. Dairy or fruit farmers, who are highly dependent on a secure supply of water, might be better off if they could buy water entitlements during normal seasons and store it for drought years. Alternatively, they might sign contracts with low value users during years of 'normal' allocation levels for the supply of water allocations during droughts.

2692 Bjornlund and Rossini "Tracing evidence" 2-3.

In Victoria the rights holder in a water holding in an irrigation district may temporarily transfer²⁶⁹³ to an authority or to the owner or occupier of any land any water rights that are attached to that holding, or the whole or part of any additional water offered for sale to him by the authority.²⁶⁹⁴ Water rights may in terms of the Act also be permanently transferred with the permission of both the buyer and the seller's authority, as well as the permission of each person who has a prescribed interest in the holding of the transferor.²⁶⁹⁵ Schreider²⁶⁹⁶ poses the choice as: what is better - to use allocated water to irrigate crops or to sell water allocations to another market player? If a farmer sells too many water allocations or entitlements he faces the risk of losing his crops - especially perennial ones - if the level of rain remains low. If he stores too many entitlements and rainfall is high, he loses possible revenue from water.

In theory one can buy water entitlements or allocations on the spot (cash) market, but this involves substantial price risks. Alternatively, one can seek forward contract access to water allocations or entitlements under specified trigger conditions. Derivatives²⁶⁹⁷ should allow risks to be assigned more effectively to those who are best placed to take those risks.²⁶⁹⁸ Forward sales can be constrained if one is not able to obtain approval for conditional transfers at a future time. The regulatory framework is very important for the development of water products. The outcome of the development of a derivatives market would be that during periods of high scarcity there would be reduced uncertainty for prospective buyers and sellers in respect of prices. This would lead to more security for longer term investment. Another outcome is that users can reduce their demand for water when prices are high.²⁶⁹⁹ This they can do by deciding to invest in permanent crops, for example, nut bearing trees, or annual crops, for example tomatoes, or they may decide not to invest at all. Bjornlund and Rossini²⁷⁰⁰ found the price of feeding barley had a significantly positive impact on the price of water allocations. This reflects the fact that the dairy industry is the main buyer in a particular study region, and that irrigators can substitute buying water to grow grass by buying feed. As the price of substitute feed rises, farmers' willingness to pay for water to grow grass also rises. Bjornlund²⁷⁰¹ also gives the example of a maize farmer who at the start of the season had trouble getting adequate

2693 Armitage *Economic Analysis* 143 is of the opinion that the authorisation of only temporary use rights will effectively reduce the collateral value of irrigation properties. It will distort incentives for farmers to make more productive and sustainable use of available water.

2694 S 224(1) *Victoria Water Act* 1989.

2695 S 226 *Victoria Water Act* 1989.

2696 Schreider "Water price dynamics" 3641.

2697 A derivative is a financial instrument of which the value derives from the values of other, more basic underlying variables. Schreider "Water price dynamics" 3644.

2698 Campbell "Water trading instruments" 6.

2699 Campbell "Water trading instruments" 6.

2700 Bjornlund and Rossini "Tracing evidence" 3. See also Bjornlund 2003 *Int J of WRD* 562.

2701 Bjornlund 2003 *Int J of WRD* 564.

water for his crop. He calculated that A\$175/Mℓ was the break-even point between buying and selling. When he could get that price he sold and avoided the risks of growing the crop. Without the exchange the dairy industry, the region's high-value water user, which generates most off-farm jobs, would not have been able to manage the drought.

One of the objectives of the management of the Murray Darling Basin is indeed to enable the appropriate mix of water products to develop. Water access entitlements may also be traded - either permanently, through lease arrangements, or through other trading options that may evolve over time.²⁷⁰² It allows for new products to develop.²⁷⁰³

7.5.3 Possible water market instruments

In a paper that has been prepared for the Water Reform Working Group, the following examples of instruments with good prospects for application to water markets were identified:²⁷⁰⁴

- futures contracts that allow forward sale/purchase of access to water entitlements or allocations at an agreed price;
- call options that allow the forward sale to a buyer of the right to acquire access to water on an agreed basis, if the buyer wants to exercise the option at the time;
- put options that provide the holder of water entitlement with the right to sell access on agreed terms, at a time in the future, should the water holder want to exercise the option at the time;
- swaps contracts designed to allow trading in the release pattern of water in a manner paralleling financial market uses of swaps to exchange, for example, fixed interest repayment terms for variable interest ones;
- swaptions, that involve sale of options in respect of the right to enter into a swap contract at some time in the future.
- commitment to a trade at *agreed price* at a *nominated time* in the future, e.g:
 - forward sell water allocations or entitlements 5 years on, to coincide with planned fallow rotation;²⁷⁰⁵

2702 That would be the case if water resources were physically shared or hydrologic connections and water supply considerations would permit water trading. Grafton and Peterson "Water trading" 73-74 state that markets for derivative products for water, such as leases and forward contracts, are emerging in response to irrigators preferring more flexible trading arrangements.

2703 See Clause 4(2) of *Sched 3* of the *Water Act 2007* and National Water Commission 2004 *NWI Sched G* para 1, as well as Clause 3(c) of *Sched 3* of the *Water Act 2007*. The basin water market and trading objectives and principles in *Sched 3* of the *Water Act 2007* are in terms of Note 2 based on those set out in clauses 58 to 63 and *Sched G* (above) of the National Water Initiative.

2704 ACIL Tasman 2003 *Water Trading in Australia* 34.

2705 ACIL Tasman 2003 *Water Trading in Australia* 35.

- forward purchase tranches of the water allocations or entitlements, at a known price, over several years to coincide with expected patterns of demand as a farm development matures. It allows a developer to lock in costs of a key input;
- buyers could source futures contracts from a range of sources to produce a *portfolio* with significant stability over time, or with a specified supply profile suited to needs;
- in return for both price and volume security, a fee would typically be paid, upfront, to the seller of the water entitlement or allocation, allowing holders of water entitlements or allocations to bring forward some of the benefits of the water entitlements or allocations at a future time, at the cost of some loss of flexibility. Depending on the price struck for the contract, payments could be structured to flow the other way, with the seller of the water paying to lock in a future price.

7.5.4 *Products resulting from global warming*

There is in principle little difference between environmental impacts caused by air pollution and environmental impacts caused by water pollution. A difference is that air pollution causes global warming and global warming is predicted to cause water scarcity. The Queensland Government ensured that there is a clear statutory framework, which enables people to transfer property rights over carbon sequestered in trees and vegetation as a commodity separate from the tree or vegetation.²⁷⁰⁶ The statutory framework was brought about by the potential of the Kyoto Protocol and its proposed scheme of international trading in greenhouse gas emissions permits and carbon credits becoming operational.²⁷⁰⁷ Carbon sequestration rights are a class of property right (generally recognised under common law or created under statute) that recognises the existence of carbon sequestered in a particular area of land and/or vegetation.²⁷⁰⁸ These rights are recognised in legislation in several states. Property rights are generally specified through contractual arrangement.

A weather derivative is a contract between two parties that stipulates how payment will be made during the contract period, depending on certain meteorological conditions. Weather insurance covers a once-off risk and a pay-out may (or may not) be proportional to the risk. Weather derivatives compensate proportionally when the weather circumstances

²⁷⁰⁶ Action Salinity 2002 *New Approaches* 8.

²⁷⁰⁷ Action Salinity 2002 *New Approaches* 8.

²⁷⁰⁸ Action Salinity 2002 *New Approaches* vii. See also Bates "Legal perspectives" 297-298. In NSW the Forestry Commission and electricity generators are empowered to deal in these rights. In Victoria a landowner may enter into an agreement to plant and grow trees.

meet those defined in the contract.²⁷⁰⁹ Some of the higher revenues in good times are bargained away in return for compensation in bad (low income) times. There are a number of differences between weather derivatives and insurance contracts.²⁷¹⁰

TABLE 7.2 INSURANCE CONTRACTS COMPARED TO WEATHER DERIVATIVES

INSURANCE CONTRACTS	WEATHER DERIVATIVES
High risk, low probability events.	Low risk, high probability scenarios.
Once off lump sum, not always proportional; not flexible.	Pay-out in proportion to magnitude of phenomena.
Pays out when proof of damage.	A predetermined index value is passed.
	Traded security with a price that can be sold or bought back.
Relatively expensive and requires a demonstration of loss.	Less costly, no demonstration of loss and protects against the uncertainty of variable weather conditions.
	Not an underlying instrument in the spot market. Protects against excessive costs or reduced supply.

The weather risk market makes it possible to manage the adverse impact of weather on the financial system by using risk transfer instruments based on elements of the weather – for instance temperature, rain, snow, wind – which affect revenues, costs or margins. In its simplest form an enterprise affected by weather pays a premium to a risk taker who assumes the risk, defined in terms of a weather element, posed by adverse weather. In exchange for the premium the risk taker, under certain pre-defined circumstances, will pay the buyer an amount of money that corresponds to the loss or cost increase caused by the weather.²⁷¹¹

The following is a good example:²⁷¹² Extremely cold weather increases heating costs for a university. The university budgets that heating costs should conform to a winter with a daily average temperature of 4.5°C. The university also maintains a modest contingency fund for unforeseen expenses. On the basis of the review of energy consumption, it

2709 Geyser 2004 *Agrekon* 445.

2710 Geyser 2004 *Agrekon* 445.

2711 WRMA 2007 *Introduction to the Weather Market* http://www.wrma.org/risk_intro.html

2712 WRMA 2007 *Introduction to the Weather Market* http://www.wrma.org/risk_intro.html

negotiates with a weather risk taker to pay a set amount of \$XX, 000 per degree should the coming winter's average temperature fall below 3°C. The winter's actual average temperature was 1.2°C. The risk taker pays the buyer an amount equal to \$XX,000 (3.05°C-1.2°C). The university uses this payment to defray the unexpectedly high heating costs, thereby limiting the impact of the extra heating costs on the contingency fund in the budget. If the winter's average daily temperature is above 3.05°C the risk taker retains the premium. The university's expenditure for heat was less than the amount, which critically affected its budget. Weather derivatives have the potential to complement water trades, and to allow greater value to be derived from water trading positions.²⁷¹³ A range of weather derivative products has emerged and recent growth has been remarkable. Weather derivatives create opportunities for dealing with disaster risks. They also promote insurance products for sectors that are highly dependent on weather, such as agriculture.²⁷¹⁴ A range of secondary market products and transactions might reasonably be expected to emerge in time, in the absence of market constraints.

7.5.5 *Victoria's clearinghouse market*

Acceptance by society is a prerequisite for a successful water allocation or entitlement market.²⁷¹⁵ The lack of social resources impedes the development of water allocation or entitlement markets, especially permanent water allocation or entitlement markets, in many developing countries.²⁷¹⁶ Permanent markets in water entitlements have been active predominantly in more developed countries such as Australia, the US and Chile. Informal allocation or entitlement markets, or markets for temporary water allocations or entitlements, have flourished quite widely in many countries such as India and Pakistan. Markets for temporary water allocations or entitlements have the important function of providing water to smaller farmers who cannot afford the necessary infrastructure to extract it. Such markets are easy to administer. The underlying property right in the water entitlement remains with the seller.²⁷¹⁷ Only the right to use the water for a defined period of time or the allocation is traded.

In the *Goulburn–Murray Irrigation District (GMID)* of Victoria (Australia) most trading, in the more sophisticated market, is also in temporary allocations.²⁷¹⁸ Trades are ranging from about 30% to 50% of total entitlements for individual farms. An on-line internet trading system called *Watermove* has conducted trading since the commencement of the

2713 See ACIL Tasman 2003 *Water Trading in Australia* F-10.

2714 Geyser 2004 *Agrekon* 444.

2715 Bjornlund 2003 *Agr Water Manage* 58.

2716 Bjornlund 2003 *Agr Water Manage* 59.

2717 See also Bjornlund 2003 *Int J of WRD* 554.

2718 Oczkowski 2008 *EAP Journal* 261.

2002/03 season. *Watermove* oversees a clearinghouse (CH) auction market. It determines the trading "pooled" price which equates the demand and supply for water entitlements.²⁷¹⁹

Irrigators in Victoria have two different water entitlements; a water right, where the security of delivery is 96 of every 100 years, and an annual "sales water" allocation.²⁷²⁰ The latter is announced every year and is a percentage of the water right. It depends on the availability of water in storage. Trading in water entitlements occurs on a weekly basis during a season that runs from July to June each year.²⁷²¹ Water allocations (a percentage of the entitlement) determine how much water can be irrigated every season. Water allocations are determined by the water authorities and depend upon rainfall and other seasonal conditions. Farmers and water traders exchange a water entitlement. There is a separate exchange for each of the nine trading zones in the GMID.²⁷²² The zones have been created to implement the trading rule that water can only be traded between two places if it can be physically transported from seller to buyer.

For each trading zone and week during the season, buyers and sellers submit price and quantity bids electronically (without knowledge of other bids) for trade.²⁷²³ These bids construct cumulative demand and supply curves. For demand, bids are listed from the highest to lowest price with quantities cumulated as prices fall. For supply, bids are listed from lowest to highest price with quantities cumulated as prices rise. The intersection between the cumulative demand and supply curves determines the single 'pooled' (uniform) price and the quantities (and traders) at which transactions occur. No demander pays more than he bid. No supplier receives less than he bid. The marginal traders determine prices (and trade at their bids) while the other successful demanders pay less than their price bids. The successful suppliers receive more than their price bids. Demanders whose bids are less and suppliers whose bids are more than the pooled price do not trade and are unsatisfied and are labelled as such in the public market information reports.²⁷²⁴ Buyers tended to possess larger water entitlements than sellers and typically operated well-off commercial properties, while sellers had smaller properties with low farm incomes. The main reasons for buying are low annual water allocations, good commodity prices and high product demand; for selling, traders are motivated by low commodity prices; interestingly, 16% of surveyed traders both bought and sold water during the same

2719 See also Bjornlund 2003 *Int J of WRD* 558.

2720 Bjornlund 2003 *Int J of WRD* 559.

2721 Oczkowski 2008 *EAP Journal* 262.

2722 Bjornlund 2003 *Int J of WRD* 560.

2723 Oczkowski 2008 *EAP Journal* 262.

2724 Oczkowski 2008 *EAP Journal* 263.

season, half of these traders had a zero net trade; 22% of net sellers and 10% of net buyers cited speculation as a motivation for trading.

Theoretical and experimental auction evidence suggests that with many traders the *Watermove* auction design will lead to rapid convergence to near competitive equilibrium prices, but with the possibility of less than competitive volume levels due to strategic attempts of traders to manipulate prices and exploit their local monopoly power.²⁷²⁵ Price adjustment may be influenced by excess (unsatisfied) demand. The possibility that market power may influence price outcomes exists. This would happen because of the asymmetry of buyer and seller size (in terms of average bids, water entitlements and financial resources) and the fact that some agents act as speculating traders (both buying and selling water).

Bjornlund²⁷²⁶ explains that the following factors have been identified as *inter alia* causing a preference for temporary water entitlement or allocation trading:

7.5.5.1 Taxation

A temporary purchase is fully tax deductible in the year in which it is purchased.²⁷²⁷ A permanent purchase is not tax deductible or depreciated.

7.5.5.2 The impact of water sales on the capital value of properties

Many irrigators believe that selling their water entitlement permanently destroys the capital value of their property and reduces their future options.

7.5.5.3 Policy uncertainty

If an irrigator buys a unit of water allocation on the temporary market, s/he can be certain of receiving a unit of water for the price paid. When s/he buys a unit of water in the form of an entitlement on the permanent market, there is no guarantee that he or s/he will receive a unit in all future years.

7.5.5.4 Administrative issues

The problems are related to the lengthy and costly processes. Time delays are caused by the need to advertise sales to protect other parties with an interest in the water use right

²⁷²⁵ Oczkowski 2008 *EAP Journal* 265.

²⁷²⁶ 2003 *Agr Water Manage* 64. Bjornlund's study area is part of Goulburn–Murray Irrigation District (GMID) in Northern Victoria and is located within the Murray–Darling Basin (MDB). It concentrates on the Western part of the GMID, which includes two sections: (1) Torrumbarry Irrigation Districts in the North, supplied by the Murray River, and (2) the Pyramid Hill–Boort area in the South, supplied from the Goulburn River via the Waranga Western Main Channel. Bjornlund 2003 *Agr Water Manage* 60–61.

²⁷²⁷ Bjornlund 2003 *Agr Water Manage* 65.

or entitlement. Costs are associated with the need to produce whole farm plans or improving irrigation and drainage infrastructure to fulfil regulatory requirements

7.5.5.5 The ability to adjust to annual fluctuations in supply, demand and prices for water and commodities

Some buyers do not need the water allocation every year, but only during periods of resource constraints, or when special market opportunities appear.²⁷²⁸ Some sellers do not have excess water allocations every year, but sell water allocations if commodity prices for their products are low.

7.5.5.6 The general adjustment pressure within the irrigation industry

Many irrigators are under pressure to adjust their properties to become financially viable by investing in farm expansions and improved irrigation and drainage infrastructure. They have used their available capital and cannot afford to buy permanent water entitlements.

7.5.5.7 The need to generate annual income

Many farmers have given up irrigation, but stay on the family farm generating a household income from annual water allocation sales, off-farm work, and some dry land farming.

It is clear from the discussion of the *Watermove* market in Victoria that temporary trading in water allocations is more popular than trading in permanent entitlements. On the one hand people tend to be hesitant to make permanent choices when there might be hidden costs relating to things like taxation, a loss of land value and administrative costs. On the other hand, they do not know how much water will be available in future or how much water they will need. Some even get an annual income from water sales. Playing it safe seems to be the rule of the game. Furthermore, there is the possibility that big buyers of water entitlements might form monopolies. Water entitlement trading does have its pitfalls and it is possibly better to move slowly rather than fast. The discussion on water entitlement or allocation trading will focus on South Africa in the next section.

7.6 Water trading in South Africa

Thompson²⁷²⁹ places water entitlement trading in South Africa in historical perspective when he explains that the various legal systems applicable during different periods were only a manner to implement the *res omnium communes* principle during a specific period, depending on the political arrangements and

²⁷²⁸ Bjornlund 2003 *Agr Water Manage* 66.

²⁷²⁹ Thompson "Legal aspects relevant to a market" 108.

available technology as well as the intensity of the competition for usage and the need for water. There is no reason why an allocation measure should apply forever. It should be amended to meet the requirements of the times. Thompson's view is in accordance with the hypothesis that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. He defines trading as a specific way of transferring entitlements.²⁷³⁰ Trading takes place when a willing buyer meets a willing seller. It usually takes place in a market.

7.6.1 *A wary attitude towards trading*

The *White Paper*²⁷³¹ provided that a proposed system for water allocation could function on an entirely administrative foundation. On the other hand, water pricing could be used to assist in the process of allocation. The system would also be compatible with provisions for creating a market in water use allocations in the event that it was to become attractive. It admitted that the administrative approach to price setting has some limitations in the current South African situation.²⁷³² However, it recognised that even water allocation trading suffers from administrative burdens. The practical difficulty of taking water, as the object of the water use entitlement, from one location and making it available in another also exists. A problem also identified in Australia, is that prices generated by trading in water-use entitlements or allocations will not necessarily reflect the real value of the resource.²⁷³³ Another concern that is also relevant to other countries with a history of social exclusion, is that it would be unacceptable for landowners who have received their water-use entitlement and resultant allocation under an unjust system of land acquisition to make profit from water's new cash value.

7.6.2 *A possible auction market*

The *White Paper* opened the door to a system similar to *Watermove*²⁷³⁴ that oversees a clearinghouse (CH) auction market. It recognised that a way to set an appropriate price for water use²⁷³⁵ or even waste discharge would be by pooling available allocations and selling them by tender or through an auction.²⁷³⁶ This would be managed by the water administration. Water allocations could be offered within a given area and all potential

2730 Thompson *Water Law* 520.

2731 DWA 1997 *White Paper on a National Water Policy* in para 6.2.1.

2732 DWA 1997 *White Paper on a National Water Policy* in para 6.5.3.

2733 See Parliament of Victoria inquiry para 7.6.

2734 See para 7.5.5 above.

2735 S 21 of the *National Water Act* 36 of 1998.

2736 DWA 1997 *White Paper on a National Water Policy* in para 6.5.3.

users offered the opportunity to bid for them. It is the allocations or volume of water that are sold in terms of this proposal, not the entitlements or the licences.²⁷³⁷

Where wealth is concentrated in the hands of a small, privileged minority, such an approach also has limitations. The *White Paper* envisaged that trading in water use allocations will be allowed in limited areas, but it will be subject to varying degrees of control. This will depend on whether it is within a single user sector or between such sectors. It will also depend on whether it is within or between water management areas. The government will pay attention to whether equity objectives and fair resource allocations are achieved.

Bronstein²⁷³⁸ notes that the 1999 pricing strategy was a shift from government hostility towards market allocations of water. The South African Department of Water Affairs in its pricing strategy²⁷³⁹ considered the possibility of using economic incentives in water-stressed areas to encourage water users to discard uses with a low value for uses with a high value.²⁷⁴⁰ This would be done to optimise the allocation of water resources between competing water uses where water is becoming increasingly scarce. An administratively determined economic charge could be introduced where water is used predominantly for low-value purposes. The charge would be over and above the charges for water resources management and development. The basis for determining the economic charge will be the opportunity cost of water as reflected in transactions taking place between water users.²⁷⁴¹ If government were to deem it necessary to introduce economic incentives in water-stressed areas, this could be achieved either administratively via an explicit charge or via a market-orientated mechanism. The Department does not draw a clear distinction between selling water entitlements and selling water allocations. The regulation²⁷⁴² defines a water market as a market where water entitlements are traded in the same fashion as other goods. Tradeable water use entitlements promote the shift from low to high value use of water and may remove the need for administratively set prices in water-stressed areas where the water demand is increasing.²⁷⁴³ The advantage of making a water use entitlement tradeable is that it allows for a more efficient user to buy the

2737 No licence is required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence. If a licence is issued it becomes the source of authority for the water use. If a licence is not granted, the use is no longer permissible. (Introduction to Part 3 (ss 32-35) of the *National Water Act* 36 of 1998.) If a licence is issued, the existing lawful water use becomes a licensed water use. If a licence is not granted, it ends the existing water use. The duration of a water licence is limited to 40 years. (S 28(1)(e) of the *National Water Act* 36 of 1998.)

2738 Bronstein 2002 SALJ 473.

2739 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3.

2740 Compare this to its misgivings in the DWA 1997 *White Paper on a National Water Policy* para 6.5.2.

2741 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3.

2742 GN 1353 in GG 20615 of 12 November 1999 para 9.

2743 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3.

entitlement from an existing, but less efficient, holder of the entitlement. It involves encouraging people to exercise water uses that are more beneficial.

According to the pricing strategy, one way to set an appropriate price for water use (or waste discharge) would be by pooling available allocations and selling them by tender or through an auction, managed by the water administration.²⁷⁴⁴ Public auction as a method of water allocation could be followed in areas which experience water stress and for which compulsory licences have been issued.²⁷⁴⁵ The issuing of new permits for any remaining water could be effected through a process of bidding or tendering for certain catchment or sub-catchment areas.²⁷⁴⁶ The highest bids or tenders would be awarded the available permits at a price equal to the lowest bid above the cut-off point. That price should be an efficient and economic price for water in the area and for the specified water use. The scarcity value of water would be implicitly reflected in the bids that are made by competing water users. Prospective permit holders would thus compete with each other for entitlements. Water allocations could also be offered within a given area and all potential users offered the opportunity to bid for them. Such an approach has limitations in a country where wealth is concentrated in the hands of a small, privileged minority.²⁷⁴⁷ The public auction concept stops short of making provision for a fully-fledged water entitlement market in that the permits representing water use entitlements would not be traded freely among competing water users.²⁷⁴⁸ Prospective permit holders would compete with each other for entitlements. This would facilitate a move away from the administrative setting of first tier prices towards a market-oriented approach to price determination.

7.6.3 *The need to readjust entitlements*

Conningarth Economists²⁷⁴⁹ agree that regulation is necessary to protect third parties, ensure beneficial use, correct past injustices and protect the water resource itself. Redistribution considerations may also put limits on the possibility of trade in water use entitlements.²⁷⁵⁰ They suggest that a proper impact study should be done to evaluate all the private and social cost and benefits of a proposed trade and to guide a decision. Ways have to be found to evaluate social factors properly. There should be a broader inter-

2744 See s 57(1) *Victoria Water Act* 1989.

2745 See chapter 4, part 8 *National Water Act* 36 of 1998.

2746 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3.

2747 The DWA 2006 *Strategy for Water Allocation Reform* 20 states that water allocation can also be done by encouraging water trading for water users who are able to purchase water entitlements. The strategy only provides a framework for the abstraction of water (either from groundwater or surface water sources), the storage of water and stream flow reduction activities (on 6-7).

2748 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3.

2749 *Facilitation of trade* 80.

2750 Conningarth Economists *Facilitation of trade* 85.

departmental policy framework for issues related to the redistribution of water entitlements or allocations to previously disadvantaged individuals.²⁷⁵¹

7.6.4 The National Water Act

The *National Water Act*²⁷⁵² provides for trading in water use entitlements through the provisions of sections 25 and 26. The Act recognises that, while the trading of entitlements between the various uses may optimise the economic use of water, they may also impose considerable external costs on the rest of the local economy.²⁷⁵³ Trading in water use entitlements would have to be subject to a form of control to protect the public interest. According to Thompson,²⁷⁵⁴ the entitlements allocated to a property for irrigation purposes could, in terms of the previous legislation²⁷⁵⁵ with the permission of the Minister, have been used on another property for irrigation purposes. Trading by transferring water entitlements for irrigation by way of lease or sale was only considered a real policy option from about 1993. Various permanent transfers were recorded in some areas.²⁷⁵⁶ In some schemes those who did not develop their unused entitlements were allowed to transfer them temporarily or permanently to other properties serviced by the scheme. Because of the high assurance of supply in some schemes, there was no need to negotiate temporary transfers as a strategic reserve for use during seasons when water restrictions were imposed. The implication of this is that those who could trade their entitlements temporarily in the two years prior to the *National Water Act*²⁷⁵⁷ coming into operation, could rely on existing lawful water uses. In at least some instances people who could not trade their entitlements because of system constraints, lost the entitlements.

Currently transfers of water use entitlements, both temporary and permanent, will only be permitted where both the original and the transferred water use entitlements are from the same water resource.²⁷⁵⁸ In the case of temporary transfers the *National Water Act*²⁷⁵⁹ states that:

A water management institution may, at the request of a person authorised to use water for *irrigation* under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of

2751 Conningarth Economists *Facilitation of trade* 90.

2752 S 25 and s 26(1) of Act 36 of 1998.

2753 GN 1353 in GG 20615 of 12 November 1999 para 5.3.3.

2754 *Water Law* 101.

2755 In terms of s 63(6) of the *Water Act* 54 of 1956.

2756 Thompson *Water Law* 102. Under the previous dispensation, the law allowed for the trading of entitlements, but it was contrary to policy to allow it to take place. Thompson *Water Law* 99.

2757 Act 36 of 1998.

2758 DWA 2004 *National Water Resource Strategy* para 3.2.3.12.

2759 S 25(1) *National Water Act* 36 of 1998.

some or all of that water on another property in the same vicinity for the same or a similar purpose.

From the above it appears that the subsection applies to a person who has been authorised to use water for irrigation under the *National Water Act*.²⁷⁶⁰ The water management institution has the discretion whether to approve or deny a request from the irrigator. The approval to use some or all of that water for a different purpose, is temporary and conditional.²⁷⁶¹ The approval can be to allow the use of some or all of that water on another property in the same vicinity for the same or a similar purpose. The right to be traded is the right to use water. The legal status of the original right and the legal status of the traded right should be the same.²⁷⁶² Temporary transfers are granted for one year only. The user has the option of applying for an extension of a further year.²⁷⁶³

The *National Water Act*²⁷⁶⁴ also states that a person holding an entitlement²⁷⁶⁵ to use water from a water resource in respect of any land may surrender that entitlement (or a part of it) to facilitate a particular licence for the use of water from the same resource in respect of other land.²⁷⁶⁶ The condition is that the surrender only becomes effective if and when the application is granted.²⁷⁶⁷ The most serious problems with this procedure are the need to verify, transfers between tributaries and main streams, transfers from above to below Government Waterworks and administrative bottlenecks.²⁷⁶⁸

The Water Tribunal case of *HHH Boerdery Trust On Behalf Of Osborne Boerdery (Pty) Limited and Director General: Department of Water Affairs and Forestry*²⁷⁶⁹ is a good example of where an irrigator wanted to trade his existing entitlement to use water. Osborne Boerdery had applied to obtain a water use entitlement through a surrender by HHH Boerdery (Pty) Limited ("HHH Boerdery") of its lawful water use. The surrender was in terms of section 25(2) of the *National Water Act*.²⁷⁷⁰ The water was to be used for

2760 Act 36 of 1998.

2761 See discussion of s 25(1) in Conningarth Economists *Facilitation of trade* 79.

2762 Thompson "Legal aspects relevant to a market" 109.

2763 DWA 2004 *National Water Resource Strategy* para 3.2.3.12.

2764 S 25(2) of Act 36 of 1998.

2765 According to Conningarth Economists *Facilitation of trade* 88-89 an existing licence is not a prerequisite for a water market as *ad hoc* verification of individual water use authorisations can be done. The number of transaction in 1999 were 323 transactions. Up to August 2003 only 90 cases were approved. See also Armitage 1999 *Economic Analysis* 112.

2766 The Department regards this to be trade in water use authorisations. They require new licence applications and are subject to the need for a Reserve determination if one has not already been carried out. Permanent transfers become effective only when the new licence is granted. The authority may attach different conditions to the new licence than were attached to the surrendered licence. One such condition may be that the new user must pay compensation to the original licence holder. DWA 2004 *National Water Resource Strategy* para 3.2.3.12.

2767 S 25(3) of the *National Water Act* 36 of 1998. The annual report of a water management institution or a responsible authority, as the case may be, must, in addition to any other information required under this Act, contain details in respect of every permission or every application granted.

2768 See Conningarth Economists *Facilitation of trade* 75 and 89 for the process.

2769 *HHH Boerdery Trust and DG: DWAF WT 15/03/2006*.

2770 Act 36 of 1998.

irrigation purposes.²⁷⁷¹ The Department of Agriculture (Eastern Cape) confirmed that the land being used by HHH Boerdery and in respect of which HHH Boerdery sought to surrender its water-use entitlement, would remain economically viable should the water use entitlement be transferred to Osborne Boerdery.²⁷⁷² Similarly, it was also determined that Osborne Boerdery, as the receiving property, needed to use the water that is the subject of the licence application.

The tribunal held that²⁷⁷³ section 25(2) does not require that an application be made where a lawful water user wishes to surrender his use of the water. All that is required of such a user is to advise the responsible authority of the wish to surrender the water entitlement. Such notification is intended to be made simultaneously with an application for an entitlement to the water use in respect of the water that is being surrendered.²⁷⁷⁴ When a responsible authority issues a general authorisation or a licence it must take account of the socio-economic impact of the water use or uses if authorised or not authorised.²⁷⁷⁵ This might prevent emerging farmers from being given authorisation to sell their water entitlements to raise cash.²⁷⁷⁶

Section 26(1)(l) of the *National Water Act*²⁷⁷⁷ allows the Minister to make regulations relating to transactions in respect of authorisations to use water. This is the most direct permission for a water entitlement market in the *NWA*. It enables the Minister to prescribe *inter alia* the following: the circumstances under which a transaction may be permitted; the conditions subject to which a transaction may take place; and the procedure to deal with a transaction. Section 26 also allows the Minister to make regulations prescribing procedures for the allocation of water by means of public tender or auction.²⁷⁷⁸ The regulations may also differentiate between different water resources and different classes of water resources - it may also differentiate between different geographical areas. It may create offences and prescribe penalties.²⁷⁷⁹ When making regulations, the Minister must take into account all relevant considerations, including the need to promote the economic and sustainable use of water and to prevent wasteful water use.²⁷⁸⁰

2771 HHH Boerdery Trust and DG: DWAF WT 15/03/2006 para 3.

2772 HHH Boerdery Trust and DG: DWAF WT 15/03/2006 para 8.

2773 HHH Boerdery Trust and DG: DWAF WT 15/03/2006 para 21.

2774 HHH Boerdery Trust and DG: DWAF WT 15/03/2006 para 21-22.

2775 S 27(1)(d) of the *National Water Act* 36 of 1998.

2776 Conningarth Economists *Facilitation of trade* 91.

2777 Act 36 of 1998.

2778 S 26(n) of the *National Water Act* 36 of 1998.

2779 S 26(2) of the *National Water Act* 36 of 1998.

2780 S 26(4) of the *National Water Act* 36 of 1998.

The *National Water Act*²⁷⁸¹ states that any entitlement granted to a person in terms of the Act replaces any right to use water.²⁷⁸² Water use entitlements²⁷⁸³ thus replaced old order rights to take or use water; to obstruct or divert a flow of water; to affect the quality of any water; to receive any particular flow of water; to receive a flow of water of any particular quality; or to construct, operate or maintain any water work. When separate water use entitlements are granted for these water uses the competencies inherent in the entitlement to use the water are in effect separated. It should make the water use entitlements more tradeable. The *National Water Act*²⁷⁸⁴ also requires the Minister, as soon as it is practicable to do so, to establish national information systems, such as a national register of water use authorisations. The existence of such a register is of the utmost importance for the development of the full value of water as a natural resource. It is also important to the banking system when one considers the fact that water now has value in itself.

7.7 Conclusion

One should support Thompson's²⁷⁸⁵ view that the various legal systems applicable in South Africa during different periods were only a manner to implement the *res omnium communes*' principle in a specific period, depending on the political arrangements and available technology, as well as the intensity of the competition for usage and the need for water.²⁷⁸⁶ Moreover, there is no reason why an allocation measure should apply forever. It should be amended to meet the requirements of the times. It is thus true that when water scarcity necessitates the reform of the water law dispensation, the definition of which uses are valued, is adapted in accordance with a changing perception of what is in the public interest.

It is also true that when it is necessary to encourage people to use water for high value uses rather than low value uses, water allocation or entitlement trading will be an effective way to encourage people to use water for uses with a high value. It may thus encourage the more beneficial use of water. However, water entitlement or allocation trading itself has various pitfalls, not the least of which are the impacts on third parties and the forming of monopolies.²⁷⁸⁷ It appears from the clearinghouse auction market in Victoria that

2781 S 4(4) of Act 36 of 1998.

2782 Water can now be transferred without the land. The fact that rights to water and land have been separated, is confirmed by the fact that a licence may be granted to use water found underground on land not owned by the applicant if the owner of the land consents or if there is good reason to do so. S 24 of the *National Water Act* 36 of 1998.

2783 See the activities listed in terms of S 21 as being included under water use.

2784 S 139(2)(d) of Part 2 of Chapter 14 of the *National Water Act* 36 of 1998.

2785 Thompson "Legal aspects relevant to a market" 108.

2786 See para 7.6.

2787 See para 7.5.1.

entitlement holders are playing it safe and only doing temporary trades in water allocations due to hidden costs.²⁷⁸⁸ They also do not know what their needs will be in future. The good thing is that people who trade are not hoarding their allocations or entitlements and the allocations or entitlements are made available for the use of those who need them.

Because water is so necessary to life on earth, water allocation or entitlement trading needs to be well regulated. Uncontrolled water entitlement or allocation trading may have devastating effects on innocent members of the public. Those with money should never be allowed to monopolise the resource to the exclusion of the rest of the population. The effects of water allocation or entitlement trading also need to be monitored carefully. Water allocation or entitlement trading can, however, never replace the effective and professional management of the water resource. When done correctly, water entitlement trading can protect the individual's water entitlement, without affecting society's ability to manage and control its water resources. It is likely that business in South Africa will turn towards water trading when the Department of Water Affairs is unable to give water licences because of water scarcity. The framework in the *National Water Act* and its regulations allow water allocation or entitlement trading, but much more regulation is needed.

More regulation is also needed to deal with the result of the separation of the link between water entitlements and land rights.²⁷⁸⁹ The separate existence of the entitlement has made it possible that the water entitlement might be used as collateral.²⁷⁹⁰ The separation of the entitlement and the property right in land has also made it possible to unlock value hidden in the various uses of the entitlement. The separation of property rights in land and water entitlements means that every last drop can be squeezed out of the resource when it is unbundled into all its underlying values.²⁷⁹¹ Only once one knows what the values and uses are, can one appreciate and exploit them in *inter alia* derivatives trading.²⁷⁹² Water allocation or entitlement trading is a way to manage the risk associated with a reduction in the resource. The development of derivative products is vital for the management of risk. However, there also needs to be a clear understanding of the effect and the protection that the law is prepared to give to various instruments. Water allocation or entitlement trading is here to stay, but the various rules dealing with water allocation or entitlement trading need to be spelt out clearly and in advance.

2788 See para 7.5.5.

2789 See para 6.8.

2790 See para 7.3.3.

2791 See para 7.2.

2792 See para 7.5.2 and para 7.5.3.

CONCLUSION

8.1 Revisiting the research question and objectives of this study

The research question that underlies this study is: How does the concept "beneficial use" influence South African water law reform? The question originated from the wording of section 32 of the *National Water Act* 36 of 1998 where it is stated that an existing lawful water use means a water use which has taken place at any time during a period of two years immediately before the commencement of the Act.²⁷⁹³ The water use must also have been authorised by a law that was in force immediately before the commencement of the Act. The wording of this section reminds of section 4(1) of the *Water Act* 54 of 1956 that stated that the *Water Act* of 1956 should not have been construed as derogating from any right to water which at the commencement of the Act had been lawfully acquired, was possessed and was being beneficially exercised by any person.²⁷⁹⁴ The research showed that the concept "beneficial use" in the sense of the exercise of the water use right can be identified as the criterion used to evaluate both pre-1956 and pre-1998 water use rights to determine whether they could be continued in a new water law dispensation.

One should keep in mind that water law involves a determination by the government, on behalf of society, of the interests in the water resources it is prepared to protect within the boundaries of South Africa's *Constitution* of 1996 and applicable framework law. In the context of water law the water uses are the interests in the water resources that are protected by rights to use water. The fact that running water had been classified as a *res omnium communes*²⁷⁹⁵ by the Romans meant that the individual's water use rights throughout the history of water law were limited by the rights of other people to use water from the same water resources. Despite the historical precedent of individuals' rights to use water being curtailed by society's demands, potential hardship arises when water dispensation reform occurs and some previously acknowledged water use rights are cancelled. In a new water law dispensation where some previously acknowledged water use rights are accepted because they can be classified as beneficially used and others rejected because they are not found to be beneficially used, it was necessary to establish the following: How the concept "beneficial use" is utilised to determine the content of a water use right, how it influences the availability of water for reform and how it may be used to reflect the public interest in the extent of a water use right. In order to determine

²⁷⁹³ See para 4.5.

²⁷⁹⁴ See para 4.4.1.

²⁷⁹⁵ See para 2.2.2 and para 2.2.3.

the effect and role of the concept "beneficial use" in South African water law reform the content and role of the concept "beneficial use" in South African water law prior to the promulgation of the *National Water Act* 36 of 1998 was first established.²⁷⁹⁶ The reform of the water law dispensation by the utilisation of the concept "beneficial use" in terms of section 32 of the *National Water Act* 36 of 1998 was then discussed.²⁷⁹⁷ It was also pointed out that the concept "beneficial use" currently plays a role when compensation are payable in cases where licences for existing lawful water uses are not granted or are amended.²⁷⁹⁸

8.1.1 *Structure of the analysis*

The thesis was divided into chapters in accordance with the focus of that chapter's research question. Chapter 1 dealt with the objectives of the research and the hypotheses to be tested. Chapter 2 provided the historical background to South African water law and focussed on the classification of the water resources and limitations on the right to use water in every period. The first part of chapter 3 focussed on the state's duty to give greater access to water for basic human needs and the aquatic ecology. The second part of chapter 3 focussed on the more equitable allocation of water to be used for economic purposes. Chapter 4 focussed on the effect the state's duty to improve the equitable allocation of water had on the individual's water use rights as rights in property. The question that was answered at the end of the chapter was whether the cancellation of unexercised water use rights in terms of section 32 of the *National Water Act* 36 of 1998 brought about the arbitrary deprivation or expropriation of property. Chapter 5 dealt with the role the concept "beneficial use" plays in water law reform in America. Beneficial use in America *inter alia* affects the water use right as a property right by being a background condition in terms of which the right has to be exercised. The main question discussed was whether the cancellation of unexercised water use rights in America amounts to a regulatory taking for which compensation is payable. Chapter 6 dealt with natural resource law reform in Australia. The Australian property clause is interpreted to mean that it is not an acquisition of property if a right in property is extinguished by a law made in pursuance of another legitimate governmental objective. The question was whether one should be compensated for the cancellation of one's water use rights. Both chapters 5 and 6 are useful from a comparative perspective when one determines what limitation of property rights is normal in an open and democratic society in terms of section 36 of the *Constitution* of 1996. The practice in those countries can also assist in determining when

²⁷⁹⁶ See para 4.4.1.

²⁷⁹⁷ See para 4.5.

²⁷⁹⁸ See para 4.4.2.4.

conduct is regarded to be similar to an arbitrary regulation of property or an expropriation of property in terms of the property clauses of other open and democratic societies. Chapter 6 dealt with ways to manage the risk of a reduction in available water resources and also lay the legal foundation for the discussion of water trading in chapter 7. Chapter 7 dealt with attempts to encourage the more beneficial uses of water by making use of water trading in Australia. The Australian experience was then compared to South African legislation. Chapter 7 is forward-looking and may point to possibilities and pitfalls South Africa might encounter in future.

Some of the hypotheses set out in the next section were tested in the above chapters as and when they were applicable. The hypotheses were used to establish the principles on which water law is based in the above legal systems and also to establish how they affect the content of water use rights.

8.2 Hypotheses

The main hypothesis that was tested in this thesis is that when the South African water law dispensation was reformed in 1998, the concept "beneficial use" set the limits of the water use right as a property right. The hypothesis was tested by way of investigating certain underlying hypotheses. The objective with using the underlying hypotheses to prove the main hypothesis was to investigate or uncover the principles on which water law and water use rights are based. The underlying hypotheses were:

- 8.2.1 A right of access to sufficient water as entrenched in the *Bill of Rights* is a manifestation of the Roman law principle of *res omnium communes*.
- 8.2.2 Because of the need for water to sustain life and livelihoods in conditions of water scarcity, the public interest plays a larger role in the allocation of water use rights in South Africa than in the allocation of rights to other forms of property.
- 8.2.3 When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.
- 8.2.4 The extent of the right of access to sufficient water as a constitutional right should be limited by the concept "beneficial use".
- 8.2.5 The concept "beneficial use" should be used to determine the existence of the right to use water.
- 8.2.6 When some private rights to use a water resource are in conflict with other private rights to use the water resource, beneficial use is the tool that is used to determine which rights are to be preferred to others.

8.2.7 When it is necessary to encourage water users to discard uses with a low value and to encourage them to use water resources for uses with a higher value, water trading will be an effective way to encourage the discarding of uses with a low value.

In the next section the meaning of the concept "beneficial use" as uncovered during the research will be discussed before the underlying hypotheses will be discussed.

8.3 Beneficial use and water use rights

The more equitable allocation of water use rights is now mandated by the *Constitution*.²⁷⁹⁹ The source of the power to allocate water lies in the constitutional guarantee of the right of access to sufficient water in section 27(1) of the *Constitution* of 1996. The governmental power to achieve the equitable allocation of water use rights is supported by section 25(4) of the *Constitution* that states that the public interest in the context of the property clause of the *Constitution* includes the nation's commitment to reforms to bring about equitable access to all South Africa's natural resources. It is argued that realising the right of access to sufficient water not only affects access to sufficient water for basic human needs and the needs of the aquatic ecology as set out in the Reserve,²⁸⁰⁰ but it also involves improving access to sufficient water for previously disadvantaged communities to help them make a living.²⁸⁰¹ The responsibility of government in terms of the Preamble to the *National Water Act* is *inter alia* to achieve the equitable allocation of water for beneficial use and the redistribution of water.²⁸⁰² The beneficial use of water traditionally meant the use of water for a productive or economic purpose.²⁸⁰³ In the context of the section 27(1) guarantee of the right of access to sufficient water, it is argued that the equitable allocation of water for beneficial use probably means that once water had been allocated for the requirements of the Reserve water should be allocated for productive or economic purposes only.²⁸⁰⁴ Moreover, when water for economic purposes is allocated, the allocation must meet the standard in section 195 of the *Constitution* of 1996 that the efficient, economic and effective use of resources must be promoted.²⁸⁰⁵ The Appellate Division in 1958 in *De Villiers v Barnard*²⁸⁰⁶ held that taking public water for the efficient and economical irrigation of land is exactly the same thing as the taking of public water for one's reasonable requirements and is no different from making beneficial use of public

2799 See para 3.2 and para 4.1.2.

2800 See para 3.1.4.

2801 See para 3.8.

2802 See para 3.1.4 and para 3.8.1.

2803 See para 3.8.1.

2804 See para 3.8.

2805 See para 3.8.1.

2806 See para 4.4.1.

water without waste. It is argued that the requirement of efficient, economic and effective use of resources in terms of section 195 of the *Constitution* of 1996 serves to confirm that the meaning of the concept "beneficial use" of the water resources remains one of the efficient and economical use of water. The requirement of effectiveness, however, now exists in addition to the other two requirements.

Moreover, the principle stated in *De Villiers v Barnard* in 1958 that "no person possesses a greater right to the use of public water than he is able to exercise beneficially" still should be valid today when water is even scarcer and the requirement of beneficial use is applied even more strictly.²⁸⁰⁷ The reason for the uneven distribution of rights to use water is that access to the water resources in South Africa was limited to those with access to land. The fact that the *National Water Act* 36 of 1998 *de iure* separated the right to use water from the ownership of land does not affect the requirement that water for irrigation has to be beneficially used on land.²⁸⁰⁸ In the case of water to be used for irrigation the efficient, economic and effective use of water resources would be more readily achieved if land reform made more land available to be irrigated by previously disadvantaged people. It would assist them in meeting the requirement of having the capacity to beneficially use the water.

It follows logically that giving more water to some people means giving less water to other people. It has happened twice in the past fifty five years that the water law dispensation was reformed.²⁸⁰⁹ In both instances the water use rights that survived reform of the water law dispensation by Parliament unscathed were those that have been beneficially used. No requirement that riparian water use rights had to be exercised or they would be forfeited existed in the *Irrigation and Conservation of Waters Act* 8 of 1912,²⁸¹⁰ the legislation governing water law before it was repealed by the *Water Act* 54 of 1956. However, when the *Water Act* 54 of 1956 was promulgated, Parliament as regulator of the water resources adjusted water use rights so that only the beneficial exercise of riparian rights to the normal flow of a river ensured that they survived water law reform.²⁸¹¹ After the Act had been promulgated, the water use rights of the holders of unexercised riparian rights were limited to surplus flow.

The second time that the exercise of water use rights ensured their continued existence was with the adoption of the *National Water Act* 36 of 1998. The concept "existing lawful water use" in section 32 of the Act has the effect that only a water use that had been

2807 See para 4.4.1.

2808 See para 3.8.1.

2809 See para 4.4 and para 4.5.

2810 See para 2.6.3.

2811 See para 4.4.1.

exercised in the two years before the promulgation of the Act is defined to be an existing lawful water use.²⁸¹² The concept "existing lawful water use" is a manifestation of the concept "beneficial use" in the sense that the water use right had to be lawfully or beneficially exercised in order to survive the reform of the water law dispensation. The question was whether the existence of water use rights was conditional on their beneficial use after the promulgation of the *Water Act* 54 of 1956 or not. If their existence was conditional on beneficial exercise, they would not be recognised as property. If their existence was not conditional on beneficial exercise, they are still to be recognised as property. What needed to be determined was the effect of the concept "beneficial use" on the water use right as a property right. The question that followed from the answer to this question was whether compensation should be paid for the cancellation of unexercised water use rights.

The research was done by way of testing the main and supporting hypotheses. The principles on which South African water law is based, which became apparent as the underlying hypotheses were tested, will be discussed next. Sometimes two hypotheses are so closely related that they are discussed in the same section. The historical development of the concept "beneficial use" took place against the background of water being classified as *res omnium communes*. The implications of this will be discussed next.

8.3.1 *Development of the res omnium communes' principle*

The *res omnium communes'* principle (see the hypothesis in 8.2.1) as encapsulated in the *Institutes* of Justinian²⁸¹³ stating that running water is common to all, forms the foundation of water law in South Africa;²⁸¹⁴ America²⁸¹⁵ and Australia.²⁸¹⁶ Simon van Leeuwen in the *Censura Forensis*²⁸¹⁷ recognised that in Roman-Dutch law running water was also common property. The concept "common use" is typical of the *res omnium communes'* principle. Van Leeuwen stated that certain things that are common property are "by their nature" equally allotted to everyone and can be occupied, in so far as that user does no harm; for without the use of water no one can live. The right to use water was at the Cape of Good Hope also limited by the condition that water use may do no harm.²⁸¹⁸ Because of the potential of harm to others, the public interest, particularly the public interest in sustaining life and livelihoods, plays a larger role in the allocation of water use rights than

2812 See para 4.5.

2813 See para 2.2.3.

2814 See para 4.4.2.3.

2815 See para 5.4.

2816 See para 6.2.1.

2817 See para 2.3.1.

2818 See para 2.4.6.

in the allocation of rights to other forms of property. The fact that water is common property meant that rules had to develop around the custodianship of water.²⁸¹⁹

8.3.1.1 Custodianship of water

The public interest played a role in the development of the principle of custodianship. The principle of custodianship, or stewardship, as discussed by Grotius,²⁸²⁰ evolved in the light of the Spanish Moral Philosophers' influence on Grotius' view of property and other real rights. The basic principle underlying custodianship is that creation in terms of natural law is available for everybody's use and therefore individuals should not claim parts thereof for themselves. God remains primary proprietor, but a human being establishes a secondary proprietorship for own maintenance. The concept "custodianship" in a modern guise is reflected in the principle that the national government, acting through the Minister, is the custodian of the water resources on behalf of the nation in terms of the concept "public trusteeship" in section 3(1) of the *National Water Act*.²⁸²¹ The concept "custodianship" is also reflected in section 24 of the *Constitution* of 1996, which states that everyone has the right to have the environment protected for the benefit of present and future generations.²⁸²² In the case of the environment, of which the water resources form a part, the government is also the custodian on behalf of the nation. Although the concept "custodianship" is based on the religious belief that creation in terms of natural law is available for everybody's use, it is reconcilable with the fact that government is the custodian of the water resources on behalf of the nation in terms of section 3(1) of the *National Water Act*.²⁸²³ The rule that a human forms a secondary proprietorship for own maintenance is reconcilable with the concepts "water use right" and "beneficial use" of the water resources. The concept "custodianship" acts as a mediating principle that guides the decision maker when different public interests in water resources are balanced against one another. It should be those interests that are in harmony with the protection of the water resources on behalf of the nation that are encouraged. One of the reasons why there exists a need for water law reform by the government is that the concept "custodianship" places a moral obligation on the powers that be to allocate water equitably. The concept "beneficial use" goes hand in hand with the concept of "custodianship" or "public trusteeship".²⁸²⁴ The reason is that water as a public trust resource is used in common with other water users. The use should thus be beneficial

2819 See para 2.2.2.

2820 See para 2.3.3.

2821 See para 4.4.2.3.

2822 See para 3.1.4.

2823 See para 4.4.2.3.

2824 See para 4.4.2.4.

and non-wasteful in order to protect the water resource and the interests of other water users.

Another rule recognised by Grotius²⁸²⁵ was that equity demands that in times of scarcity people need to produce their provisions for common use. For example, when people are in a boat at sea and provisions run low, they have to share the provisions. Grotius quoted Seneca the father, who stated that necessity, the great resource of human frailty, breaks through the ties of all human laws. The necessity caused by hunger and thirst meant that a person who owned provisions had to share them with those in the same boat who did not have provisions. The same principle applies to water as a common resource. In the case of an emergency or necessity, when only one person has access to water and other people and animals are dying from thirst, the one person with access to water would have to share the water that he has access to or he would have to allow other people to access the water.

However, in a modern state one should regulate water as a resource and not only manage the resource from crisis to crisis. The regulator in the case of necessity had to replace the *Water Act* 54 of 1956 with the *National Water Act* 36 of 1998 to ensure that water for basic human needs and the aquatic ecology is available in the Reserve.²⁸²⁶ The adoption of section 27(1) of the *Constitution* of 1996 guaranteeing everyone's right of access to sufficient water and requiring reform of access to water necessitated a change in the framework law in terms of which water use rights as rights in property are regulated. The background conditions in term of which water use rights are granted have also been changed substantially by the fact that the government, acting through the Minister, is now the custodian of the water resources.²⁸²⁷ The right of access to sufficient water as entrenched in the *Bill of Rights* must be turned into reality by the Minister acting on behalf of the government as custodian of the nation's water resources.²⁸²⁸ The Minister acting as custodian of the nation's water resources is a manifestation of the Roman law principle of *res omnium communes*.²⁸²⁹ Some people argue that the right of access to sufficient water does not contain all of the *res omnium communes*' principle, as one cannot expect the state to be obliged to provide access to water for economic purposes in conditions of water shortage.²⁸³⁰ Others argue that the state has a duty in terms of section 27(1) to at least create the conditions for people to be able to access water for economic purposes, whether it is by allowing them to make use of water allocation or entitlement trading or

2825 See para 2.3.4.

2826 See para 3.1.4.

2827 See para 4.4.2.3.

2828 See para 4.4.2.3.

2829 See para 3.2.1.

2830 See para 3.2.1.

not.²⁸³¹ Courts will rely on the context of every case to determine the extent of the right of access to sufficient water.²⁸³²

The content of the concept "public trusteeship" in South Africa is that the state retains the right of a custodian in relation to natural resources. The national government acting through the Minister was appointed as the public trustee of the nation's water resources in terms of the *National Water Act*²⁸³³ *inter alia* to ensure that the water resources are protected and controlled. The rights of the Minister to act as public trustee are qualified by her duty towards the nation. The implication is that the permission to use water that is granted by the government stems from its function as regulator or custodian of the resource. All water use licences are conditional, as they are permanently "burdened" with the knowledge that the state is the custodian of the water resources on behalf of the nation,²⁸³⁴ and that the state may not act contrary to its duties as custodian. The exercise of water use rights may intrude on a public common or *res omnium communes*. For this reason they are subject to underlying limitations such as the public trust, beneficial use and to laws protecting the water from pollution.

When the *National Water Act* was adopted, existing lawful water uses survived as water use entitlements.²⁸³⁵ In terms of the definition of the Reserve in terms of section 1 of the *National Water Act*²⁸³⁶ water is set aside for basic human needs and the aquatic ecology. It was explained in chapter 4 that some writers believe that property rights to use water in the Reserve do not exist.²⁸³⁷ The system in terms of which water entitlements are regulated by the national government as public trustee of the nation's water resources in terms of the *National Water Act* reminds one of the system of public grants followed in Rome.²⁸³⁸ The South African water law needed to be updated to make room for the modern permit system envisaged in the *National Water Act*. The principles of the Act, including the use of the concepts "custodianship" of water and "beneficial use," are largely consistent with the principles of Roman water law. However, some 2 000 years separate water law in South Africa from water law in Rome. Roman water law was not the sole source of South African water law.²⁸³⁹ Many of the principles in the *National Water Act* 36 of 1998 will need to be interpreted by the courts in the light of the background principles of South African water law, which has taken many detours since the time of ancient Rome.

2831 See para 7.6.

2832 See para 3.7.2.

2833 See para 4.4.2.3.

2834 See para 4.4.2.

2835 See para 4.4.2.2.

2836 See para 3.1.4.

2837 See para 4.2.2 and para 4.5.

2838 See para 2.2.3.

2839 See chapter 2, in particular para 2.3 and para 2.4.

8.3.1.2 Public trusteeship and the public trust doctrine

The concept "public trusteeship" in section 3 of the *National Water Act*²⁸⁴⁰ is similar to the public trust doctrine²⁸⁴¹ that has been developed in American law. In terms of the public trust doctrine the sovereign owns all of the navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people". The public trust doctrine with its underlying notion of stewardship is also in accordance with the classification of water as a *res omnium communes* in Roman water law.²⁸⁴² The concept "public trusteeship" operates within the confines of the *National Water Act* 36 of 1998, but the attention of South African courts may be drawn to important principles relevant to similar circumstances in South Africa when doing research into the public trust doctrine in American law. Where the understanding of a concept in foreign law is consistent with our constitutional notion of the same concept, like the concept "public trusteeship," it may be of assistance to a court to consider the understanding of the foreign concept when making its decision.²⁸⁴³ It is the situation despite the fact that individual cases may be distinguishable because of the facts or because other principles of law may be applicable in a particular case.

In America the private right to appropriate water from a watercourse is subject not only to the rights of other riparian owners who are situated lower down on a river, but to the initial limitation that it may not substantially diminish the water resources, it being one of the great foundations of public welfare and health.²⁸⁴⁴ The public trust doctrine in America is a tool to stress the importance of custodianship of the water resources. The public trust doctrine draws the attention to the fact that water resources are all-important and deserve special treatment.²⁸⁴⁵ Unlike the position in South Africa, no right of access to sufficient water is contained in a *Bill of Rights* in America.²⁸⁴⁶ The public trust doctrine in America gives water resources a standing that it would not have had if a right of access to sufficient water had been merely protected as a human right in a *Bill of Rights*.²⁸⁴⁷ If a right of access to sufficient water had been merely protected as a human right in America, it is argued that the right of access to sufficient water would have been one of many human and other economic rights that had to be weighed against one another. There would have been the risk that political influences on the courts meant that material concerns weighed more than the right of access to sufficient or clean water.

2840 See para 4.4.2.3.

2841 See para 5.4.

2842 See para 5.4.1.

2843 See para 1.4.2.

2844 See para 5.4.2.

2845 See para 5.4.4.

2846 See para 5.3.

2847 See para 5.4.5.

When South African courts determine how the public trust concept enables the protection of the water resources they may find it useful to take cognisance of the *locus standi* the public trust doctrine in America affords various parties to defend their interest in natural resources.²⁸⁴⁸ The public trust doctrine protects the environment by, *firstly*, allowing private parties to use the public trust concept against the government where proposed government action threatens the public trust or its values. *Secondly*, government is allowed to use the public trust to prevent private parties from infringing on trust values. *Thirdly*, private parties are allowed to use the public trust against other private parties where trust values are infringed. South African courts should consider interpreting the public trust concept in section 2(4)(o) of the *National Environmental Management Act* 107 of 1998²⁸⁴⁹ and section 3(1) of the *National Water Act* 36 of 1998²⁸⁵⁰ by considering American law on the public trust. In South Africa where the environment is under pressure because of ill-managed development, allowing members of the public to act on behalf of the public trust will allow the concepts of "custodianship" and *res omnium communes* to take hold in the public imagination. It would be sensible if the courts, when considering the control of the water resources by the government as public trustee thereof in terms of section 3 of the *National Water Act*, would enquire how a specific matter was addressed in terms of the public trust doctrine in America. It might then decide that the issue at stake in terms of the public trust doctrine in America is to be distinguished on the facts or on the law from the matter before the court, or that certain principles are consistent with South African law.

8.3.1.3 No public trust in Australia

It is necessary to be aware that water law in a modern democracy can function without making use of the public trust concept. In Australia, for example, water law is based on Justinian's proposition that running water is common to all,²⁸⁵¹ or a part of the *res omnium communes*. The government is not described as custodian of the water resources²⁸⁵² and the concept "beneficial use" plays a peripheral role. Water is public property,²⁸⁵³ though, and vests in the state governments. In the *Harper* case the High Court of Australia held that a limited natural resource can be said truly to be public property. The "statutory vesting" of property in the Crown is nothing more than a fiction in legal shorthand of the importance to the people of a state that the state has the power to preserve and to regulate the exploitation of an important resource. This is in harmony with both the

2848 See para 5.4.3.

2849 See para 3.1.4.

2850 See para 4.4.2.3.

2851 See para 6.2.1.

2852 See para 6.4.

2853 See para 6.4.

concept of "public trusteeship" that involves the state retaining a residual right in relation to natural resources and with the Roman law concept of *res omnium communes*.

The right to use natural resources was traditionally a usufructuary or limited real right or a *profit à prendre* in Australia,²⁸⁵⁴ as was the case in America.²⁸⁵⁵ As a result of the modernisation of the law relating to natural resources, the right of commercial exploitation of a public resource, like a fishery, has been turned into a privilege confined to commercial licensees, according to the *Harper* case.²⁸⁵⁶ It is an entitlement of a new kind. The effect of this is that the licence is capable of modification or extinguishment without constituting an acquisition of property, if that course is permitted by its terms. This concept of a "privilege confined to licensees" accords with the view in American and South African water law that the water use right is burdened by the conditions of the state's background law. However, the protection of the environment via the concept of the "public trust" might grasp the public imagination more than the concept "public property" would.

8.3.2 *The role of the public interest*

The devastating impact a lack of access to sufficient water would have on the individual and society justifies the involvement of the public interest in the allocation of water use rights (see the hypotheses in 8.2.2 and 8.2.3). It was explained above²⁸⁵⁷ that Simon van Leeuwen's *Censura Forensis* stated that water can be used in so far as that use does no harm. The result is that the public interest, particularly the public interest in sustaining life and livelihoods, plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property. The role of the public interest in water law is *inter alia* reflected in the principle of stewardship that was discussed above.²⁸⁵⁸ The public interest is also reflected in those aspects of the right of access to sufficient water that are protected in terms of the international instruments, like *General Comment 15*²⁸⁵⁹ and various other international human, economic, social, and cultural rights instruments. The Constitutional Court in the case of *Lindiwe Mazibuko*²⁸⁶⁰ stated that what a right requires will vary over time and context. The context should be considered when determining whether a government programme is reasonable.²⁸⁶¹ The context *inter alia* reflects the public interest and the public interest determines what the realisation of the right requires. The difference between the application of the concept of *res omnium communes* 2 000

2854 See para 6.6.2.

2855 See para 5.5.

2856 See para 6.6.4.

2857 See para 8.2.1.

2858 See para 8.3.1.1.

2859 See para 3.6.

2860 See para 3.7.2.

2861 See para 3.7.3.

years ago and today is merely that the content of the public interest is different because the concerns of the public depend on the context.

Water scarcity is an important public interest influencing the context in which the *res omnium communes* operates. When the American courts in the nineteenth century wanted to move away from a conceptualisation of water as private property, as encapsulated in the theory of the natural flow of a river, it relied on the concept of *res omnium communes*.²⁸⁶² In the classical case of *Tyler v Wilkinson* the late Mr Justice Story stated that a land owner has no property in the water in the river itself; only a simple use, while it flows along.²⁸⁶³ American courts thus used the Roman concept of *res omnium communes* to develop a theory of the reasonable use of water. The *res omnium communes*' principle was thus used in the nineteenth century to bring American water law up to date with the needs of a modern society.²⁸⁶⁴ Industrialisation in the mid- to late-nineteenth century caused the natural flow theory to be replaced throughout the Eastern United States of America with the "reasonable use" theory.²⁸⁶⁵ It involved a transition from a private property system to a common property system. Justice Story limited the concept "reasonable water use" by using the standard of the "absence of injury". It is consistent with a utilitarian "greatest good" axiom. The greatest good involves determining what is in the public interest in the context of the time. The greatest good to a certain extent determines what uses are beneficial.

When water scarcity necessitated the reform of the water law dispensation in South Africa the court in the case of *Retief v Louw*²⁸⁶⁶ adopted the concept "reasonable use" in accordance with the changing perception in both South Africa and America of what is in the public interest. At the time the *Water Act* 54 of 1956 was promulgated in South Africa the public interest consisted of a desire to prevent unused water flowing to the oceans. When the *National Water Act* 36 of 1998 was promulgated, however, water for basic human needs and aquatic ecosystems received priority in terms of the Reserve²⁸⁶⁷ when water was to be allocated. It appears that uses preferred by the legislature change as the content of the public interest changes. The public interest thus plays a larger role in the allocation of water use rights than in the allocation of rights to other forms of property. The operation of the concept "beneficial use" by limiting water uses that are recognised by the legislature to those uses that are considered by society to be beneficial or in the public interest, presents a good illustration of how society's values influence the property

2862 See para 2.6.1.1.

2863 See para 2.6.1.1.

2864 See para 2.6.1.4.

2865 See para 2.6.1.4.

2866 See para 2.6.

2867 See para 3.1.4.

concept.²⁸⁶⁸ When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest.

One of the advantages of comparing American water law is that it provides an excellent example of how the law prescribes the background conditions in terms of which property is owned. The rule is that beneficial use is the source, gauge, and limit of property rights in water.²⁸⁶⁹ Beneficial uses by their nature are those that are in the public interest. Because of the changing nature of the public interest, the nature of the concept "beneficial" keeps changing. California's law of beneficial use, for example, has always been that the scope of private rights changes in response to changing circumstances.²⁸⁷⁰ When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use in America is also adapted in accordance with a changing perception of what is in the public interest. The history of water law is a record of the change continually taking place in society.²⁸⁷¹ In America it is also true that when water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. Moreover, much of the value of the property that property owners enjoy is the product of public investment in infrastructure like transportation and utilities, rather than the product of individual enterprise. The result is that the individual claims owners have, are not so strong.²⁸⁷² It is clear that the extent of water use rights changes as the public interest changes both in America and in South Africa.

8.3.3 *Limiting the constitutional right of access to sufficient water*

All rights are limited by the rights of other people. It is even more so in the case of water. As a result of the conflicting interests in the water resources, even the right of access to sufficient water as a constitutional right is not absolute (see the hypothesis in 8.2.5) and is not enforceable in all circumstances. The courts evaluate the reasonableness of government's conduct in realising the constitutional right of access to sufficient water in section 27(1)(b) of the *Constitution* of 1996 when they determine what the content of the right is in a given case.

In the *Mazibuko*²⁸⁷³ case the group affected were people living in Soweto who were the target of severe unfair discrimination in the past. The law restricting their access to

2868 See para 3.8.3.
2869 See para 5.7.
2870 See para 5.9.2.
2871 See para 5.7.
2872 See para 5.8.
2873 See para 3.7.6.

unlimited quantities of free water might have curtailed their right of access to sufficient water, but its purpose was to eradicate severe water losses in the area of Soweto. It is a legitimate government purpose. Justice O'Regan²⁸⁷⁴ warned that courts need to be cautious when approaching the question of different treatment, in circumstances like those *in casu*, not to find legitimate government action, like the eradication of severe water losses, to constitute unfair discrimination. Although not mentioned by the court, it appears that the principle is that the waste of water falls outside the protection of the right of access to sufficient water because of the principle that water should only be used beneficially. Government has a duty to ensure that water is only used beneficially.²⁸⁷⁵ It appears that, when the extent of right of access to sufficient water as a constitutional right is determined, it is limited by the concept "beneficial use" that forms a part of South Africa's background law. The limitation of the extent of the constitutional right of access to sufficient water by the concept "beneficial use" is in accordance with the demands of the *Constitution* of 1996 regarding water use in a democracy.

8.3.4 *Beneficial use limiting the water use right*

Not only the right of access to water for basic human needs and the aquatic ecology, as protected by the Reserve, is limited by the concept "beneficial use". The right to use water for economic purposes in particular is also limited by the government's power to insist on the beneficial use of the water resources, as required by legislation. In this section the effect of the concept "beneficial use" on the water use right as a right in property is discussed (see the hypothesis in 8.2.5). The proposition that beneficial use is the tool to determine which water use rights are to be preferred in the case of conflict between various water use right holders (see the hypothesis in 8.2.6) was discussed in concert with the effect of the concept "beneficial use" on the water use right.

In the case of water law reform in terms section 32 of the *National Water Act* 36 of 1998, as explained above,²⁸⁷⁶ only those water uses that have been lawfully exercised in the two years before the promulgation of the Act were defined as existing lawful water uses. All other water use rights that had not been exercised in that time were cancelled, including unexercised rights to use private water. Although the cancellation would likely not have damaged existing businesses, the cancellation of unexercised water use rights might have led to damages being suffered as the resale value of land, of which the water use rights have been cancelled, would likely have been affected. One of the main objectives of this

2874 See para 3.7.6.

2875 See para 4.4.2.

2876 See para 8.1.

thesis was to determine whether the utilisation of the concept "beneficial use" to limit existing lawful water uses to those exercised in the two years before the promulgation of the *National Water Act* 36 of 1998 amounted to an arbitrary deprivation, or an expropriation of property.

8.3.4.1 The regulator's utilisation of beneficial use

Before the conclusion whether the cancellation of unexercised water use rights in terms of section 32 amounts to an arbitrary deprivation or an expropriation of property is discussed, one should consider why a regulator would utilise the concept "beneficial use" when regulating the water resources of a country. In the case of both the promulgation of the *Water Act* 54 of 1956²⁸⁷⁷ and the *National Water Act* 36 of 1998²⁸⁷⁸ reform of the water law dispensation was required because there was not enough water in the resource to back up potential rights to the water resources. Riparian rights that had been beneficially exercised, survived the water law reform when the *Water Act* 54 of 1956 was promulgated, and unexercised riparian rights only survived as rights to use surplus or flood water. It was perfectly reasonable for government to protect those water use rights that have been exercised before considering the water use rights that have not been exercised. Not only was time and money invested in exercising the water use rights, but the exercise of the water use rights in a beneficial or productive way led to economic development and job creation. Not protecting water use rights that have been exercised would have put an end to economic development and would have led to unemployment on a considerable scale.

A similar preference toward protecting water use rights that have been beneficially exercised is found in more than one place in the *National Water Act* 36 of 1998. A requirement of current beneficial use is found when an application for a licence has been refused and compensation for consequential financial loss is claimed.²⁸⁷⁹ Section 22(6) of the *National Water Act* 36 of 1998 states that any person who has applied for a licence in respect of an existing lawful water use, and whose application has been refused, resulting in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may claim compensation for any financial loss suffered in consequence. The implication is that if an existing lawful water use had taken place in the two years before the promulgation of the Act, but the use had since been discontinued, no financial loss would be suffered when the application for a licence is refused. It appears as

2877 See para 4.4.1.

2878 See para 3.1.2.

2879 See para 4.4.2.4.

though the exercise of a water use is a requirement for a payment of compensation in terms of section 22(6) of the *National Water Act*. A similar requirement exists in the case of section 49(4) of the Act, which states that where a licence had been granted, but there is an amendment of a licence condition on review that severely prejudices the economic viability of any undertaking in respect of which the licence was issued, the provisions of section 22(6) to 22(10) similarly apply. The result is that unexercised water use rights are currently not as well protected as water use rights that have been beneficially exercised. One argument may be that a water use right holder cannot prove that he suffered damages when he did not exercise his water use right. Another may be that the regulator does not want to pay compensation for potentially unlimited unexercised water use rights. An important question, that will be discussed next, was whether unexercised water use rights were property in terms of the *Water Act* 54 of 1956.

8.3.4.2 Was the existence of the property right conditional on beneficial use?

The riparian system of water law, with its potentially unlimited number of water use rights that were undefined, had already been severely curtailed by the *Water Act* 54 of 1956.²⁸⁸⁰ However, water use rights existing in terms of the *Water Act* 54 of 1956 were recognised as property rights for which compensation had to be paid when they were expropriated.²⁸⁸¹ Although the exercise of rights to the normal and surplus flow of a river had to be beneficial in the sense of not being wasteful or causing pollution, no explicit requirement existed that the water use right to riparian or underground water had to be exercised within a certain period or would be forfeited.²⁸⁸² The risk that existed that an unexercised water use right would not be backed up by an allocation of water when a Government Water Control Area was declared, was counterbalanced by the knowledge that one could apply for a permit to establish a water use when sufficient water existed in the resource. In the case of *Joubert v Benede-Blyderivier Watergebruikersvereniging*²⁸⁸³ the Supreme Court of Appeal held that a notice issued by the Minister did not give farmers the right to use the water, as they already had the right to use a reasonable amount of water. The Minister's notice, however, limited their rights by determining the maximum amount of water that they were allowed to reasonably use from a state water work. A water use right in a Government Water Control Area thus remained a right to use water reasonably that did not depend on the determination of the Minister. The extent of the right or the quantity of water that one was entitled to use, could, however, be curtailed by the Minister. When a water use right was not exercised, the Minister did not need to provide a water allocation

2880 See para 4.4.1.

2881 See para 4.2.2.

2882 See para 4.4.1.

2883 See para 4.5.1.

for the right holder in the water allocation schedules. Section 32 of the *National Water Act* represented a new development by defining an existing lawful water use as one that had been exercised in the two years before the promulgation of the Act.²⁸⁸⁴ Only existing lawful water uses are protected as entitlements in terms of the Act.²⁸⁸⁵ Unexercised water use rights have been cancelled.

8.3.4.3 Did section 32 bring about a deprivation of property?

In the case of the cancellation of unexercised water use rights a deprivation of property took place because the right holders lost the benefit of the cancelled water use rights.²⁸⁸⁶ Cancelled rights to use water were sometimes replaced by a permission to use water in terms of Schedule 1 to the *National Water Act*, a general authorisation or a licence on application. In those cases where old order rights were replaced by entitlements in terms of Schedule 1 or an authorisation, there was no deprivation of property. In other cases where unexercised water rights were cancelled, there was a deprivation of property.

8.3.4.4 Did an arbitrary deprivation take place?

There was sufficient reason for the deprivation caused by the water reform mechanism in sections 32 and 33 of the *National Water Act* to ensure that the deprivation was not arbitrary for want of a sufficient reason. The state's obligation to fulfil the right of access to sufficient water in terms of section 27 of the *Constitution* is the first constitutional mandate that establishes sufficient reason for the regulatory deprivation of unexercised water use rights. The second constitutional mandate is the fact that the state is empowered to undertake legislative measures to achieve water access reform in order to redress the results of past racial discrimination in terms of section 25(8) of the *Constitution*. It is characteristic of section 25(1) that the protection given to individuals is merely protection against an arbitrary deprivation of property. It is not protection against the loss of property rights in the case of the regulation of competing rights when there is a lawful governmental purpose such as water reform. The water access reform measures are thus not arbitrary in the sense of there not being a legitimate reason for the measures.

Some people would, however, argue that the deprivation in question was procedurally unfair.²⁸⁸⁷ The limitation of only defining a use that was utilised in the two years before the promulgation of the *National Water Act* as an existing lawful water use, is a retrospective

2884 See para 4.5.

2885 See para 4.4.2.2.

2886 See para 4.6.2.

2887 See para 4.3.4.

limitation that refers to a relatively short time period of only two years.²⁸⁸⁸ It cannot be said that section 32 of the *National Water Act* was ascertainable in advance so as to be predictable and not retrospective in its operation. It is arguable that the *National Water Act* of 1998 unreasonably or unfairly impaired the ability of those bound by the law to regulate their conduct in accordance therewith, as it retrospectively determined new consequences for acts or omissions that were lawful at the time that they were committed. Moreover, the period of two years is a short period in which to judge decisions on irrigation farming, where decisions sometimes take several years to be implemented. However, some people would argue that the *National Water Act* would pass constitutional scrutiny because the arbitrary operation of the retrospective limitation of two years in section 32 is mitigated by section 33 of the *National Water Act*. Section 33 states that if a use did not take place lawfully for good reason in the two year period, it might still be recognised as a lawful water use.²⁸⁸⁹ When section 33 of the *National Water Act* is applied arbitrarily by the authorities - by for example taking current policies into account that did not exist at the time the decision was made not to exercise the water use - a court might still declare that the use was an existing lawful water use. It would mean that compensation in terms of sections 22(6) and 22(7) of the *National Water Act* would be payable where an application for a licence for an existing lawful water use is denied.

A second possible reason why section 32 of the *National Water Act* might pass constitutional scrutiny, even though it may be arbitrary because it is procedurally unfair, is because it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of section 36(1) of the *Constitution* of 1996. The strongest argument in favour of this proposition is that, prior to the promulgation of the Act, there existed more potential rights to use water than there existed water in the resource and water allocation reform was thus imperative. The fact that a court may declare that section 32 would pass constitutional scrutiny as not being arbitrary, or as being a reasonable and justifiable limitation of section 25(1), does not assist the individual whose property value was affected because his water use rights were cancelled.

8.3.4.4 Did an expropriation take place?

Some people might claim that their land in fact lost some of its value because of the cancellation of unused water use rights.²⁸⁹⁰ This might have happened in the case of private water where there used to be enough water for irrigation of the property, or in the case of public water where there only were plans to utilise the water in the distant future.

²⁸⁸⁸ See para 4.5.2.1

²⁸⁸⁹ See para 4.6.3.

²⁸⁹⁰ See para 4.6.4.

Proponents would argue that when there had never been a requirement that a water use had to be exercised, it was lawful not to have exercised the right. They would probably try to establish that section 32 of the *National Water Act* led to the expropriation of their unexercised water use rights. However, because the *National Water Act* merely redefined an existing lawful water use when it introduced a system in terms of which water use rights have to be registered and ultimately licensed, it cannot be said that the scheme in sections 32 and 33 of the Act amounts to an expropriation.²⁸⁹¹ Section 32 of the *National Water Act* does not transfer water use rights to the government.²⁸⁹² The acquisition of rights by the state is normally a requirement for an expropriation.²⁸⁹³ The Minister of Water Affairs acting on behalf of the government is the custodian of the water resources on behalf of the nation.²⁸⁹⁴ She did not acquire water use rights.

8.3.4.5 Constructive expropriation

Neither section 25(1) that only protects against arbitrary deprivations, nor section 25(2) that only provides for compensation in the case of expropriation, are of any assistance to the individual who is deprived of property because of the need for water reform. The person who lawfully did not exercise his water use rights might as a result of the regulatory deprivation have suffered a reduction in the value of his land, whether the purpose of the legislation was laudable or not.²⁸⁹⁵ The justification for state interference in property is contained in the principle that every member of the community must contribute to the obligations of the community according to his or her means.²⁸⁹⁶ When an individual's contribution is excessive, he must be compensated. It is known as the principle of proportionality.²⁸⁹⁷ The protection of section 9 of the *Constitution* of 1996 might ensure that excessive regulatory burdens do not strip individuals of their rights to use water when the legislation is viewed as a cancellation of rights to use water that affects an individual unequally in comparison to the rest of society. What the courts would be asked to do would be to fill the conceptual gap between the prohibition on the arbitrary deprivation of property in section 25(1) of the *Constitution* and the command to only expropriate property subject to compensation in section 25(2) of the Act. Although the deprivation of property may not be arbitrary because sufficient reason - like a need for water reform - exists, it might lead to the unequal treatment of certain individuals who suffer a reduction in the value of their property. This in turn might lead to a lack of investment because of a lack of

2891 See para 4.6.4.

2892 See para 4.4.2.3.

2893 See para 4.3.6.

2894 See para 4.4.2.

2895 See para 4.6.5.

2896 See para 4.3.6; para 4.4; para 4.5; para 5.8 and para 5.9.

2897 See para 8.3.4.8.

confidence in the protection of property. When the effect of the deprivation on the individual could be described as significant, society would expect the courts to protect the individual's water use rights by providing compensation for the cancellation of water use rights. The conceptual shift that is required, is that the courts should not merely weigh a laudable objective like water reform against the sacrifice to be made by a single individual to determine whether the regulation was justified. The test whether power was exercised without any reasonable justification in the service of a legitimate governmental objective is not necessarily a valid method to determine whether a property right holder has been deprived of property by a regulation.²⁸⁹⁸ A proper consideration of the web of interests in the water resource²⁸⁹⁹ would involve that the effect on the deprived right holder should be weighed to see whether it was in proportion to the effect on other right holders affected by the regulation. The application of this principle by the courts would mean that the notion of constructive appropriation has been applied.²⁹⁰⁰ It would, in the long run, encourage investment if people believed that their rights in property would be protected. The protection of property rights is a *sine qua non* for a modern economy where trade is based on the fact that rights in property cannot be cancelled by the state without the payment of compensation.

8.3.4.6 The cancellation of unexercised water use rights in America

America has the largest economy in the world in terms of its gross domestic product, according to a World Bank Estimate in 2009.²⁹⁰¹ However, even in America with its capitalist economy, the protection of water use rights are subject to many limitations because of the common nature of rights to use the water resources. Arnold's metaphor²⁹⁰² of property as a web of interests is a useful tool when one attempts to conceptualise the protection of water use rights in terms of water law. The metaphor holds that the web of interests consists of a set of interconnections among people, groups, and entities that each has a stake in an identifiable tangible or intangible object, like the water resources, at the centre of the web. All of the interest-holders are connected both to the object and to one another. The interests of the public in the water resources, like the rights to use the water in the water resources, and the right to regulate the water resources all form a web of interests. The knowledge of the existence of the web of interests in the water resources affects the protection afforded to water use rights in the case of the cancellation of water use rights by regulation. The takings clause states that property may be taken, but

2898 See para 4.7 and para 5.8.1

2899 See para 4.3.4.4 and para 5.9.2.3.

2900 See para 4.6.5.

2901 World Bank *World Development Report 2009* xix.

2902 See para 5.9.2.

property owners must be compensated.²⁹⁰³ The protection of rights to use water as rights in property focuses on the protection of the investment in the property use right. The property owner's investment-backed expectations are limited by regulatory schemes for which the owner is on notice when investing in property.²⁹⁰⁴ In the language of the web of interests metaphor, restrictions on water use rights for environmental protection purposes, for example, are unlikely to constitute a regulatory taking when the primary interest holder is aware of the other interests existing in addition to his or her own. Where a water use rights holder tries to prove frustration of investment-backed expectations by a reduction in his beneficially used water rights, the court would look at the effect of the so-called taking on the rights holder in the context of the background restrictions that the rights holder knew had been imposed by the public trust.²⁹⁰⁵ The rule is that government's right to constrain the use of property without paying compensation to the owners is limited by what it withheld from the owner at the outset. Property owners have to realise that they are not entitled to the most profitable use of their land.²⁹⁰⁶ Substantial diminutions of value caused by government regulation are tolerated. Virtually all public interests sought to be achieved by typical land use and environmental laws are legitimate in the eyes of the American Constitution.

The difference between water law reform in America and water law reform in South Africa is that the beneficial exercise of a water use is an underlying condition for it to exist in terms of American water law, particularly to the west of the 100th meridian,²⁹⁰⁷ but it is not a condition for a water use right to exist in terms of South African water law. One's reasonable expectation of the extent of one's water use right in America was informed by the knowledge that a water use had to be exercised or the water use right would be cancelled. Where a need for water reform necessitated a move from the riparian system to an appropriative system, a common thread in some court cases was that riparians had to be given a reasonable time to exercise their previously unused rights.²⁹⁰⁸ It was held that, after notice and upon reasonable terms, the termination of the riparian's continuous non-use of water is not a taking of property. A statutory mechanism for transition should not be arbitrary, unreasonable, or unduly burdensome. The importance of due process of law when reforming water law systems appears from these cases. The principle that was applied in these cases is similar to the one in the *Pharmaceutical Manufacturers Association* case that one of the internal qualities of all public law is that it should be

2903 See para 5.9.2.

2904 See para 5.8.2.2.

2905 See para 5.9.2.

2906 See para 5.8.2.3.

2907 See para 5.6.

2908 See para 5.9.3.3.

certain in the sense of being ascertainable in advance so as to be predictable and not retrospective in its operation.

8.3.4.7 Water law reform in Australia

In Australia the balancing involved when reducing water use rights in order to reform the system of water law is also complicated by competing visions of property. On the one hand property is seen as inviolable and on the other hand property is seen as subject to redistribution in the public interest.²⁹⁰⁹ Post *National Water Initiative* water use rights in Australia are regarded to be property rights.²⁹¹⁰ The use of water does not establish the water use right like the concept "beneficial use" does in America.²⁹¹¹ Australian law approaches the question of whether the reduction of rights to use natural resources as property rights is compensable by determining whether the state acquired the property.²⁹¹² Case law on the subject reminds of South African expropriation cases, in terms of which the acquisition of property by or on behalf of the state is an element of an expropriation.²⁹¹³ Regulatory deprivations in Australia are only subjected to "just terms" when the deprivations are connected to some benefit for the state.²⁹¹⁴ The deprivation will also have to result from a police power measure that is inappropriate for the purpose or is disproportionate in that it causes more harm than is justified by the public interest served. There is no acquisition if a deprivation of property was not effected by a law with respect to the acquisition of property but was effected by an incidental, appropriate and reasonably proportionate side-effect of a law that serves a different purpose and falls under another constitutional head of power.²⁹¹⁵ It could be argued that the principle in the *Mutual Pools* case applies in the case of a natural resource like water, namely that where a law resolves or adjusts competing claims or property rights, the law under discussion is not a law for the acquisition of property within the meaning of section 51(xxxi).²⁹¹⁶

A perspective that focuses more on the effect of the regulation on the individual is found in the *obiter* decision in *Commonwealth v WMC Resources Ltd*. The court *in casu* held that where a law of the Commonwealth creates or authorises the creation of a right, a statutory extinguishment of the right effects its acquisition when it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject.²⁹¹⁷ It is possible that Australian courts might follow this decision when interpreting the cancellations of water

2909 See para 6.5.4.6.

2910 See para 6.7.1.

2911 See para 6.4.

2912 See para 6.4.1.

2913 See para 4.3.6.3.

2914 See para 6.5.2.

2915 See para 6.5.3.

2916 See para 6.6.3.

2917 See para 6.6.6.

use rights by the Commonwealth. Focusing on the effect of a reduction or extinguishment of a right on a liability of the state might enable courts in Australia as well as in South Africa to adjust the scales of justice so that the individual does not have to make an excessive contribution to the common welfare. The legal principle that the individual should not have to make an excessive contribution to society also underlies the rule that, in the case of a shortage of water, the *Victoria Water Act* 80 of 1989 allows an authority to reduce the water to all users proportionally.²⁹¹⁸

8.3.4.8 Conclusion on beneficial use and the water use right

The requirement of a proportional reduction in Victorian water law reminds one of the fact that, in South Africa and America, the justification for state interference in property is contained in the principle that every member of the community “must contribute to the obligations of the community according to his means”.²⁹¹⁹ When an individual’s contribution is excessive, he must be compensated. On the other hand it is important for the state to be able to adjust rights in natural resources in the case of scarcity. In America proportionality is the basis of the law on regulatory takings. It is not surprising that proportionality plays a role in the regulation of water use rights in the three jurisdictions. The constitutional notion of a property clause in terms of which the right to use water is regulated in America and Australia is consistent with our constitutional notion of a property clause in terms of which the right to use water is regulated.²⁹²⁰ The courts are entitled to review relevant foreign jurisprudence on the interpretation of the property clause. Water use rights in South Africa, America and Australia have certain characteristics in common. They are rights to share in a resource that is controlled by the state on behalf of the people.²⁹²¹ The state has the power to regulate water use rights.²⁹²² Individuals’ rights to use water are limited by the rights of other users and the background law of every country. Regulation of water use rights in general is a process of continually weighing the various interests in the resource to ensure that the rights holders all have access to the resource. When water law is reformed all stakeholders should be treated proportionally, as not doing so would offend the concept of “equality”.²⁹²³ The role that the principle of proportionality will play in the law of regulatory deprivations in South Africa in future can only be determined by the courts. It is suggested that the courts consider utilise the equality clause in section 9 of the *Constitution* of 1996 to investigate whether a complainant had to make a larger contribution to water reform than others.

²⁹¹⁸ See para 6.9.6.

²⁹¹⁹ See para 4.3.6.1 and para 5.8.1.

²⁹²⁰ See para 1.4.2.

²⁹²¹ See para 4.4.2.2; para 5.5; para 6.6 and para 6.7.

²⁹²² See para 4.1.2; para 5.4.1 and para 6.5.

²⁹²³ See para 4.3.6.1; para 4.3.7; para 5.8.1; para 6.7.4.2 and para 6.9.6

It is likely that courts in future would consider whether an individual exercised his water use right to determine the effect that regulation of water use entitlements had on him, and the contribution he thus had to make for the good of society. The exercise of a water use right might not be a condition for it to remain in existence in South Africa, in contrast to the position in America.²⁹²⁴ However, the exercise of a water use right determines whether compensation is payable in terms of section 22(6) to section 22(10) of the *National Water Act* 36 of 1998 when licences for existing lawful water uses are not granted or licences are amended.²⁹²⁵ The exercise of a water use thus determines whether there was severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used when the water use right is cancelled. Severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used thus represents the standard the legislator uses to determine the contribution the individual makes to society. Some would argue that in cases where land values are affected by the cancellation of unexercised water use rights, individuals also make an excessive contribution to society. Those individuals should in appropriate cases also be entitled to a payment of compensation in terms of the notion of constructive expropriation.

8.3.5 *Using trading to encourage more valuable water uses*

It is true that the definition of which water uses are valued by society is adapted in accordance with a changing perception of what is in the public interest (see the discussion of the hypothesis in 8.2.4 in paragraph 8.3.2). It is illustrated by the fact that several states in Australia have introduced water markets as a way to restructure water thirsty industries like irrigation.²⁹²⁶ Policy makers want to encourage water users to rather use water for uses with a high economic value than utilise it for uses with little economic value (see the hypothesis in 8.2.7). Trade in water entitlements or allocations in Australia required water use entitlements to be separated from land, and to be defined as a commodity by itself. Water access entitlements are understood to be comprised of various bundles of conditional rights to access water.²⁹²⁷ The unbundling of the water use entitlement involves separate property rights and instruments for each component of the water entitlement. It is also recognised that the registration of water use entitlements *inter alia* assists in getting investment for going concerns by providing security to banks.²⁹²⁸ An additional benefit of water allocation or entitlement trading is that it is a strategy to manage risk.²⁹²⁹ A secondary market, like an options market, would reduce demands for water in times of

2924 See para 5.7.

2925 See para 4.2.2.4.

2926 See para 7.1.3.

2927 See para 7.2.

2928 See para 7.3.

2929 See para 7.5.2.

drought. Options provide greater price certainty to users and allow them to manage their financial risks in a more efficient manner. Water scarcity forces people to decide whether water entitlements or allocations should be used or traded. Water entitlement or allocation trading forces participants in markets to decide when it is more beneficial to use water and when it is more beneficial to sell or lease it. Market instruments that are actually risk management instruments, such as long-term leases, lease-back agreements, weekly and continuous water exchanges and futures contracts could evolve. For a fraction of the cost of buying the water use entitlement, the option holder can create an exposure to risk similar to that of physical ownership. A farmer can use limited capital to make profit from favourable water price movements and minimise his potential losses. In the South African context greater clarity is needed on the effect and the protection that the law is prepared to give to various instruments. Water allocation or entitlement trading is here to stay, but the rules dealing with water allocation or entitlement trading need to be spelt out clearly and in advance.

The discussion of the *Watermove* market in Victoria showed that temporary trading in water entitlements or allocations is more popular than trading in permanent water entitlements. People hesitate to make permanent choices when there might be hidden costs as a result of taxation, a loss of land value and administrative costs. They also do not know how much water will be available in future or how much water they will need. Some people get an annual income from temporary trading in water allocations. Moreover, there is a possibility that big buyers of water entitlements might form monopolies, which necessitates strict government regulation.

According to the *White Paper*, one of the objectives of water policy in South Africa was to reallocate existing water uses to improve the optimum and equitable use of water.²⁹³⁰ It is true that when it is necessary to encourage high value uses rather than low value uses, water allocation or entitlement trading will be an effective way to discard water uses with a low value. It is one of the recommendations of this thesis that water allocation or entitlement trading that is overseen by a regulatory authority can help to unlock the optimum uses of water.²⁹³¹ However, water entitlement or allocation trading itself has various pitfalls, not the least of which are the impacts on third parties and the forming of monopolies.²⁹³² Uncontrolled water entitlement or allocation trading may have devastating effects on innocent members of the public and need to be monitored carefully. When there are excessive impacts on third parties when water allocations or entitlements are traded, one would not be able to describe the resultant uses of the water as beneficial. Those with

2930 See para 4.3.2.1.

2931 See para 8.4 11.

2932 See para 7.5.1.

money should never be allowed to monopolise the resource to the exclusion of the rest of the population. Water allocation or entitlement trading can, moreover, never replace the effective and professional management of the water resource. When done correctly, water entitlement trading can protect the individual's water entitlement, without affecting society's ability to manage and control its water resources. It is clear that water allocation or entitlement trading may become a commercial enterprise if the Department of Water Affairs is unable to issue sufficient water licences because of water scarcity. The framework in the *National Water Act* and its regulations allow water allocation or entitlement trading, but much more effective and transparent regulation is needed. More regulation is also needed to deal with the result of the separation of the link between water entitlements and land rights.²⁹³³ The separate existence of the entitlement has made it possible that the water entitlement might be used as collateral for loans²⁹³⁴ and this would need to be regulated. Although water entitlement or allocation trading can be a way to ensure the more beneficial use of the water resource, it needs to be regulated to ensure that the use of the water would be beneficial after the entitlement or allocation has been traded.

8.4 In conclusion

When the objectives of the study were discussed in paragraph 1.2, it was stated that a critical analysis of the concept "beneficial use" was necessary to determine what is meant by this concept in water policy, legislation and regulations. The research led to the following conclusions:

8.4.1 The main objective of the study was to determine whether and how the concept "beneficial use" is used to determine the content of a water use right. It is argued that the common use that results from the classification of water as *res omnium communes* caused many distinct principles of water law to develop. The principle of custodianship developed because the government has a duty to protect and regulate the water resources on behalf of the nation.²⁹³⁵ The principle of beneficial use developed because the water user's exercise of his water use entitlement has an effect on both the resource and other water users.²⁹³⁶ The principle of beneficial use as a result is a much needed limitation on the water use right. There are many other water users who use the resource and whose use also have to be regulated. The result is that water use rights are inherently subject to being adjusted in accordance with changes in the water resources, the number

2933 See para 6.8.

2934 See para 7.3.3.

2935 See para 8.3.1

2936 See para 8.3.3.

of users and the typical uses. Moreover, the fact that there are many users and many uses that are protected by a water use right, led to the development of a principle of proportionality that has to be adhered to when water use rights are adjusted.²⁹³⁷

All water uses are conditional as they are permanently "burdened" with the knowledge that the state is custodian on behalf of the nation.²⁹³⁸ The state's regulation of the resources is also limited by the fact that it has to act as custodian of the water resource. It is obliged to protect the resource and the established uses associated with the resource. It selects the uses it wishes to protect by only protecting those uses that meet the requirement of beneficial use. As property, water use rights are more limited than other forms of rights in property, such as rights of ownership in land. The content of the right to water has always been a right to *use* water.²⁹³⁹ It is the action to *use* that determines the narrower set of boundaries delimiting the right to use water. It was the capacity to use water beneficially that was the measure of rights to use public water under the previous water law dispensation.²⁹⁴⁰ The concept "beneficial use" was thus utilised to determine the quantity of water that was subject to the right to use water in the case of public water and not the existence of the right to use water.

In terms of the current water law dispensation the possibility of compensation for an amendment of a water use licence²⁹⁴¹ and the refusal of a licence for an existing lawful water use implies that a water use licence is a right in property. Furthermore, the fact that section 22(7)(a) of the *National Water Act* states that the amount of the compensation must be determined in accordance with section 25(3) of the *Constitution*, implies that the legislature has recognised that a water use entitlement is constitutional property. Section 22(7) subjects the amount of the compensation that is payable to the same limitations that restrict the entitlement to use the water. It is possible that the objective of subsection 22(7)(b) of the *National Water Act* is merely to underline basic premises of *National Water Act*. They are that a water use right to use water for economic purposes can only exist when there exists sufficient water in the resource to enable the water use entitlement to be exercised.²⁹⁴² Furthermore, once a water use entitlement is exercised, the use should be beneficial.²⁹⁴³ It should not be unfair or disproportional. The stipulations of section 22(7) draws the attention to the fact that the exercise of both existing lawful water uses and water use licences as rights in property is subject to basic principles of the *National Water Act* like the Reserve and the concepts "custodianship" and "beneficial use" of the water

2937 See para 8.3.4.8.

2938 See para 4.4.2.

2939 See para 4.4.2.2.

2940 See para 4.4.1.

2941 See para 4.2.2.

2942 See para 3.1.4.

2943 See para 4.4.2.4.

resources. The fact that compensation is only payable for the refusal of a licence for an existing lawful water use or the amendment of an existing licence when there has been severe prejudice to the economic viability of an undertaking, implies that water use entitlements have to be exercised at the time of the application for compensation for the compensation to be payable.

8.4.2 Does the concept "beneficial use" influence the availability of water for reform?

Because water now needs to be redistributed to ensure an equitable allocation, section 32 of the *National Water Act* only defines those uses that had been beneficially exercised in the two years before the promulgation of the Act as existing lawful water uses.²⁹⁴⁴ The concept "beneficial use" was utilised in this manner in order to cancel unexercised water use rights. It made more water available for distribution for reform purposes. The possible arbitrary effect of the two year retrospective period is mitigated by the terms of section 33 in cases where there exists a good reason for the non-use.²⁹⁴⁵ The state in the *Water Act* 54 of 1956 already limited the quantity of private water to the quantity of water that was not suitable for common irrigation.²⁹⁴⁶ The typical uses to which private water have been applied, whether it had been used or not, likely would have survived the promulgation of the *National Water Act*.²⁹⁴⁷ The government, in terms of the *National Water Act* 36 of 1998, makes water available in terms of Schedule 1 to the Act. It is only when general authorisations or licences are not granted for irrigation with private water that a deprivation of property occurred. In those cases where the value of the individual's land has been affected by the loss of private water, the regulatory burden might lead to injustice. Because it was merely the quantity of available water that was adjusted, there was no acquisition of water by the state and no expropriation.²⁹⁴⁸ The courts should consider developing the notion of constructive expropriation in those cases where the individual has to bear a burden to enable water law reform that is out of proportion to those of other members of the public. The argument is supported by the fact that users of private water were not given notice that they had to exercise the water use rights or the water use rights would be cancelled.²⁹⁴⁹ The notion of constructive expropriation would bridge the gap between section 25(1) of the *Constitution* prohibiting arbitrary deprivations and section 25(2) demanding the payment of compensation for expropriations. It would also help to ensure that people's investments in their land are respected while at the same time enabling water allocation reform.

2944 See para 4.5.

2945 See para 4.5.2.

2946 See para 4.4.1.2.

2947 See para 4.6.2.

2948 See para 4.6.4.

2949 See para 4.5.2 and para 5.9.3.

8.4.3 May the concept "beneficial use" be utilised to reflect the public interest in the extent of a water use right?

Beneficial uses by their nature are those that are in the public interest.²⁹⁵⁰ Because of the changing nature of the public interest, the nature of the concept "beneficial" keeps changing. When water scarcity necessitates the reform of the water law dispensation, the definition of beneficial use is adapted in accordance with a changing perception of what is in the public interest. The history of water law is a record of the change continually taking place in society.²⁹⁵¹ However, the public interest is not a concept that hangs in the air. It needs to be determined in accordance with the constitutional guarantee of access to sufficient water in section 27(1) of the *Constitution* of 1996, the need for water law reform as reflected in section 25(4) of the *Constitution* and the dictate in section 195(1)(b) of the *Constitution* that the efficient, economic and effective use of resources must be promoted. In the context of the distribution of water, the efficient, economic and effective use of water resources means a beneficial use that is producing a decided effect and is without waste. The Minister of Water and Environmental Affairs, who acts as public trustee of the water resources on behalf of the government, is ultimately responsible to ensure that water is used beneficially in the public interest. It is suggested that beneficial use is a productive use of water in the light of different social, economic and environmental objectives that balances equity within and between generations. Equity within and between generations refers to the custodianship of the Minister acting on behalf of the government to protect the water resources on behalf of everybody in the nation.

The impact on existing water users of putting equity in the form of ownership above all other criteria should be carefully monitored. Everyone is equal before the law and entitled to equal protection of the law in terms of section 9(1) of the *Constitution*. All measures to achieve equality should be measured against the three yardsticks in *Minister of Finance v Van Heerden*,²⁹⁵² particularly whether they indeed promote the achievement of equality. South Africa cannot afford to allocate water to users that will not use them beneficially. Once there is sufficient water in the Reserve, the right of access to sufficient water as a basic human need loses its priority and has to compete with other uses. Water has to be used productively when allocated. In a water-stressed country the waste of water cannot be tolerated.

2950 See para 3.8.1 and para 8.3.2.

2951 See para 5.7.

2952 See para 3.8.2.

8.5 Recommendations

As a result of this study, the following recommendations are made:

8.5.1 Existing lawful water use

The definition of an existing lawful water use is in fact a redefinition of the water uses that are regarded as beneficial in terms of section 32 of the *National Water Act*.²⁹⁵³ The concept "existing lawful water use," being a powerful tool of the Department of Water Affairs to achieve water reform, should be interpreted with due regard to the predicament of people who have lost their water use rights.

- a) When good reason to have discontinued a water use must be established in terms of section 33 of the *National Water Act*, it should be done with reference to good reasons why people would ordinarily cease a water use that was regarded to be lawful at the time it was exercised. The objectives of the *National Water Act* should play no part, as they were not in operation as the existing water law at the time the decision was made.
- b) There exists a need for the publication of a set of guidelines on which factors may be taken into account when assessing whether a good reason existed not to exercise a water use.²⁹⁵⁴
- c) Beneficial use was a requirement to determine the lawfulness of the utilisation of what used to be public water, but that is not the case with what used to be private water.²⁹⁵⁵
- d) There must be due process of law when the exercise of lawful water use rights are confirmed for the purposes of obtaining licences.²⁹⁵⁶
- e) The extent of water use rights should be determined by what the explicit conditions of the grants were.
- f) It should be clear upfront when the non-exercise of a water use entitlement will mean that the entitlement holder will not be protected by the payment of compensation when the entitlement is amended or cancelled.²⁹⁵⁷

²⁹⁵³ See para 4.5.1.

²⁹⁵⁴ See para 4.5.

²⁹⁵⁵ See para 4.4.1.2.

²⁹⁵⁶ See para 4.5.2.

²⁹⁵⁷ See para 4.4.1 and para 4.4.2.

- g) It should be made clear in regulations or in licence conditions what period of non-exercise would in future cause forfeiture of a water entitlement, should it be the case.²⁹⁵⁸

8.5.2 *Reform and regulatory deprivation*

- a) The answer to the question whether a legislative power was exercised in the service of a legitimate governmental objective should not be used to determine whether an individual's water use rights were invaded. In the case of regulatory reform there would always be a legitimate government purpose, but the real question should be whether the individual should be forced to pay the cost of the reform or not.²⁹⁵⁹
- b) The doctrine of constructive expropriation should be adopted by courts in the case of a regulatory deprivation that places a disproportionately heavy burden on an individual.
- c) Whether a regulation has gone too far and amounts to constructive expropriation should be established on the facts of the case.
- d) The question whether there was an acquisition by the state should only play a limited role, if any, in establishing whether there was a regulatory deprivation.

8.5.3 *Beneficial use in the public interest*

- a) Once water for the Reserve has been allocated, a use of the water resources will be beneficial when it is efficient, effective and economical in terms of section 195 of the *Constitution*.²⁹⁶⁰
- b) The concept "beneficial use" in the public interest should mean a productive use in the light of different social, economic and environmental objectives that balances equity within and between generations.²⁹⁶¹ The concept of "public trusteeship" involves that the water resources should in the public interest be managed in a way that will ensure their sustainability.²⁹⁶²

8.5.4 *Separation of rights to use water from ownership of land*

- a) A little considered side-effect of the separation of the water entitlement from the right in land is that the value of the land may be diminished or that the underlying security

2958 See para 4.4.2.4.

2959 See para 4.6.5.

2960 See para 8.3.1.

2961 See para 8.3.1.

2962 See para 6.6.

given to banks may be affected.²⁹⁶³ A way to deal with this should be negotiated with stakeholders.

- b) The fact that the right to use water has been separated from rights in land does not alter the fact that water is used on land and that a licence to use water identifies the land where the water is to be used. A true redistribution of water entitlements will, as a result of this, only be achieved once land reform has been achieved.²⁹⁶⁴

8.5.5 *Water allocation or entitlement trading*

Water allocation or entitlement trading

- a) should be overseen by a regulatory authority that can help to unlock the optimum uses of water;²⁹⁶⁵
- b) is a way to manage the risk associated with a reduction in the resource;
- c) The regulatory authority needs to keep in mind that impacts on innocent third parties must be prevented.
- d) The development of derivative products, like options, is vital for the management of risk;
- e) The appropriate system for water trading should be developed with the input of stake holders.

8.5.6 *Risk of scarcity*

There should be a national plan that has been negotiated with stakeholders to deal with the risk of water scarcity and a resultant reduction in the volume of water allocations.²⁹⁶⁶

8.5.7 *Good management*

Good management of the water resources in South Africa is a prerequisite for any system of water law to function. Keeping and obtaining the best skills for the job would allow more people access to clean water and would enable younger staff to be trained properly.

Per gratias Dei ad finem veni

²⁹⁶³ See para 6.8; para 7.3 and para 7.7.

²⁹⁶⁴ See para 3.1.

²⁹⁶⁵ See para 7.7.

²⁹⁶⁶ See para 6.9.

9 ADDENDUM A RELEVANT CLAUSES

For ease of reference, a paragraph containing the wording of certain oft quoted sections in the *Constitution* of 1996 and the *National Water Act*²⁹⁶⁷ is included hereunder:

Constitution of 1996

9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

²⁹⁶⁷ Act 36 of 1998.

- (e) the purpose of the expropriation.
- (4) For the purposes of this section-
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6).

27 Health care, food, water and social security

- (1) Everyone has the right to have access to-
- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Section 3 Public trusteeship of nation's water resources

- (1) As the public trustee of the nation's water resources the national government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.
- (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.
- (3) The national government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

Section 4 Entitlement to water use

- (4) Any entitlement granted to a person by or under this Act replaces any right to use water which that person might otherwise have been able to enjoy or enforce under any other law-
 - (a) to take or use water;
 - (b) to obstruct or divert a flow of water;
 - (c) to affect the quality of any water;
 - (d) to receive any particular flow of water;
 - (e) to receive a flow of water of any particular quality;or
 - (f) to construct, operate or maintain any waterwork.

Section 22 Permissible water use

- (6) Any person who has applied for a licence in terms of section 43 in respect of an existing lawful water use as contemplated in section 32, and whose application has been refused or who has been granted a licence for a lesser use than the existing lawful water use, resulting in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may, subject to subsections (7) and (8), claim compensation for any financial loss suffered in consequence.

- (7) The amount of any compensation payable must be determined-
- (a) in accordance with section 25 (3) of the Constitution; and
 - (b) by disregarding any reduction in the existing lawful water use made in order to-
 - (i) provide for the Reserve;
 - (ii) rectify an over-allocation of water use from the resource in question; or
 - (iii) rectify an unfair or disproportionate water use.

Section 32 Definition of existing lawful water use

- (1) An existing lawful water use means a water use-
- (a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which-
 - (i) was authorised by or under any law which was in force immediately before the date of commencement of this Act;
 - (ii) is a stream flow reduction activity contemplated in section 36 (1); or
 - (iii) is a controlled activity contemplated in section 37 (1); or
 - (b) which has been declared an existing lawful water use under section 33.
- (2) In the case of-
- (a) a stream flow reduction activity declared under section 36 (1); or
 - (b) a controlled activity declared under section 38,
- existing lawful water use means a water use which has taken place at any time during a period of two years immediately before the date of the declaration.

Section 33 Declaration of water use as existing lawful water use

- (1) A person may apply to a responsible authority to have a water use which is not one contemplated in section 32 (1) (a), declared to be an existing lawful water use.
- (2) A responsible authority may, on its own initiative, declare a water use which is not one contemplated in section 32 (1) (a), to be an existing lawful water use.
- (3) A responsible authority may only make a declaration under subsections (1) and (2) if it is satisfied that the water use-
 - (a) took place lawfully more than two years before the date of commencement of this Act and was discontinued for good reason; or
 - (b) had not yet taken place at any time before the date of commencement of this Act but-
 - (i) would have been lawful had it so taken place; and
 - (ii) steps towards effecting the use had been taken in good faith before the date of commencement of this Act.
- (4) Section 41 applies to an application in terms of this section as if the application had been made in terms of that section.

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11 Abbreviations

Acta Jur - Acta Juridica

Agr Water Manage - Agricultural Water Management

AHRLJ - African Human Rights Law Journal

AJARE - Australian Journal of Agricultural and Resource Economics

Ala L Rev - Alabama Law Review

Am J Comp L - American Journal of Comparative Law

Amer J Econ Sociology - American Journal of Economics and Sociology

AMPLA Bulletin - Australian Mining and Petroleum Law Association Bulletin

AMPLA LJ - Australian Mining and Petroleum Law Association Law Journal

Annu Surv SA L - Annual Survey of South African Law

ARELJ - Australian Resources & Energy Law Journal

Ariz L Rev - Arizona Law Review

Ariz St LJ - Arizona State Law Journal

Austl & NZ Prop J - Australian and New Zealand Property Journal

Austl Econ Rev - Australian Economic Review

Australian Mining and Petroleum LJ - Australian Mining and Petroleum Law Journal

AYB - Archives Year Book for South African History

B C Envtl Aff L Rev - Boston College Environmental Affairs Law Review

Buff L Rev - Buffalo Law Review

BYU J Pub L - Brigham Young University Journal of Public Law

Cal L Rev - California Law Review

Cal Real Est - Miller and Starr California Real Estate 3D

Cardozo L Rev - Cardozo Law Review

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

CESCR – Committee on Economic Social and Cultural Rights

Choices - Choices, the magazine of food, farm and resource issues

CJ – Classical Journal

CJS - Corpus Juris Secundum

CLJ - Cambridge Law Journal

Colo J Int'l Env'tl L & Pol'y - Colorado Journal of International Environmental Law & Policy

Const Comment - Constitutional Commentary

Cornell L Rev - Cornell Law Review

CRC - Convention on the Rights of the Child

D - Digest of Justinian

DG – Director General

Duke Env'tl L & Pol'y - Duke Environmental Law and Policy Forum

DWA – Department of Water Affairs

DWAF – Department of Water Affairs and Forestry (formerly)

EAP - Economic Analysis & Policy

Ecology L Q - Ecology Law Quarterly

Ecology Law Quarterly - Ecology LQ

Econ - Economic

Emory LJ - Emory Law Journal

Env'tl Aff - Environmental Affairs

Env'tl L - Environmental Law

ESCOR - Economic and Social Committee on Research

ESR Review - Economic Self-Reliance Review

Fn - footnote

Fordham Env'tl LJ - Fordham Environmental Law Journal

Ga St U L Rev - Georgia State University Law Review

Geo Int'l Env'tl L Rev - Georgetown International Environmental Law Review

Georgia L Rev - Georgia Law Review

Griffith L Rev - Griffith Law Review

Harv Env'tl L Rev - Harvard Environmental Law Review

Hastings W-NW J Env'tl L & Pol'y - Hastings West-Northwest Journal of Environmental Law and Policy

HJIL - Heidelberg Journal of International Law

Howard L J - Howard Law Journal

Hum Rts and Const LJ - Human Rights and Constitutional Law Journal

ICESCR/Covenant - International Covenant on Economic, Social and Cultural rights

ILA - International Law Association

ICWE - International Conference on Water and the Environment

Ind L Rev - Indiana Law Review

Int J of WRD –International Journal of Water Resources Development

Iowa L Rev - Iowa Law Review

ITQ - Individual Transferable Quota

J Env'tl L & Litig - Journal of Environmental Law and Litigation

J Legal Hist - Journal of Legal History

JSAS - Journal of Southern African Studies

Just - Justinian

Ky L J - Kentucky Law Journal

Land & Water L Rev - Land and Water Law Review

LDDEV - Law, democracy & development

LEAD J - Law Environment and Development Journal

LGB - Local Government Bulletin

Loy LA Rev - Loyola of Los Angeles Law Review

Loy L Rev - Loyola Law Review

Macquarie J Int'l & Comp Envtl L - Macquarie Journal of International and Comparative Environmental LawU

M&I - Municipal and Industrial

McGeorge L Rev- McGeorge Law Review

Md L Rev - Maryland Law Review

Melb U L Rev - Melbourne University Law Review

Mich L Rev - Michigan Law Review

Nat Resources J - Natural Resources Journal

NWA - National Water Act

NYU L Rev - New York University Law Review

Ocean and Coastal LJ - Ocean and Coastal Law Journal

Okla City U L Rev - Oklahoma City University Law Review

Okla L Rev - Oklahoma Law Review

Or L Rev- Oregon Law Review

Pac LJ – Pacific Law Journal

POCA – Prevention of Organised Crime Act

Penn State Int LR - Pennsylvania State University International Law Review

PER - Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal

PLR - Public Law Review

Poli Sci Rev - Political Science Review

Pub Land & Resources L Rev - Public Land and Resources Law Review

S Afr Geogr J- South African Geographical Journal

S Afr J on Hum Rts - South African Journal on Human Rights

SAJHR - South African Journal on Human Rights

SALJ - South African Law Journal

San Diego L Rev - San Diego Law Review

SAPL/SAPR - SA Public Law/SA Publiekreg

Sing J Int'l & Comp L - Singapore Journal of International and Comparative Law

St Mary's LJ - Saint Mary's Law Journal

Stan Envtl LJ - Stanford Environmental Law Journal

Stan L Rev - Stanford Law Review

Stell LR - Stellenbosch Law Review

Stellenbosch L Rev - Stellenbosch Law Review

Sydney L Rev - Sydney Law Review

Tex Tech L Rev - Texas Tech Law Review

Texas L Rev - Texas Law Review

THRHR - Tydskrif vir Hedendaagse Romeins-Hollandse Reg

TSAR - Tydskrif vir die Suid Afrikaanse Reg

U C Davis L Rev - University of California, Davis, School of Law

U Colo L Rev - University of Colorado Law Review

U Denv Water L Rev - University of Denver Water Law Review

U Ill L Rev - University of Illinois Law Review

UN – United Nations

U Penn LR - University of Pennsylvania Law Review

Urb Law – Urban Lawyer

Va L Rev - Virginia Law Review

Vt J Envtl L - Vermont Journal of Environmental Law

W Va L Rev - West Virginia Law Review

Wash L Rev - Washington Law Review

Wash U J Urb & Contemp L - Washington University Journal of Urban and Contemporary Law

Wash U L Q - Washington University Law Quarterly

Whittier L Rev - Whittier Law Review

Wis Envtl LJ - Wisconsin Environmental Law Journal

WM & Mary L Rev - William and Mary Law Review

WRMA - Weather Risk Management Association

WSA - Water Services Act

Yale LJ - Yale Law Journal