Water as Public Property: A Parallel Evaluation of South African and German Law

G VILJOEN

13073834

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Promoter:	Prof E van der Schyff (Faculty of Law, North-West University)
Co-promoter:	Prof AA du Plessis (Faculty of Law, North-West University)

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ABSTRACT

With the introduction of the National Water Act 36 of 1998 (NWA) in South Africa's water regulatory regime, the foundations of the country's existing water law system changed fundamentally. The NWA was promulgated with the primary aim to reform the law relating to water resources. The preamble to the NWA states that water is "a scarce natural resource that belongs to all people." Section 3 of the NWA continues along similar lines and stipulates that all water use rights fall under the centralised control of the state or public trustee to *inter alia* improve the distribution, management, use, conservation and equality of access to this scarce resource. Statutory transformation of this nature has inevitable and important legal implications. It has for example been argued that the changed system has brought about a reallocation and redefinition of property rights to natural resources; a transformation which will inevitably impact the nature, form, extent, limits and protection of access and use rights that can be acquired in water as a natural resource.

In an effort to understand the extent of the legal transformation brought about by the concept of public trusteeship, this thesis considers the impact of the concept in the broader South African water law context. The concept of public trusteeship is a novel concept in South African jurisprudence, without established links to existing principles of law. This thesis subsequently focuses on how and to what extent the German property law concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA. Consequently, this thesis commences with an exposition of information on the idea of property and the relevance and importance of the different property rights regimes against which both the South African and German property regimes can be evaluated. This is followed by a description of the South African property rights paradigm and its different property concepts. The research introduces a novel take on the discussion of the regulation of rights in natural resources in South Africa, namely a "stewardship ethic of public trusteeship". As a stewardship ethic could potentially influence the regulation of property in natural resources and even perhaps the property regime within which water as natural resource is regulated in South Africa, the next section of the research proceeds with a historical account of the South African water law dispensation. Although the historical review indicates that the concept of public trusteeship is not part of South Africa's

common law heritage, some of its principles find application in the common law concept of *res publicae.* The conclusion is that the concept of public trusteeship does not merely (re-) introduce the *res publicae* concept into the South African water realm. The concept of public trusteeship is a novel concept that was statutorily introduced into the South African water regulatory framework in terms whereof “ownership” of water resources vests in the national government, and are consequently administered on behalf of the nation and generations yet to come.

A separate section of the research analyses and contextualises the concept of *őffentliche Sache* as it functions in German law to offer new insight into the implications that the statutorily introduced concept of public trusteeship might have on water as property and the property regime within which water is regulated in South Africa. This guides the study to the next section of the research, which illustrates that the concept of *őffentliche Sache* is at the basis of the German water regulatory framework.

The conclusion of the study proposes an understanding of the concept of public trusteeship in South Africa based on lessons learned from the German concept of *őffentliche Sache.*

Keywords:

Water, water rights, property, property rights regime, public property, *res publicae*, *National Water Act*, public trusteeship, constitutional property, *őffentliche Sache*, German water regulatory framework.

OPSOMMING

Die inwerkingstelling van die *Nasionale Waterwet* 36 van 1998 (NWW) as deel van Suid-Afrika se waterreguleringsregime het die grondslag van die land se bestaande waterregstelsel fundamenteel verander. Die NWW is uitgevaardig met die primêre doel om die reg rakende waterhulpbronne fundamenteel te hervorm. Die aanhef tot die NWW stel dat water "'n skaars hulpbron [is] wat aan alle mense behoort." Artikel 3 van die NWW sit hierdie sentiment voort deur te stipuleer dat alle watergebruiksregte onder die gesentraliseerde beheer van die staat of die openbare trustee val om *inter alia* die verspreiding, bestuur, gebruik, bewaring en gelyke toegang tot die skaars hulpbron te verbeter. Statutêre transformasie van hierdie aard het onvermydelike en belangrike regsimplikasies. Daar is al aangevoer dat die veranderde stelsel 'n hertoedeling en herdefinisie van eiendomsregte met betrekking tot natuurlike hulpbronne meegebring het; 'n transformasie wat onvermydelik die aard, vorm, omvang, beperkinge en beskerming van toegangs- en gebruiksregte wat in water as 'n natuurlike hulpbron verkry kan word, sal beïnvloed.

Ten einde die omvang van die regsverandering wat deur die konsep van openbare trusteeskap meegebring word te verstaan, oorweeg hierdie proefskrif die konsep binne die konteks van die breër Suid-Afrikaanse waterreg. Die konsep van openbare trusteeskap is 'n nuwe konsep in Suid-Afrikaanse regspraak sonder gevestigde bande met bestaande regsbeginsels. Die proefskrif fokus gevolglik op hoe en tot watter mate die Duitse eiendomsregkonsep van *öffentliche Sache* die ontwikkeling en interpretasie van die Suid-Afrikaanse konsep van openbare trusteeskap soos verskans in die NWW, kan belig. Die proefskrif begin gevolglik met 'n uiteensetting van basiese inligting oor die idee van eiendom en die relevansie en belangrikheid van die verskillende eiendomsreg-regimes waarteen die Suid-Afrikaanse en Duitse eiendomsreg-regimes onderskeidelik gemeet kan word. Dit word gevolg deur 'n beskrywing van die Suid-Afrikaanse eiendomsregparadigma en die verskillende eiendomskonsepte. Die navorsing bied 'n nuwe blik op die bespreking van die regulasie van regte in natuurlike hulpbronne in Suid-Afrika met die invoer van 'n "rentmeesterskap-etiek van openbare trusteeskap". Aangesien 'n rentmeesterskap-etiek 'n potensiële invloed kan hê op die regulasie van eiendom in natuurlike hulpbronne en selfs die eiendomsreg-regime waarbinne water as 'n natuurlike hulpbron in Suid-Afrika gereguleer word, bied die volgende deel van die

navorsing 'n historiese oorsig oor die Suid-Afrikaanse waterregbestel. Alhoewel die historiese oorsig aandui dat die konsep van openbare trusteeskap nie deel vorm van Suid-Afrika se gemenereg-erfenis nie, kan van die beginsels daarvan toegepas word op die gemeneregkonsep van *res publicae.* Die gevolgtrekking is dat die konsep van openbare trusteeskap nie bloot die konsep van *res publicae* in die Suid-Afrikaanse waterbestel invoer nie. Die konsep van openbare trusteeskap is ’n nuwe konsep wat statutêr deelgemaak is van die Suid-Afrikaanse waterregulasieraamwerk. Na aanleiding hiervan berus die “eienaarskap” van waterhulpbronne in die nasionale regering, en word dit gevolglik bestuur namens die volk en die toekomstige geslagte.

’n Verdere gedeelte van die navorsing ontleed en kontekstualiseer die konsep van *őffentliche Sache* soos dit binne die Duitse reg funksioneer ten einde nuwe insig te bied oor die implikasies van die statutêr ingevoerde konsep van openbare trusteeskap vir water as eiendom en die eiendomsreg-regime waarbinne water gereguleer word in Suid-Afrika. Dit lei die studie na die volgende deel van die navorsing, wat aandui dat die konsep van *őffentliche Sache* die basis vorm van die Duitse waterreguleringsraamwerk.

Die slot van die studie bied ’n nuwe begrip van die konsep van openbare trusteeskap in Suid-Afrika gegewe die lesse wat geleer kan word vanuit die Duitse konsep van *őffentliche Sache.*

Sleutelwoorde:

Water, waterregte, eiendom, eiendomsreg-regime, openbare eiendom, *res publicae, Nasionale Waterwet,* openbare trusteeskap, grondwetlike eiendom, *őffentliche Sache*, Duitse waterreguleringsraamwerk.

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LIST OF ABBREVIATIONS

AD	Appellate Division
BCLR	Butterworths Constitutional Law Reports
BGB	*Das Bürgerliche Gesetzbuch* (the German Civil Code)
Buch	Buchanan's Reports/ Cape Supreme Court Reports
CC	Constitutional Court
CESCR	Committee on Economic, Social and Cultural Rights
Constitution	*Constitution of the Republic of South Africa*, 1996
EU	European Union
J	Judge
MPRDA	*Mineral and Petroleum Resources Devepment Act* 28 of 2002
NEMA	*National Environmental Management Act* 107 of 1998
NEM:ICMA	*National Environmental Management: Integrated Coastal Management Act* 24 of 2008
NWA	*National Water Act* 36 of 1998
NWW	*Nasionale Water Wet* 36 van 1998
Par	Paragraph
PER/ PELJ	Potchefstroomse Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SAPR/PL	SA Publiekreg/Public law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
UN	United Nations
Wash.& Lee L. Rev.	Washington and Lee Law Review
WFD	Water Framework Directive
WHG	*Wasserhaushaltsgesetz* (Federal Water Act)
WSA	*Water Services Act* 108 of 1997

Chapter 1

Introduction

1.1 Background

Water is an essential[1] but scarce resource.[2] According to a report on sanitation and drinking water by the World Health Organisation and UNICEF in 2013,[3] an estimated 768 million people do not have access to sufficient and safe water for domestic use. Due to population and industry growth, the demand for water is still on the increase.[4] In a water scarce country such as South Africa,[5] the increasing scarcity and demand of water result in prolonged conflicts[6] and catastrophes, including *inter alia* poverty,[7] human suffering[8] and water resources degradation.[9] South Africa's political history, characterised by a reality of inequitable access to water,[10] adds additional and unique challenges to the field of water resources regulation. It is trite that access to land, and therefore natural resources attached to land such as water and minerals, were previously restricted and available only to the white minority of the country due to the

1 Water is essential for people, plants and animals to survive on earth. Water is further vital for *inter alia* health, religious purposes, as well as responsible socio-economic growth. Barrett and Jaichand 2007 *SAJHR* 561; Crow and Sultana 2002 *Society & Natural Resources: An International Journal* 709; Cullet *Water Law, Poverty, and Development Water Reforms in India* 8-17; Seckler, Barker and Amarasinghe 1999 *International Journal of Water Resources Development* 29; Thompson *Water Law a Practical Approach to Resource Management & the Provision of Services* 3; Vandermyde 2015 http://digitalcommons.augustana.edu/cgi/viewcontent.cgi?article=1001&context=ethicscontest

2 Thompson *Water Law a Practical Approach to Resource Management & Provision of Services* 1; United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 15 *The right to water (arts 11 & 12 of the Covenant)* (29th session, 2003) [UN Doc E/C 12/2002/11], 20 January 2003.

3 World Health Organisation & UNICEF 2013 http://apps.who.int/iris/bitstream/10665/81245/1/9789241505390_eng.pdf

4 In the light hereof, it is envisaged that the number of people directly affected by problems related to access to sufficient water is expected to increase to five billion by the year 2025. Rüegger 2014 *Law, Environment and Development Journal* 3; World Health Organisation & UNICEF 2013 http://apps.who.int/iris/bitstream/10665/81245/1/9789241505390_eng.pdf

5 See the preamble of the *National Water Act* 36 of 1998; Van der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* 1.

6 Gleick 1993 *International Security* 79.

7 Cullet *Water Law, Poverty, and Development Water Reforms in India* 17-19; Klasen 2000 *Review of Income and Wealth* 33; See Viljoen *The Public Trust Doctrine in South African law* 1.

8 As far as it concerns socio-economic needs, specifically. See Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 181.

9 Barrett and Jaichand 2007 *SAJHR* 545; Gleick 1998 *Water Policy* 487.

10 See the introduction of the *White Paper on a National Water Policy for South Africa* 1997; See chapters 4.2.4 and 4.2.5 below.

strict Apartheid policy that applied in South Africa.[11] This race-based discriminatory policy divided the entire South African society.[12] In order to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights",[13] the first democratic Government[14] of South Africa promulgated the *Constitution of the Republic of South Africa*, 1996 (the Constitution). Chapter 2 of the Constitution contains the Bill of Rights, "a cornerstone of democracy in South Africa."[15] Of specific relevance for this thesis, is the right to have access to sufficient water as enshrined in section 27(1)(b) in the Bill of Rights.

Section 27 of the Constitution imposes specific positive duties[16] on the state to provide every person with access to sufficient water.[17] The positive obligations of the state to realise the section 27(1)(b) water right against the backdrop of a history of inequitable access to water,[18] is concretised by section 27(2). The latter section stipulates that "the state must take reasonable legislative measures to achieve the progressive realisation of the right to have access to sufficient water." A number of legislative measures have been taken since 1996 in adherence to this obligation.[19] These include the adoption of the *Water Services Act* 108 of 1997 (WSA), the *National Water Act* 36 of 1998 (NWA), and the *National Environmental Management Act* 107 of 1998

11 See the introduction of the *White Paper on a National Water Policy for South Africa* 1997.
12 Seekings 2005 *The Colour of Desert: Race, Class and Distributive Justice in Post-Apartheid South Africa* 1.
13 See the preamble of the *Constitution of the Republic of South Africa,* 1996.
14 The terms "government", "state" and "public authority" are often used interchangeably and synonymously. Unless a particular meaning is attributed to a specific term in this thesis, the term "state" refers to an independent and sovereign entity that can be distinguished from the other states and has certain administrative tasks to be carried out for its proper functioning. These administrative tasks are carried out by the "government". "Government" refers to the authorative body responsible for the formulation and execution of policies which ensures law and order in the state. The term "government" includes the sum total of the legislative, executive and judicial bodies who are engaged in making, administrating and interpreting the law. Following this understanding,"state" carries meaning broader than a "government". Both the terms "state" and "government" fall within the definition of "public authorities".
15 Section 7(1) of the Constitution.
16 While this thesis focuses on the positive duties of the state, section 7(2) of the Constitution places a suite of positive and negative duties on the state to respect, protect, promote and fulfil all of the rights in the Bill of Rights. Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 30-56; *Jaftha v Schoeman and Others, Van Rooyen v Stolz and Others* 2005 1 BCLR 78 (CC) para [31-34]; Klare 1998 *SAJR* 149.
17 Soltau 1999 *Acta Juridica* 250, section 7(2) read with section 27(1)(b) of the Constitution; See also section 24(b)(i) of the Constitution.
18 Du Plessis 2010 *Review of European Community & International Environmental Law* 19(3) 318; See also chapters 4.2.4 and 4.2.5 below.
19 Blumm 2012 *University of California Davis Law Review* 788.

(NEMA).[20] These statutes have broken new ground by *inter alia* introducing a novel concept in realising the right to have access to water, namely the concept of public trusteeship.[21] The NWA specifically was promulgated with the primary aim to "provide for fundamental reform of the law relating to water resources".[22] The preamble to the NWA states that water is "a scare natural resource that belongs to all people." Section 3 of the NWA continues along similar lines:

> 3(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 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.

Any attempt to understand the extent of the legal transformation brought about by this concept of public trusteeship is reliant on an understanding of the impact of the concept in the broader South African water law context.

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20 The relevance of the framework environmental law (NEMA) for this thesis, dealing with water law specifically, lies in the fact that NEMA defines "environment" with reference to the surroundings within which humans exist. According to NEMA, the environment is made up of *inter alia* land and water, which includes the aesthetic conditions that influence human health and well-being. Water is therefore regarded as part of the legal definition of the "environment".

21 The preamble of the WSA confirms the National Government's role as custodian of the nation's water resources, while section 3 of the NWA stipulates that 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. The concept of public trusteeship also finds its rightful place as part of one of the principles in NEMA. Section 2(4)(o) of NEMA stipulates 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.

22 See the long title and section 2 of the NWA.

1.2 Problem statement

Studies[23] on the impact of the statutorily introduced concept of public trusteeship on South African water law show that scholars hold different views regarding the origin, content, meaning and implications of the concept.[24] It remains to be determined, for example, whether elements of the Anglo-American public trust doctrine have been introduced into South African water law; whether the existing Roman-Dutch common law notion of *res publicae* was statutorily entrenched in South African water law;[25] or whether the notion underpins a stewardship principle that merely emphasises and defines the National Government's fiduciary duty towards the resource. Uncertainty also exists regarding the extent to which the notion affects the state's proprietary relationships and corresponding duties with relation to water, as well as the nature and extent of access and water use rights acquired by the public. Clarity on these aspects may enhance future legal discourse and the development of law.

The uncertainties are deepened by the current developments in the field of mineral and petroleum law.[26] The preamble to the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) for example acknowledges that the country's mineral and petroleum resources "belong to the nation." A notion seemingly corresponding to public trusteeship, namely that of state custodianship, has therefore been introduced by the MPRDA. In determining the relevance of the statutory introduction of the notion of state custodianship, the North Gauteng High Court in *Agri*

23 See for example Stein 2005 *Texas Law Review* 2167-2183; Viljoen *The Public Trust Doctrine in South African Law* 38; Young *Public Trusteeship and Water Management* 15, 17, 156.

24 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 183-184; Stein 2005 *Texas Law Review* 2170-2183; Thompson *Water Law a Practical Approach to Resource Management & Provision of Services* 279.

25 The nature of the terminology used in legislation (such as the NWA, NEMA and WSA), has prompted scholarly comparison between modern public trusteeship and the Roman and Roman-Dutch law classifications of *res publicae.* Young *Public Trusteeship and Water Management* vii.

26 This thesis focuses on the content, meaning and implications of the concept of public trusteeship in water resources law but the concept also features in other fields of South African law. For example, the preamble of the *Mineral and Petroleum Resources Development Act* 28 of 2002 acknowledges that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof. In the field of coastal management, section 2(c) of the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (NEM:ICMA) provides for the status of coastal property as being held in trust by the state on behalf of all South Africans. The concept also forms part of new developments within the law regulating natural forests. In this regard, the *National Forest Amendment Bill*, 2015 recently proposed the insertion of public trusteeship into the field of the nation's forestry resources. See GN 143 in GG 38533 of 13 March 2015 in this regard.

South Africa v Minister of Minerals and Energy and Another 2011 3 SA 296 (GNP), held that the incorporation of the principle of state custodianship resulted in the state acquiring the substance of the property rights of "erstwhile holders".[27] The Supreme Court of Appeal in *Minister of Minerals and Energy v Agri SA* 2012 (SCA) on the other hand held that "nothing [was] to be gained by attempts to dissect these concepts and categorise them in terms of private law concepts such as ownership".[28] The Constitutional Court in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) in turn stated that it is necessary to determine whether the assumption of custodianship means that the state acquired rights to the resource.[29] In the Constitutional Court, Froneman CJ was of the view that it is important to do a thorough examination of what the new concept of state custodianship holds for South African law.[30] The same is imperative for South African water law, specifically, in light of the fact that the previous water regime, which linked access to water to land ownership[31] and differentiated between private and public water,[32] was substituted by a unitary system that applies to all water in South Africa.[33] In terms of the new unitary system, "water belongs to all people"[34] and the National Government is appointed as the trustee of the country's water resources.[35]

The necessity of examining the proprietary implications of a water law regime based on the notion of public trusteeship is exacerbated by the fact that when the modern state amends its regulatory legal framework, it simultaneously "limits and redefines the existing property regimes subjecting them to ever more complex systems of control".[36] Along these lines, one may contend that property rights in the spheres subject to public trusteeship were fundamentally redefined in South Africa.[37] It is therefore necessary to question whether the statutory introduction of the concept of public trusteeship

27 *Agri South Africa v Minister of Minerals and Energy and Another* 2011 3 SA 296 (GNP) par [82].
28 *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* 2012 (SCA) 93 par [86].
29 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par [68].
30 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par [105].
31 See the introduction of the *White Paper on a National Water Policy for South Africa*, 1997; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 393-340.
32 Par 5.1.1 of the *White Paper on a National Water Policy for South Africa*, 1997.
33 See the introduction of the *White Paper on a National Water Policy for South Africa*, 1997; and the preamble of the NWA.
34 See the preamble of the NWA.
35 See section 3 of the NWA.
36 Soltau 1999 *Acta Juridica* 250.
37 Van der Schyff "South African Natural Resources, Property Rights, and Public Trusteeship" 324.

brought about a new or alternative property rights regime within which water is managed. A better understanding of the property rights regime within which water as a natural resource is presently regulated may contribute to clarity regarding *inter alia* the extent of the state's regulatory powers and constitutional and statutory obligations; the extent to which access to water is granted to the general public; and the nature, duration and possible limitations of individual rights to water acquired in terms of the NWA.

Given the novelty[38] of public trusteeship in South African jurisprudence, it makes sense to turn to and draw insights from existing foreign law with more established understandings of the notion and related concepts in the water context.[39]. The Anglo-American public trust doctrine serves as one such foreign framework that is often analysed by scholars dealing with the concept of public trusteeship in South Africa's natural resources.[40] The Anglo-American public trust doctrine speaks to *inter alia* the concepts of public ownership, the public's rights in natural resources, the state's fiduciary responsibilities, as well as the protection of the public interest, in particular natural resources.[41] Sand[42] brings to the fore that "functional equivalents" of the public trust doctrine exist in other legal jurisdictions that may be analysed for interpretative guidance. One of these "functional equivalents" of the Anglo-American public trust doctrine is the German property law concept of *öffentliche Sache.*[43] In essence, the concept of *öffentliche Sache* articulates the principle that the state becomes the "public owner" of resources that are vital to the public.[44] This mechanism in German law embodies the "interplay between private ownership rights in natural resources and restrictions on their exclusive use for the benefit of the public".[45] The concept of *öffentliche Sache* hence reflects a corresponding understanding that resides at the core of the Anglo-American public trust doctrine, namely the concept of "public ownership" that proclaims an obligation of the state to protect the public interest in

38 Van der Schyff 2010 *PER* 122.
39 Section 39(1) of the Constitution.
40 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 106-148; Young *Public Trusteeship and Water Management* 147-171.
41 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 280-281.
42 Turnipseed *et al* 2010 *Environment* 12.
43 Kube 1997 *Natural Resources Journal* 857.
44 Kube 1997 *Natural Resources Journal* 862.
45 Kube 1997 *Natural Resources Journal* 857, 877-879.

natural resources and to regulate public rights therein.[46] The South African notion of public trusteeship contains similar features of *inter alia* recognising a fiduciary obligation of the state and the protection of the public interest regarding the resource.[47] It is therefore particularly beneficial to evaluate, analyse and interpret the statutorily introduced notion of public trusteeship against the development and meaning of the German concept of *öffentliche Sache* when addressing the uncertainties that emanate from the introduction of the notion of public trusteeship and the new property rights regime in the South African water law context.

Due to the corresponding characteristics that underpin the Anglo-American public trust doctrine, the German notion of *öffentliche Sache* and the South African concept of public trusteeship respectively, an in-depth analysis of the concept of *öffentliche Sache* may be beneficial to a scholarly analysis of the concept of public trusteeship. The analysis may also provide novel insight into the new property rights regime in the South African water law context.

1.3 Area of focus

1.3.1 Central research question

The question that underpins this study is how and to what extent the German concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the *National Water Act* 36 of 1998.

1.3.2 Objectives of the study

The primary objective of this thesis is to determine how the German concept of *öffentliche Sache* informs the development and interpretation of the South African concept of public trusteeship as entrenched in the *National Water Act* 36 of 1998.

46 Blumm 2010 *Pace Environmental Law Review* 658.
47 Van der Schyff 2010 *PER* 123, 130; Viljoen *The Public Trust Doctrine in South African law* 38; Young *Public Trusteeship And Water Management* 15, 17, 156.

In order to achieve the above objective, the following secondary objectives are set:

1. To theoretically examine perspectives on the "idea" of property in order to indicate the relevance that the particular property rights regime within which a resource is regulated has for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource;
2. To examine the property concept in the South African legal context to provide a property rights paradigm against which the statutorily introduced, public trusteeship-based property regime in water resources law can be measured. This objective can only be reached if the examination of the property concept in the legal context of South Africa includes a discussion of the current differentiation between private and public property, an explanation of the extent of constitutional protection, as well as the regulation of property in South Africa;
3. To discuss the development of the legal status of water as the contextual point of departure for understanding the implications of the introduction of the public trusteeship paradigm for water regulation in South Africa;
4. To provide a brief overview of the development of the concept of property in German property law in order to contextualise the analysis of the concept of *öffentliche Sache* as it functions in German law;
5. To discuss the development of water as public property in German law and to examine the nature of water rights that can be acquired in the resource as well as the state's regulatory obligations resulting from the public property regime; and
6. To distil from the German law analysis of *öffentliche Sache* lessons learned and to make recommendations for the interpretation and development of South Africa's concept of public trusteeship within the scope of the NWA.

1.3.3 Assumptions and hypothesis

1.3.3.1 Assumptions

The following assumptions underlie this thesis:

1. Sections 24, 25 and 27 of the Bill of Rights in the Constitution afford everyone the constitutional right to a protected environment that is not harmful to the person's health or well-being; a constitutional right to property and access to sufficient water;
2. The South African Government, in its entirety, has the positive constitutional obligation to realise the right of access to sufficient water;
3. The South African Government must respond to its obligations in relation to the right of access to sufficient water by means of relevant legislative and other reasonable measures;
4. Various legislative measures, such as the NWA, exist to concretise and translate the state's constitutional obligation into subjective statutory entitlements;
5. The NWA introduced the concept of public trusteeship into the South African water law; and
6. Scholars hold different views on the full meaning and implications of the statutory introduced concept of public trusteeship and its application on constitutional water rights and water law in South Africa in general.

1.3.3.2 Hypothesis

The main hypothesis of this study is that the German concept of ***öffentliche** Sache* may to a certain extent inform the interpretation and development of the concept of public trusteeship in the South African water law context.

1.4 Research methodology

1.4.1 Literature study

This thesis is based on a literature study. The main legal sources under review are relevant statutes and other legislative measures, cases, textbooks, scientific articles published in national and international journals, as well as electronic materials. The study commences with a synthesising review of scholarly literature on the idea of property. It also explores sources on the theoretical foundations, content, forms and meaning of the property concept in South Africa. The study subsequently offers a review of the meaning and implications of water as property in South Africa, as well as the concept of public trusteeship in general. The desktop review of the property concept and its relation to water as a natural resource is repeated for German law. The thesis therefore explores the theoretical foundations, content, forms and meaning of the property concept in German law, followed by a discussion of the property rights regime in Germany within which water is managed. The literature review includes a review of relevant historical developments in South Africa and Germany and a parallel evaluation of the concepts of public trusteeship and *öffentliche Sache* in the said jurisdictions.

1.4.1.1 Historical research

There is a historical dimension to the focus of the literature study to explain and contextualise the development of the current differentiation between private and public property in both the South African and German property law regimes. The historical development of the respective constitutional property concepts receives attention to explain the extent of the existing constitutional protection and regulation of property in South African and German law. The development of water as public property is explained within the historical contexts of South Africa and German jurisprudence in order to contextualise the present day implications of the property rights regimes within which the two countries' water resources are respectively regulated.

1.4.1.2 Parallel evaluation

The literature review includes a parallel evaluation of a foreign jurisdiction in the spirit of the interpretation clause, section 39 of the Constitution,[48] in order to provide further insights for the interpretation of aspects of the South African legal system.[49] This study delves into the jurisdiction of German law and focuses on aspects of the German property law regime to determine whether the notion of ***öffentliche** Sache* may inform the development and interpretation of the South African concept of public trusteeship. The inquiry into the German property law is motivated by the resemblances in the history, structure and interpretation of German and South African law generally, and in aspects of the constitutional law and property law specifically.[50] Resemblances between the German and South African constitutional and property law include *inter alia* that the German *Grundgesetz* or Basic Law was used as a model in the drafting process of both the Interim and the final Constitutions of South Africa; that the principles of German constitutional interpretation correspond with those endorsed in the South African Constitution;[51] that Germany and South Africa had to resolve similar

48 Section 39 of the Constitution requires the courts to consider international law, and allows for the consideration of foreign law when interpreting the Bill of Rights. The interpretation clause as such seems to support the use of non-South African law for purposes of the development of the Bill of Rights and arguably, South African law in general.

49 Raff *Private Property and Environmental Responsibility* 17.

50 The basis of the South African legal system justifies the possibility of legal evaluation with Germany. It is trite that South Africa has a mixed legal system, comprising of both common law and civil law features. The South African common law has on its turn been influenced by both the Roman-Dutch and the English law. It is with reference to the Roman-Dutch roots of the South African legal system that the German legal system (being an important system in Europe) is regarded as a suitable model for legal evaluation. It should further be noted that both South Africa and Germany share the traditional division between private law and public law. In Germany, the separate treatment of property in the constitutional context resulted in a concept of property that co-exists in the private law and public law. The fact that Germany and South Africa had to resolve similar property-related questions over time also serves as a justification of embarking on a parallel evaluation. For example, similar treatment of social limitations on individual ownership rights over land in order to have access to water serves is depicted. The German property law regime wherein water as a natural resource is managed is expected to assist in stimulating new thinking approaches in resolving uncertainties relating to the interpretation and development of the concept of public trusteeship in the South African water law. Hahlo and Kahn *The South African Legal System and its Background* 566-575; Hübner *A History of Germanic Private Law* 7, 9; Mousourakis *The Historical and Institutional Context of Roman Law* 415; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 30-42; Sarkin 1998 *Journal of Constitutional Law* 184; Stein *Roman Law in European History* 41-42; Venter *Constitutional Comparison Japan, Germany, Canada & South Africa as Constitutional States* 44-47; Van der Walt *Constitutional Property Law* 32.

51 It is therefore logical to derive that the drafters of the South African Constitution would expect the text to be interpreted by having regard for the jurisdiction that provided guidelines in the formulation of the constitutional text.

property-related questions over time;[52] and that similar social limitations on individual ownership rights over land can be depicted in both jurisdictions. These resemblances between the German and South African constitutional and property law, amongst others, create a legal framework that is favourable for a comparative parallel evaluation.

The aim with the comparative parallel evaluation is limited to a determination of the extent to which the German property law concept of *öffentliche Sache* may inform the interpretation and development of the South African concept of public trusteeship.[53] As articulated in chapter 1.2 above, the German concept of *öffentliche Sache* and the South African notion of public trusteeship share similar features on *inter alia* the exclusion of private ownership rights to certain vital resources and the recognition of the obligation of the state to protect the public interest therein.[54] Because of the shared features of the concept of *öffentliche Sache* and the South African concept of public trusteeship respectively, it may arguably be beneficial to compare the two concepts. It might be particularly beneficial to evaluate and interpret the statutorily introduced notion of public trusteeship against the development and meaning of the German concept of *öffentliche Sache* and to distil from the analysis a number of lessons that may deepen understanding of the notion of public trusteeship.

1.5 Study outline

This thesis is organised into seven chapters. The present chapter provides the background to the research question, the problem under discussion and a description of the adopted research methodology.

Chapter 2 examines perspectives on the "idea" of property to indicate the relevance of the particular property rights regime within which a resource is regulated for the regulation of access to the resource; the extent of a Government's concomitant

52 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 36.

53 The aim is not to directly transplant any of the developments in German law into South African law, or to directly compare the strengths and weaknesses of the two legal systems concerned.

54 Van der Schyff 2010 *PER* 123, 130; Viljoen *The Public Trust Doctrine in South African Water Law* 38; Young *Public Trusteeship and Water Management* 15, 17, 156.

regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.

Chapter 3 examines the South African concept of property in order to provide a property rights paradigm against which the statutorily introduced, public trusteeship-based property regime in water resources law can be measured. The examination includes a discussion regarding the current differentiation between private and public property, an explanation of the extent of constitutional protection, as well as the regulation of property in South Africa.

Chapter 4 discusses the development of water as public property in South African law in order to contextualise the implications of the introduction of the public trusteeship paradigm within which the country's water resources are currently regulated.

Chapter 5 provides an overview of the development of the German concept of property in order to contextualise and analyse the concept of *öffentliche Sache* as it functions in German law.

Chapter 6 discusses the development of water as public property in Germany and examines the nature of the water rights that citizens may acquire, as well as the state's regulatory obligations resulting from the public property paradigm.

Chapter 7 critically discusses the implications of the concept of public trusteeship for the realisation of South Africa's constitutional right of access to water in the light of lessons learned from the meaning and application of the concept of *öffentliche Sache* in German property law. The chapter summarises the findings and conclusions of this study and serves as the basis for a number of recommendations for the future interpretation and development of South Africa's concept of public trusteeship within the scope of the NWA.

Chapter 2

General theoretical perspectives on the idea of property

2.1 Introduction

Following the advent of the Constitution, a novel legal framework for water resources regulation was developed in South Africa.[1] This framework broke new ground by *inter alia* introducing the concept of public trusteeship into the South African water law.[2] Although the concept of public trusteeship entered the South African legal realm without much fanfare, it fundamentally changed the foundation and regulatory practices of the South African water law dispensation.[3] The water regulatory framework changed from one that linked access to water to land ownership[4] and differentiated between private and public water,[5] to a framework that applies to all water in South Africa and that acknowledges that "water belongs to all people".[6] Despite the fact that the water law regime instated in terms of the previous water law regime affirmed the state's position as *dominus fluminis,*[7] it provided specifically for a category of "private water"[8] and was heavily based on riparian rights that benefited white riparian farmers, excluding the majority of South Africans from access to water rights.[9] In terms of this system, the private claims of riparian landowners to public water and claims of landowners in relation to private water were acknowledged to the extent that the appellate division held in *Minister of Waterwese v Mostert*[10] that the extinction of water rights amounted to their expropriation, thereby effectively categorising these

1 Gabru 2005 *PER* 1; Soltau 1999 *Acta Juridica* 231.
2 See section 3 of the NWA.
3 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in South Africa* 340.
4 See the introduction of the *White Paper on a National Water Policy for South Africa*; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 393-340.
5 Para 5.1.1 of the *White Paper on a National Water Policy for South Africa*, 1997; Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 16-19.
6 The long title of the NWA articulates that the Act provides for fundamental reform of the law relating to water resources in South Africa; Para 2.1.7 of the *White Paper on a National Water Policy for South Africa*, 1997
7 Tewari 2009 *Water SA* 701.
8 Preamble of the NWA.
9 Tewari 2009 *Water SA* 702; Van der Walt *The concept of "beneficial use" in South African water law reform* 1.
10 *Minister van Waterwese v Mostert en Andere* 1964 2 SA 656 (A) par [669].

rights as "property".[11] In the new water law dispensation, private control of water is abolished and the National Government is appointed as the trustee of the nation's water resources.[12] A system that provides for water allowances granted at the discretion of Government replaced the system that provided for exclusive rights to water use.[13] The introduction of the notion of public trusteeship therefore denotes a major transformation in which existing property rights are re-defined.[14] In light hereof, the post-constitutional transformation of the South African water law framework creates new dimensions to the interface between property law and water resources law. It simultaneously gives rise to conceptual questions related, but not limited, to the precise nature, form, extent, limits and protection of access and use rights that can be acquired pertaining to water as a natural resource under this new regime; the relevance and importance of the property rights regime within which water as a natural resource is regulated; and the extent of a Government's regulatory powers relating to property in general and in particular relating to the country's water resources. These questions or issues originate because, being educated in a legal system that primarily acknowledged private property rights, people normally want to know what is theirs.[15] In addition, they want to know how to protect what is theirs from harm caused by others, including Government.[16]

Understandably, the introduction of the notion of public trusteeship, linked to water as "a common resource", and the replacement of exclusive use rights (previously regarded as "property") with discretionary water allowances, raise questions about the property rights regime within which water as a common resource is regulated.[17] The understanding, interpretation and development of the full implications of the new

11 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 258-259, 283-285.
12 Section 3 of the NWA.
13 Van der Schyff and Pienaar 2007 *Law Environment and Development Journal* 181.
14 Sax 1982-1983 *Washington Law Review* 481 similarly argues that the resurgence of the Anglo-American public trust doctrine on the Anglo-American legal landscape depicts a major transformation in which property rights are redefined, often to the disadvantage of property owners.
15 Merrill and Smith 2001 *The Yale Law Journal* 357.
16 Jacobs *Private Property in the 21st Century The Future of an American Ideal* 1.
17 Anon 2015 http://www.dievryburger.co.za/2015/05/regime-storm-voort-met-onteiening/; Van der Schyff *Die nasionalisering van waterregte in Suid-Afrika: onteiening of ontneming?* 1-2; Van der Walt *The concept of "beneficial use" in South African water law reform* 68, 125-212; Par 5.1.1 of the *White Paper on a National Water Policy for South Africa*, 1997.

regulatory regime of water resources in South Africa are dependent on the answers to these questions.

In order to shed light on the property rights paradigm within which water is managed as a common resource in a public trusteeship model, a discussion of the general or 'universal' meaning attributed to the concept of "property" and the existing property regimes within which water can be regulated is paramount. The term "property" receives attention to this end. Thereafter, in an effort to shed light on the normative justification for allocating rights in a particular manner,[18] a basic overview of some prominent theories of property follows. In the final instance, the discussion turns to the content, relevance and importance of existing property regimes. This discussion is expected to highlight the relevance that a particular property regime within which a resource is regulated has for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource. The discussion also forms the background to the discussion of the South African and German law concept of property that follows in chapters 3 and 5.

2.2 What is property?

2.2.1 Two approaches

Property is a prominent notion that features in our everyday lives.[19] In Mostert and Pope's words, "property is a shorthand reference to someone's ability to undertake certain actions with certain kinds of objects".[20] In fact, human life is in every respect dominated by a sense of property.[21] Yet, despite the importance of property, there is remarkably little scholarly work on what property in the legal context entails.[22]

18 Alexander and Peñalver *An Introduction to Property Theory* 6.

19 Gray and Gray "The Idea of Property in Land" 15; McHarg, Barton, Bradbrook and Godden "Property and the law in energy and natural resources" 4; Snare 1972 *American Philosophical Quarterly* 200; Trealease 1957 *California Law Review* 639; Trelease 1957 *California Law Review* 639.

20 Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 5.

21 Alexander and Peñalver *An Introduction to Property Theory* 1; Bouckaert 1990 *Harvard Journal of Law and Public Policy* 775; Underkuffler *The Idea of Property: Its Meaning and Power* 1.

22 It would be a mistake to assume that diverging conceptual or definitional approaches to the property concept is a new legal issue. Grace *The Concept of Property in Modern Christian*

Renowned property law scholars like Underkuffler argue that even in prominent scholarly works, the author often assumes that he or she and the reader share a working understanding of "property", moving almost directly to aspects such as the subject of property or the concept of ownership.[23] In fact, some proffer that the concept of property defies definition.[24] The meaning attributed to the concept "property" within a particular legal system is determined by various factors and it is not plausible to attempt to provide a "simple" definition.[25] Religious, economical, philosophical and social factors serve as co-determinants of the concept.[26] As such, "property" is an abstract idea,[27] a "culturally constructed concept",[28] a creature of the legal system within which it functions.[29] Consequently, the word "property" is susceptible of a variety of meanings,[30] and property has *inter alia* been described as a value,[31] an institution,[32] a relationship,[33] objects,[34] rights,[35] and an organising idea.[36]

Thought 3; Kaser *Roman Private Law* 80; Lipton 1999 7 *International Journal of Law and Information Technology* 175; Longo 1983 *University of Tasmania Law Review* 279; Underkuffler *The Idea of Property: Its Meaning and Power* 11; Ziff *Principles of Property Law* 1.

23 See Bowen 1925-1926 *The Cornell Law Quarterly* 41; George 2005 *Oxford Journal of Legal Studies* 793; Underkuffler *The Idea of Property: Its Meaning and Power* 11.

24 Waldron *The Right to Private Property* 26.

25 Currie and De Waal *The Bill of Rights Handbook* 536-540.

26 Pienaar 1986 *TSAR* 295; Wolff and Raiser *Sachenrect* 170.

27 Penner *The Idea of Property in Law* 1.

28 Diamond 2009 *Saint Louis University Public Law Review* 86.

29 Penner *The Idea of Property in Law* 3.

30 *Commissioner for Inland Revenue v Estate Crewe* 1943 (AD) page [667]; Erlank *Property in Virtual Worlds* 212.

31 Jacobs *Private Property in the 21st Century The Future of an American Ideal* 27.

32 Çoban *Protection of Property Rights within the European Convention on Human Rights* 12; Harris "Is Property a Human Right" 65; Lipton 1999 *International Journal of Law and Information Technology* 175; Longo 1981-1983 *University of Tasmania Law Review* 285.

33 Çoban *Protection of Property Rights within the European Convention on Human Rights* 14.

34 Çoban *Protection of Property Rights within the European Convention on Human Rights* 1.

35 Currie and De Waal *The Bill of Rights Handbook* 538.

36 Harris *Property and Justice* 63.

In order to explain the complexity in defining property, this section acquaints the reader with some approaches to the "idea"[37] or concept of property. The aim of this section is therefore not to pin down a concise definition of property, but rather to show the variety of approaches to, and interpretations of property that are dependent on factors such as *inter alia*, the context in which the concept is used[38] and the function for which the concept is used.[39]

Cribbet[40] and Munzer[41] represent a group of scholars who hold the view that at least a part of the difficulty in defining property can be ascribed to the difference in how lay people and lawyers understand the concept of property.[42] This perceived difference illustrates to some extent the difficulty faced by the scholar trying to define the concept. Lay people often think that property is a relatively uncomplicated idea that involves a relationship between a person and a "thing"[43] on which that person has a particular claim (the so-called layman's view).[44] The importance of the legal nature underlying

37 For purposes of this chapter, the "idea" of property is a conceptualisation of property. It is therefore possible to use the term "concept" instead of the term "idea". The term "idea" is used to emphasise the fact that property is something that has existence in the real world and not only in theoretical examinations. For purposes of this chapter, the idea of property includes the question of what property is, an examination of property theories, and an understanding of property rights regimes in law. Various scholars refer to the "idea" of property in their analysis of whether property is indeed a coherent concept in law. See for example Grace *The Concept of Property in Modern Christian Thought* 3; Penner *The Idea of Property in Law* 1-2; Underkuffler *The Idea of Property It's Meaning and Power* viii.

38 Mostert indicates that the term property can only be defined within the context in which the concept is used. Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 14. Pienaar 1986 *TSAR* 295; Pienaar and Van der Schyff *Law Environment and Development Journal* 188; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 56.

39 Mostert holds that the concept of property depends on its function, either in the private- or in the constitutional law domain. In the private law, the concept of property may refer to a legal object and to the right in a legal object. Within the constitutional law sphere, the concept of property may be expanded to encapsulate "more", such as water and authorisations. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 9; Mostert *The Constitutional Protection of Property in South Africa and Germany* 11.

40 Cribbet *et al Property Cases and Materials* 2.

41 Munzer *A Theory of Property* 16.

42 The idea of property is recognised in both the ordinary language as well as in various technical legal languages. Graham *Lawscape Property, Environment, Law* 25; Gray and Gray "The Idea of Property in Land" 15; Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 4; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 11; Mossoff 2003 *Arizona Law Review* 372; Penner *The Idea of Property in Law* 2; Smith 2012 *Harvard Law Review* 1691; Van der Walt 2008 *Stell LR* 328; Wenar 1977 *Columbia Law Review* 1927.

43 Alexander 1982 *Columbia Law Review* 1546; Alexander and Peñalver *An Introduction to Property Theory* 2; Cribbet *et al Property Cases and Materials* 2; Philbrick 1938 *University of Pennsylvania Law Review* 691; Gray and Gray "The Idea of Property in Land" 15.

44 Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 4.

the individual's claim is often not even considered. More often than not, the individual perceives the object of the claim to be "the property". In this sense, the "object" or "thing" is regarded as the property. This primary association of the concept of property with "objects" or "things" brings about that the principal relationship that property conveys to a layperson, is a relationship between the person and a "thing" or legal object. Although the layman's view of property as a relationship between a person and a "thing" holds an important truth regarding the concept of property in that it emphasises the dominant theme of "the right to property" from the legal discipline "law of things",[45] the lay view does not explain the concept of property effectively due to various uncertainties inherent in the concept.

Cribbet *et al*[46] illustrate that the "simple and clear" understanding of property by a layman is misguided and indicates that the notion's separation from the legal concept of *ownership* is unclear by using the example of a motor vehicle given by a father to his daughter as a gift.[47] In such case, the daughter (as a natural person) may refer to the motor vehicle as her property and assert to be the "owner" thereof.[48] This view is one-dimensional in that it only refers to "that which a person owns" or perceives to own as property. Using the same example one can distinguish between two scenarios. In the first instance, the father acquired ownership of the vehicle and transferred ownership to his daughter when he gave her the car as a gift. It is due to the existence of the underlying legal concept of ownership that the daughter can consider the car to be her property after she received it from her father as a gift when he delivered it with the intention to transfer ownership. In the second scenario, the father concluded a hire-purchase agreement in terms of which he will eventually become the owner of the car. In the latter scenario, the daughter regards the motor vehicle as her "property" nonetheless. In light of these two scenarios, it is clear that the "layman's view" (or object-orientated view) of property is muddled because it does not distinguish between the "object" in question and the right of ownership.

45 Merrill and Smith 2001 *The Yale Law Journal* 358.
46 Cribbet *et al Property Cases and Materials* 2.
47 Cribbet *et al Property Cases and Materials* 2; Harris "Is Property a Human Right" 65.
48 Claeys 2009 *Seattle University Law Review* 2; Cribbet *et al Property Cases and Materials* 2; Underkuffler *The Idea of Property: Its Meaning and Power* 11.

The "layman's view" of property becomes even more muddled when intangible property,[49] rented property and mortgaged property are considered.[50] For example, where a house owner rents his or her house to another person, the question arises whether the tenant may refer to the house as "his or her house", although he or she is not the lawful owner. There is also confusion in the case of a mortgaged house, for not only the owner, but also the mortgage provider, has property rights to the house. The complexities attached to "property" in the layman's lexicon is further emphasised when the content, scope and character of this view of property is analysed over time and in accordance with social, political and economic developments in different contexts. Philbrick[51] for example acknowledges that although "things" such as land, its produce and even a number of tangible chattels continue to be regarded as "property" throughout centuries in different contexts, there is great variation in the content, scope and character of things used and recognised as property.

Lawyers, on the other hand, usually view property as the collection of the individual rights and duties people have against one another with respect to particular legal objects, referred to by Alexander and Peñalver as "owned resources".[52] Where laypersons often regard property and objects as the same "thing", the lawyer's view indicates that different people may simultaneously have different rights that attach to particular uses of an "object" or "thing" that might equally be regarded as property or property rights. This view distinguishes between the "object" or "thing" of property rights and the rights themselves. One way of indicating the difference between the layman's and lawyers' approach to property is to say that where the layman's perspective of property focuses on the rights of persons *over* objects or things, the lawyer's perspective provides a distinctive feature to property rights (namely providing the right with an *in rem* quality),[53] and can then be seen as describing the rights and obligations owed *between persons in respect of* objects or things.[54] Another would be to say that where the layman's perspective of property focuses on a "thing", the

49 Intangible property rights such as pension-rights.
50 Waldron *The Right to Private Property* 28; Ziff *Principles of Property Law* 5.
51 Philbrick 1938 *University of Pennsylvania Law Review* 691; Van Banning *The Human Right to Property* 1.
52 Alexander and Peñalver *An Introduction to Property Theory* 2.
53 Alexander and Peñalver *An Introduction to Property Theory* 2.
54 Alexander and Peñalver *An Introduction to Property Theory* 2; Nwabueze *Biotechnology and the Challenge of Property* 11.

lawyers' focuses on "proprietorial entitlements".[55] However, even within "the lawyer's approach" there are different theoretical approaches. In an enlightening publication, Breakey[56] differentiates between two approaches often used to define the concept of property. He refers to these concepts as the "Bundle Theory" and the idea of "Full Liberal Ownership". Blackstone and Honoré are major proponents of the latter, while Hohfeld is considered the author of the bundle of rights theory.

From his *Commentaries on the Laws of England*,[57] it is apparent that Blackstone does not equate property with things (the layman's view), but with rights over things when he considers property as the exclusive dominion that one man claims and exercises over the external things of the world.[58] Blackstone's account on property reflects an understanding that "property belongs to a single individual".[59] Honoré[60] also views property as a comprehensive concept and sets out eleven standard incidents (or rights or elements)[61] of ownership.[62] The list of incidents includes the right to possess (which includes the right to exclude),[63] the right to use,[64] the right to manage,[65] the right to the income from a thing,[66] the right to the capital,[67] the right to security,[68] the right to transmissibility and the absence of term,[69] the duty to prevent harm,[70] the liability of execution,[71] and residuarity.[72] Breakey, however, argues that Honoré's list of incidents

55 Breakey 2011 http://www.iep.utm.edu/prop-con/
56 Breakey 2011 http://www.iep.utm.edu/prop-con/
57 Blackstone 2014 http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-201/
58 Nwabueze *Biotechnology and the Challenge of Property* 11; Rose 1999 *Yale Law School Legal Scholarship Repository* 601; Seipp 1994 *Law and History Review* 30.
59 Vandevelde 1980 *Buffalo Law Review* 328.
60 Honoré *Making Law Bind* 165; See also Penner 1995-1996 *UCLA Law Review* 753 for a summary of the eleven rights, elements or incidents.
61 Bell and Parchomovsky 2005 *Cornell Law Review* 544; Johnson 2007-2008 *Vermont Law Review* 253; Ziff *Principles of Property Law* 2.
62 Alexander and Peñalver *An Introduction to Property Theory* 4; Penner *The Idea of Property in Law* 2; Ziff *Principles of Property Law* 2.
63 Alexander and Peñalver *An Introduction to Property Theory* 4; Penner 1995-1996 *UCLA Law Review* 755-756.
64 Honoré *Making Law Bind* 165.
65 Honoré *Making Law Bind* 165.
66 Honoré *Making Law Bind* 165; See also Penner 1995-1996 *UCLA Law Review* 756-759.
67 Honoré *Making Law Bind* 165.
68 Honoré *Making Law Bind* 165.
69 The concept of transmissibility and the absence of term refer to a potentially infinite duration. Honoré *Making Law Bind* 165.
70 Honoré *Making Law Bind* 165.
71 Honoré *Making Law Bind* 165.
72 Residuarity refers to when lesser interests come to an end, the full interest in the property reverts to the owner. Honoré *Making Law Bind* 165; Penner 1995-1996 *UCLA Law Review* 764-767.

should not be regarded as a strict definition of property, but rather an outline of the basic features of the concept of property.[73] Honoré's list of entitlements provides a useful resource to theorists supporting the "bundle of rights theory" as it usefully describes the types of "sticks" that may or may not be present in a proprietor's bundle that comprises property in any given scenario. The theory that describes property as a bundle of rights is, according to Breakey,[74] "not really a proper concept at all" because according to this theory -

> there is no pre-existing, well-defined and integrated concept of property that guides our understanding of property entitlement [...] Instead, the law grants specific entitlements of people to things. The property that a person holds in any given instance is simply the sum total of the particular entitlements the law grants to her in that situation.

Hohfeld is widely regarded as the major proponent of the theory of property as a bundle of rights.[75] Hohfeld argues that property, as the set of legal relations, exists between people and not between people and things.[76] His thinking allows for the conceptual dissection of the concept of property. The complexity of actual proprietorial entitlements in law necessitated a move away from the perspective that property is a comprehensive concept, as supported by Blackstone. The shortcoming of this approach is highlighted by Alexander and Peñalver, who hold that if one focuses too narrowly on any given property right, the idea of property starts to fall apart and turns into a disaggregated collection of narrowly defined property rights and duties amongst people,[77] without having regard for the connection of those rights to things.[78]

In an attempt to combat the centrifugal tendency of the "bundle of rights" understanding, some property law scholars[79] attempt to identify a "single essential feature" that is definitive of property.[80] According to these scholars, the most common

73 Breakey 2011 http://www.iep.utm.edu/prop-con/
74 Breakey 2011 http://www.iep.utm.edu/prop-con/
75 Breakey 2011 http://www.iep.utm.edu/prop-con/; Harris "Is Property a Human Right" 65; Mossoff 2003 *Arizona Law Review* 372.
76 Johnson 2007-2008 *Vermont Law Review* 247; Nwabueze *Biotechnology and the Challenge of Property* 11.
77 Penner 1995-1996 *UCLA Law Review* 712.
78 Mossoff 2003 *Arizona Law Review* 373; Penner 1996 43 *UCLA Law Review* 712; Wenar 1977 *Columbia Law Review* 1927.
79 Merril 1998 *Nebraska Law Review* 730; Penner *The Idea of Property in Law* 103.
80 Anderson 2006 *Journal of Legal Education* 543.

"feature" of property is the "right to exclude".[81] In essence, this approach boils down to reducing the idea of property to the single right of exclusion. In simple terms, this approach holds that a person is afforded private property if he or she has the right to exclude others from a resource or thing.[82] If, on the other hand, a person is denied an exclusion right, he or she does not have property.[83] However, one should agree with Alexander and Peñalver that such approach to identify property is not always workable as there are foreign legal systems where the right to exclude is limited or absent and the rights are nonetheless regarded as property. Alexander and Peñalver refer specifically to foreign legal systems such as that of Scotland, Norway and Sweden.[84] In Sweden,[85] for example, landowners do not have any right to exclude others from their property. In fact, provided that non-owners do not interfere with the use of the landowner, non-owners have the right to roam wherever they wish to.[86] The right to exclude can therefore not be used to define property in a generic manner.

Although the layman's and lawyer's views of what property entails differ, the common denominator is that both these views are focused on establishing a demarcated and protectable individual right to, or interest in, an object or a thing, be it a corporeal or incorporeal object or thing. This is attributed to the fact that both the layman's and lawyer's views are aimed at answering questions relating to *inter alia* what a person can own and how a person knows what is his or hers. It therefore seems as if, when property is examined, the initial reaction is to define private property.[87] Given this "private" orientated property concept, neither the layman's nor the lawyer's view assists in defining or describing property as a nuanced concept that might include

81 Anderson 2006 *Journal of Legal Education* 539; Bell and Parchomovsky 2005 *Cornell Law Review* 597; Dagan 2003 *California Law Review* 1519; Mossoff 2003 *Arizona Law Review* 375; Penner 1995-1996 *UCLA Law Review* 716, 742.

82 Alexander and Peñalver *An Introduction to Property Theory* 3; Demsetz 1967 *The American Economic Review* 354.

83 Alexander and Peñalver *An Introduction to Property Theory* 3.

84 In Norway and Sweden the *Allemansrätten* is recognised in terms of which every person has the right to cross the land of another and camp there temporarily. Alexander and Peñalver *An Introduction to Property Theory* 4; Anderson 2006 *Journal of Legal Education* 548; Katz 2008 *University of Toronto Law Journal* 298-299.

85 Anderson 2006 *Journal of Legal Education* 548; Katz 2008 *University of Toronto Law Journal* 298-300.

86 Swedish Environmental Protection Agency 2015 http://www.swedishepa.se/Enjoying-nature/The-Right-of-Public-Access/

87 Alchian 1965 *II Politico* 817.

private property, public property, or common property generally.[88] In fact, even when the purpose is to define property as "private", different approaches and uncertainties are evident from different legal systems[89] and different contexts.[90]

2.2.2 The public function of property

When "property" is the subject under discussion, one should never lose sight of the reality that property comes in different forms.[91] The three generally accepted basic forms of property are private property, common property and public property. As is evident from the discussion above, most of the debate on the nature of property revolves around the concept of private property. One legal regime may, however, accommodate different types of property.

Although scholars are inclined to define property to accommodate individual (and sometimes exclusive) property rights over objects or things, the already complex concept of private property is in transition,[92] a state of flux,[93] or in a state of continuous

88 Alexander and Peñalver *An Introduction to Property Theory* 3; Penner 1995-1996 *UCLA Law Review* 712, 714; Philbrick 1938 *University of Pennsylvania Law Review* 692.

89 In addition to the difficulties brought about by the layman's and lawyer's approach to property, it is further noted that the Afrikaans-, English- and German language terminology cause great confusion to the lawyer. For example, in the private law domain of both the German- and Afrikaans languages, there is only one word, "*Eigentum*" and "*eiendom*" respectively, describing two different concepts, that of "property" and "ownership". The English language term of "property", also within the private law, is more complex. In English the term can have more than one meaning. It can refer to the different assets that make up one's estate. The concept of property can also denote a "thing to which the right of ownership relates". The concept of property also represents the "right of ownership" in a thing. In the sphere of constitutional law, the three said languages also have an important role to play in the meaning of the stated concepts of "*Eigentum*", "*eiendom*" and property. In German, the constitutional term "*Eigentum*" seems to be a broader concept than the exact same term used in the Civil Code (private law codification). In Afrikaans, the term "*eiendom*" refers to the object of property rights as well as to the right of ownership. (However, in this regard the Afrikaans term "*eiendomsreg*" would probably have been more appropriate to describe the meaning of the right of ownership.) As for the constitutional concept of "property" in the English language, it may denote to a broader concept that only "ownership" and "things" as known in the private law sense, which seems to correlate with the German constitutional meaning. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 1; Kaser *Roman Private Law* 80; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 14; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 121.

90 Philbrick 1938 *University of Pennsylvania Law Review* 691, 693; Rose 1996 *Wash. & Lee L. Rev* 268.

91 Breakey 2011 http://www.iep.utm.edu/prop-con/

92 Cribbet 1986 *University of Illinois Law Review* 1; Rose 1996 *Washington and Lee Law Review* 268; Taylor and Grinlinton "Property Rights and Sustainability: Toward a New Vision of Property" 1; Wenar 1977 *Columbia Law Review* 1923.

93 Nwabueze *Biotechnology and the Challenge of Property* 13.

decline[94] that adds additional uncertainties to the question of what property is. In 1982 already, Sax argued that a gradual and constructive re-defining process for property was underway, and that it was characterised by the decline of private property prominence.[95] In following Sax's argument, it may be beneficial to investigate to what extent the function that property performs today assists in defining property.[96] Waldron[97] argues that the function of the law of property is to provide rules that govern access to and the control of a wide variety of resources. He asserts that a system of private property provides a set of rules that governs access to and control of material resources that revolves around the idea that resources are separate objects that belong to particular individuals. Alexander and Peñalver indicate, however, that although Waldron's functional approach leads to viewing property as an institution for allocating rights to material things, it does not assist in defining the property. Sax, on the other hand, indicates how this function ascribed to property assists in understanding property. He argues that where property rights are assigned, at least in the example of land, "the assignment of property rights presupposes that ownership would routinely produce socially desirable use allocations."[98] Notably, Sax further argues that development over time affected the understanding that private property is the only or best way to facilitate socially desirable use allocations.[99] Sax[100] explains that we previously assigned property to private ownership because we assumed that the uses that the owners would make of the privately owned property would maximise the owners' social benefits. However, as time went by, our general beliefs changed to acknowledge that the best use of land rather lies in non-exclusive holdings such as public recreation or wilderness.[101] Private ownership cannot sufficiently allocate land to such non-exclusive uses.[102] The need for and increasing importance of public property is therefore emphasised. Consequently, the prevailing relevance of private property becomes questionable if one takes into consideration factors that became commonplace in contemporary property law, such as *inter alia* community-based non-

94 Sax 1982 *Washington Law Review* 481.
95 Sax 1982 *Washington Law Review* 481.
96 Alexander and Peñalver *An Introduction to Property Theory* 5.
97 Waldron *The Right to Private Property* 35.
98 Sax 1982 *Washington Law Review* 487.
99 Sax 1982 *Washington Law Review* 487.
100 Sax 1982 *Washington Law Review* 487.
101 Sax 1982 *Washington Law Review* 487.
102 Sax 1982 *Washington Law Review* 487.

exclusive rights to or benefits from property;[103] the growing conviction that the system of private ownership misallocates property;[104] the fact that Government intervention (which has always been seen as exceptional) is progressively becoming common practice in contemporary law; the introduction of preservation or conservation laws that limit private property; and the resurgent concept of public trusteeship. Taking these factors into consideration, the conventional private property system or regime that organises, facilitates or allocates private and exclusionary property rights is becoming increasingly insufficient and outdated when referring to property.

This "functional approach" to property does not only indicate the decline of private property, but it calls attention to important perspectives for understanding property within the framework of this study. The functional approach shows that property is a fluid concept that moves beyond the traditional inclination towards private property and effectively incorporates the concepts of common property and public property. The concepts of common property and public property for example provide different or alternative rules for the allocation of use and access rights to resources that fall outside the traditional "private" understanding of property.

2.2.3 Conclusion

Coming back to the question of what property is, the different approaches to property referred to above clearly show that although property is a well-known concept that might seem "as natural as the morning sun" to us,[105] it is an abstract and indefinable concept. The traditional and prevailing "private property" approaches to property that focus on the rights of persons over things; the perspectives of property describing the rights and obligations owed between persons in respect of objects or things; and the property rights themselves, do not adequately define property. In fact, private property is in a process of being demoted to a subordinate role when compared to common or public property.[106] Therefore, in addition to the prevailing uncertainties relating to understanding property, it may be contended that the traditional inclination towards

103 Sax 1982 *Washington Law Review* 493.
104 Sax 1982 *Washington Law Review* 484.
105 Ziff *Principles of Property Law* 11.
106 Claeys 2009 *Seattle University Law Review* 7-8; Ziff *Principles of Property Law* 11.

private property adds to the inconclusiveness of what property is, because the concept of private property is, in itself, in a process of decline. Significantly, it follows from the argument regarding the decline of private property held above that property is a changing and fluid concept that is in a state of flux that progressively incorporates "non-private property" such as common and public property into its meaning and scope.

2.3 Property theories and theoretical principles

2.3.1 Motivating the need for a broad overview of existing property theory

Although property is a well-known, everyday feature of people's existence,[107] it remains an abstract concept that is hard to pin down to a single definition.[108] For this reason, it is necessary to inquire into legal theoretical principles or property theories that underlie and govern the concept of property. Alexander and Peñalver[109] provide a simple yet functional explanation of the value of pondering property theory. They explain that property theories *inter alia* provide normative justifications and reasons for allocating property rights in a particular way; they indicate which human interests are relevant when property rights are allocated; and they specify the content, nature, limits, types and forms of property rights. Scholars who examine the legal theoretical principles of property do so under the headings of "property theories", "justificatory arguments" or "justifications of property".[110] In their discussions, scholars then deploy existing property theories to argue the governing principles or justifications of property. Given the scope of property theories,[111] further complicated by divergent scholarly perspectives,[112] the aim of this section is not to provide comprehensive arguments for or against existing property theories, but to introduce a broad outline of basic principles

107 Munzer *A Theory of Property* 1.
108 Alexander and Peñalver *An Introduction to Property Theory* 1; Anderson 2006 *Journal of Legal Education* 539; Grace *The Concept of Property in Modern Christian Thought* 3.
109 Alexander and Peñalver *An Introduction to Property Theory* 6-7.
110 Alexander and Peñalver *An Introduction to Property Theory* 6-213; Barnes *Property Rights and Natural Resources* 29-62; Ziff *Principles of Property Law* 10-47.
111 Existing property theories include, but are not limited to, utilitarian property theories, Locke and Libertine theories of property, the Hegelian property theory and the Kantian property theory. Alexander and Peñalver *An Introduction to Property Theory* 6-213; Barnes *Property Rights and Natural Resources* 29-62.
112 As a result of, for example, political ideologies. Barnes *Property Rights and Natural Resources* 29.

in order to provide insight into *inter alia* the normative justifications for the allocation of property in a particular way.

2.3.2 A pluralist theoretical account

The inquiry starts with the pluralist theoretical account of property developed by Munzer.[113] Munzer examines the principles that govern property arrangements and argues that the allocation of property does not rely on a single property theory or theoretical argument, but on a variety of different theoretical principles. He organises the most important theoretical principles into three main categories, and refers to it as a "pluralist account". Munzer's pluralist account provides insight into the complex field of property theories by providing a simple framework that effectively encapsulates the core principles and elements of a variety of property theories. His account further justifies some forms of private property and non-private property that is of particular importance within the broader framework of this study. Munzer's organisational structure is therefore useful for this study[114] to the extent that it combines principles of a) labour and desert; b) utility and efficiency; as well as c) justice and equality.[115] This three-part categorisation of theoretical property principles is subsequently discussed to provide normative justifications for the allocation of property rights in a particular way. Due to the general emphasis placed on private property by property scholars,[116] which unsurprisingly results in the majority of property literature being private property orientated, the first group of theoretical principles discussed focuses on property principles that underlie the allocative functions of private property.

113 Ziff *Principles of Property Law* 46.
114 Although these combined principles do not provide a fully adequate legal theory of property, they provide insight into the most important property principles that make up a satisfactory pluralist legal theory of property. Munzer *A Theory of Property* 3.
115 Munzer *A Theory of Property* 3.
116 See chapter 2.2 above.

2.3.2.1 Labour and desert

The first group of property principles discussed in this chapter combines the principles of labour and desert (or entitlement)[117] to justify property. In essence, the labour-desert argument stems from natural law.[118] Natural law thinking is concerned with matters such as the possibility of moral knowledge, laying down moral principles to guide conduct, and the source of the obligation to obey the law.[119] One of the principles underlying natural law is that human beings are bound to the duty to preserve themselves and to help others to survive as well.[120] In fact, according to the natural law approach, God created the universe to allow humans to fulfil this duty of preserving humankind and of assisting others to survive. Since this duty applies to all people equally, each individual is entitled to use those things that serve his or her subsistence.[121] The basis of this proposition has been extended to support the claim that individuals are entitled to claim private rights over those things or objects acquired as a result of the actions or their labour.[122] In other words, a person is entitled to something if he or she exerted effort to make or to physically appropriate it.[123] John Locke,[124] most commonly associated with the natural law approach to property, built his theoretical account of property around the questions of *how* and *why* entitlements or private property rights in respect of things can arise as a result of the "actions" or "labour" executed by an individual. In order to understand the theoretical principles underlying Locke's account of property, it is prudent to briefly refer to Locke's main arguments.

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117 Munzer *A Theory of Property* 256; Ziff *Principles of Property Law* 5, 36.

118 Alexander and Peñalver *An Introduction to Property Theory* 36; Johnson, Pete and Du Plessis *Jurisprudence A South African Perspective* 37; Waldron *The Right to Private Property* 138.

119 Bouckaert 1990 *Harvard Journal of Law & Public Policy* 813; Meyerson *Jurisprudence* 108.

120 The characteristics of the law of nature or the natural law are not self-evident. A philosopher invoking natural law needs to select a particular aspect of nature as representative. Alexander and Peñalver *An Introduction to Property Theory* 37; Barnes *Property Rights and Natural Resources* 31; Johnson, Pete and Du Plessis *Jurisprudence A South African Perspective* 5; Locke *Second Treatise of Government* 18; Waldron *The Right to Private Property* 136.

121 Alexander and Peñalver *An Introduction to Property Theory* 37; Waldron *The Right to Private Property* 145.

122 Bell and Parchomovsky 2005 *Cornell Law Review* 541; Philbrick 1938 *University of Pennsylvania Law Review* 692; Snare 1972 *American Philosophical Quarterly* 200; Ziff *Principles of Property Law* 36.

123 Alexander and Peñalver *An Introduction to Property Theory* 256-257.

124 Bouckaert 1990 *Harvard Journal of Law & Public Policy* 813; Graham *Lawscape Property, Environment, Law* 48; Henrichsen 2012 www.patheos.com/blogs/faithpromotingrumor/2012/02/locke-on-property-a-critique; Lipton 1999 *International Journal of Law and Information Technology* 178; Seipp 1994 *Law and History Review* 30; Waldron *The Right to Private Property* 137; Ziff *Principles of Property Law* 36.

Locke's theory has a theological foundation and departs from the premise that "God gave mankind in common the bountiful nature of the earth" and that every individual has property in his own person through "[t]he labour of his body".[125] In order to understand the process that determines how and why private property rights in respect of things can arise through labour, Locke makes use of the so-called "mixing metaphor".[126] Locke assumes that each human being owns his or her own body (or person); and therefore owns his or her own labour.[127] Through the "mixing" of one's labour with material objects or goods, humans then put something of themselves into the material world.[128] The "mixing-action" then extends humans and their rights of ownership to the worldly objects or goods, which gives rise to private property rights.[129] Against the background of natural law, it may therefore be stated that Locke shows, through his "mixing metaphor", how men came to have property in several parts of that which God gave mankind in common to satisfy their human needs or to serve their subsistence. Notably, however, this "mixing" argument has an internal difficulty, because it fails to explain how this unilateral action of the labourer can serve as justification for depriving other human beings from their rights of common ownership.[130] Locke addresses this problem by placing two qualifications on his "mixing metaphor".[131] Firstly, he argues that the taking of goods can only be permitted if there is enough material left in common for others.[132] Secondly, human beings should not take so many goods that it would eventually spoil the commons.[133] Although his theory is not uncontested,[134] Locke makes a strong argument for private property

125 Locke 1690 http://www.constitution.org/jl/2ndtr05.htm; Mossoff 2003 *Arizona Law Review* 386; Waldron *The Right to Private Property* 162-167.
126 Ziff *Principles of Property Law* 37.
127 Bell and Parchomovsky 2005 *Cornell Law Review* 541; Locke 1690 http://www.constitution.org/jl/2ndtr05.htm; Ziff *Principles of Property Law* 37.
128 Ziff *Principles of Property Law* 37.
129 Bouckaert 1990 *Harvard Journal of Law & Public Policy* 813; Locke 1690 http://www.constitution.org/jl/2ndtr05.htm
130 Ziff *Principles of Property Law* 37.
131 Alexander and Peñalver *An Introduction to Property Theory* 283; Ziff *Principles of Property Law* 37.
132 Locke 1690 http://www.constitution.org/jl/2ndtr05.htm; Ziff *Principles of Property Law* 37.
133 Locke 1690 http://www.constitution.org/jl/2ndtr05.htm; Ziff *Principles of Property Law* 37.
134 Bell, Henry and Wray 2004 *Review of Social Economy* 51-65; Haddad 2003 *Ecological Economics* 19-31; Henrichsen 2012 www,patheos.com/blogs/faithpromotingrumor/2012/02/locke-on-property-a-critique.

with these two qualifications. It is based on a duty to not acquire things through labour in an unlimited fashion, and to ultimately preserve mankind.[135]

Notably, the Lockean labour-approach to property is often supplemented with the principle of desert to provide a more conceivable account of property.[136] Although the labour theory, supplemented by desert, cannot be seen as a pure natural law approach, Barnes argues that the development away from natural law is not problematic, because property is a pluralist concept.[137] With the idea of desert, the focus is not on the fact that individual property rights are derived from the "mixing" of a human being's own body and labour into the material good (as it was the case with the labour principle above), but rather on the *benefit* that emerges from that work and to *reward* the person who has created the material goods.[138] In other words, whereas the labour principle emphasises the fact that the labourer *deserves* the object or thing over which he or she has laboured, the desert principle rather places emphasis on the concept of an *entitlement* an individual may receive over a thing or object.[139] "Desert" in this context is therefore a socially constructed notion that is determined by the wider community.[140]

In essence, therefore, the combined labour and desert principle rests on the idea that individuals deserve, or are entitled to, things as a result of the individual's actions or labour in the world. This theory does not only provide some clarity on normative justifications for the allocation of property in a particular way, but it justifies a particular form or type of property, as well as the protection thereof. For example, by labouring resources in the state of nature, a person acquires a private, individual interest in the resource, which supports the proposition that others (including the Government or state) should respect the labourer's interest or entitlement to the resource. This argument can be extended to the proposition that material differences between people (where different property holders hold different amounts of property) have merit

135 As indicated earlier, the preservation of mankind is one of the principles that underlie the natural law. In fact, human beings are bound to the duty of preservation. Barnes *Property Rights and Natural Resources* 31; Locke 1690 http://www.constitution.org/jl/2ndtr05.htm
136 Barnes *Property Rights and Natural Resources* 35; Munzer *A Theory of Property* 256.
137 Barnes *Property Rights and Natural Resources* 35.
138 Munzer *A Theory of Property* 257; Ziff *Principles of Property Law* 39.
139 Waldron *The Right to Private Property* 201.
140 Barnes *Property Rights and Natural Resources* 35

because each labourer deserves or is entitled to the work of his labour. It may therefore be submitted, with regard to the justification of allocating property, that different individuals may legitimately hold different kinds and amounts of property, depending on their labour.[141] Furthermore, the labour and desert principle provides a theoretical foundation for allocating personal, individual or private property rights to a particular person, qualified by the rights of others and the limitations on the process of acquisition of the commons as referred to above.[142] Due to the fact that the labour and desert principles only justify individual, private property, and as this study draws to non-private property and public property specifically, the next section investigates whether further theoretical principles exist that may be used to *inter alia* justify other forms of property.

2.3.2.2 Utility and efficiency

This section discusses the combined principle of utility[143] and efficiency and indicates how it governs property arrangements or allocations of different forms of property. The two principles respectively invoke human welfare and individual welfare that aim for the "happiness of the community".[144] Happiness is attained in the presence of pleasure and in the absence of pain.[145] Although the *rationale* for combining the principles of utility and efficiency becomes evident towards the end of the discussion, it suffices to start out saying that the combined principle refines and reformulates[146] the contribution of the traditional utilitarian approach to property.[147]

As the principles of utility and efficiency are intended to refine and reformulate the traditional utilitarian approach to property, it is in the first instance necessary to understand the traditional utilitarian approach. Notably, the utilitarian approach should not be seen as identical to the combined principles of utility and efficiency. The initial

141 Cohen 1927-1928 *The Cornell Law Quarterly* 17; Munzer *A Theory of Property* 5.
142 Munzer *A Theory of Property* 5.
143 Utility may mean *inter alia* welfare, pleasure and happiness. Munzer *A Theory of Property* 193.
144 Munzer *A Theory of Property* 257; Ziff *Principles of Property Law* 193, 198.
145 Alexander and Peñalver *An Introduction to Property Theory* 12; Barnes *Property Rights and Natural Resources* 40.
146 Munzer *A Theory of Property* 257; Ziff *Principles of Property Law* 194.
147 From the outset, however, it should be noted that the combined principle is not the same as utilitarianism. Munzer *A Theory of Property* 257; Ziff *Principles of Property Law* 193.

utilitarian theorist of property was Hume.[148] He argued that property is the "stable possession of things" and that the possession of property is kept stable by human conventions or a general sense of common interest.[149] According to Hume,[150] humans believe that it is in their own interest not to disturb others' possession of things, provided that other humans do not disturb their possession. This understanding of common interest leads to an institution of property because it yields coordinated behaviour;[151] leads to the sense of stability in the possession of property;[152] and creates expectations of continued use.[153] In turn, the theorist Bentham treated property in terms of utility and expectations in much more detail.[154] Bentham held that property is the basis of a human's expectation.[155] He argued that property is nothing more than:[156]

> a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

It follows that if humans are able to form expectations about the future,[157] they can experience pleasure when their expectations are met, and pain when they are therein disappointed.[158] If, as Bentham argued, utility is to be understood as the presence of pleasure and the absence of pain, then utility is supported by securing the expectations of possessors with respect to their things.[159] Bentham argued strongly against state interference in property rights to secure the expectations of possessors.[160] Bentham's utilitarian approach therefore strongly argues for the

148 Hume *A Treatise of Human Nature* Book III, Part II, Sections II-IV; Munzer *A Theory of Property* 194.
149 Hume *A Treatise of Human Nature* Book III, Part II, Sections II-IV; See also Bell and Parchomovsky 2005 *Cornell Law Review* 552.
150 Hume *A Treatise of Human Nature* Book III, Part II, Section II; Munzer *A Theory of Property* 257; Ziff *Principles of Property Law* 194.
151 Munzer *A Theory of Property* 194.
152 Munzer *A Theory of Property* 194.
153 Munzer *A Theory of Property* 194.
154 Bell and Parchomovsky 2005 *Cornell Law Review* 546-547; Munzer *A Theory of Property* 194.
155 Rose 1996 *Wash. & Lee L. Rev* 268; Waldron *The Right to Private Property* 19.
156 Bentham *The Theory of Legislation* 111-112.
157 Barnes *Property Rights and Natural Resources* 40; Bentham *The Theory of Legislation* 112; Munzer *A Theory of Property* 195.
158 Barnes *Property Rights and Natural Resources* 40; Hart 1979 *Columbia Law Review* 831; Tisdell 2003 *Social Justice Research* 407.
159 Barnes *Property Rights and Natural Resources* 40; Bentham *The Theory of Legislation* 2; Waldron *The Right to Private Property* 12.
160 Barnes *Property Rights and Natural Resources* 40; Bentham *The Theory of Legislation* 111-112.

exclusivity of private ownership.[161] This utilitarian approach to property has, however, been subject to criticism.[162] Some of which include that utilitarianism provides no sound basis for measuring human welfare or satisfaction.[163] In an effort to overcome this and other criticism, advocates of utilitarianism adopted an approach that focuses on utility as a "function of an ordering of preferences".[164] This understanding of utility is common in the philosophical literature and followed by *inter alia* Munzer.[165] Munzer[166] proposes that the principle of utility should be understood as the "maximisation of preference-satisfaction". This maxim and its reference to preferences require brief explanation.

A "preference" is simply a disposition to put one thing before another.[167] For example, one may prefer driving a Volkswagen to a Mercedes Benz. Normally, in light of the example of motor vehicles, a preference will be identical to a choice made between the two.[168] However, "preferences", in this context, are arranged hierarchically according to the utilitarian principle, which is to produce as much pleasure or happiness as possible, or to decrease or minimise as much pain as possible. For example, the hierarchy may include at the highest level preferences whose satisfaction contributes to the preferences (or utilities of satisfaction) of others; the second level of the hierarchy may include preferences whose satisfaction is neutral to the preference satisfaction of others; in the third level, preferences whose satisfaction decreases the preference satisfaction of others, and so on.[169] Therefore, for present purposes, a "preference" does not suppose that a choice made between different options is identical to the decision maker's preference. It is rather the function of "utility" to order

161 Ziff *Principle of Property Law* 23.
162 Criticisms include *inter alia* the conflicts that exist between utility and other moral goals such as justice and the tendency of utility that results in the unequal allocation of resources. Barnes *Property Rights and Natural Resources* 41; Hart 1979 *Columbia Law Review* 829; Waldron *The Right to Private Property* 12.
163 Bouckaert 1990 *Harvard Journal of Law & Public Policy* 813; Hausman 1995 *Mind Association* 474; Munzer *A Theory of Property* 195.
164 Barnes *Property Rights and Natural Resources* 41.
165 See for example Alchian 1965 *II Politico* 822; Hausman 1995 *Mind Association* 473; Hausman and McPherson 2009 *Economics and Philosophy* 1; Hart 1979 *Columbia Law Review* 831.
166 Munzer *A Theory of Property* 196.
167 Munzer *A Theory of Property* 196.
168 Hausman and McPherson 2009 *Economics and Philosophy* 1; Munzer *A Theory of Property* 196.
169 Houser, Wilczenski and Ham *Culturally Relevant Ethical Decision-Making in Counseling* 27.

these “preferences” in a hierarchical order to maximise the greatest amount of happiness to all.[170]

If this understanding of “preference” and “utility” is followed, individual welfare is measured according to how many things a person possesses that are listed higher on the list of preferences.[171] Since efficiency invokes individual welfare, and since individual welfare is understood here as individual preference satisfaction, both the efficiency and utility principles rely on the same moral intuition of individual welfare.[172] In light hereof, it is possible to claim that the combined principle of utility and efficiency is both possible[173] and advantageous to promote the general welfare of individuals.[174]

The combined principle of utility and efficiency thus holds that property rights should be allocated to people in such a manner that it maximises both utility and efficiency in the use, possession and transfer of things.[175] In addition to the fact that the combined principle of utility and efficiency advocates that property rights should be allocated to maximise utility and efficiency, it emphasises an important truth for the rights of persons, namely that all persons are of equal worth and equally eligible for property rights.[176] The principles of utility and efficiency are particularly useful to justify and differentiate between private and public forms of property. In order to justify the legal recognition of private property, some assumptions regarding the preferences of individuals should be raised.[177] All of the assumptions raised here are assumptions proposed by Munzer.[178] For example, it is assumed that individuals may prefer to have their own personal things; or not to be deprived of their privacy or private things. On the basis of these assumptions, the combined principle of utility and efficiency justifies private property to the extent that individuals have property rights in their preferred private and personal things. Furthermore, if one makes similar assumptions about

170 Barnes *Property Rights and Natural Resources* 41.
171 Barnes *Property Rights and Natural Resources* 41.
172 Hart 1979 *Columbia Law Review* 829; Munzer *A Theory of Property* 198.
173 A combined principle is possible because both utility and efficiency has in common the concept of individual preference-satisfaction.
174 The combination can be advantageous when interpersonal comparisons are not available in a particular case, it is possible to fall back on efficiency. Furthermore, the combined principle may add value, as it is possible to draw coherently from two different bodies of literature.
175 Munzer *A Theory of Property* 202.
176 Munzer *A Theory of Property* 4.
177 Munzer *A Theory of Property* 209.
178 Munzer *A Theory of Property* 209.

people's preferences unattached to private property,[179] the combined principle of utility and efficiency may be used to justify the concept of public property.[180] It is for example assumed that individual preferences include *inter alia* access to education, parks, roads, public facilities and the availability of natural resources to future generations.[181] These assumptions show that the principle of utility and efficiency supports the existence and justifies the concept of public property in the sense that the Government must have property such as schools, parks, roads, Government offices, fire stations, as well as police and military departments to meet the stated preferences.[182] Private law provision of such property is unlikely to be adequate. In fact, in order to provide for the preference of available natural resources for future generations, the Government should also have requisite natural resources including land, oil and water. This argument should, however, not be accepted without qualification.[183] It should for example not be assumed that the combined principle of utility and efficiency justifies a precise or certain amount of public property. Provided therefore that certain assumptions are made, subject to some qualifications, the combined principle of utility and efficiency theoretically justifies the legal recognition and necessity for a differentiation between the forms of private or individual property and public or state property.

2.3.2.3 Justice and equality

This section provides an overview of the prevailing understanding of a combined principle of justice and equality. The main contribution of the combined principle of justice and equality in light of the objective of this chapter is that it justifies the unequal distribution of property amongst owners.[184] The argument justifying unequal distribution is, however, subject to two requirements.[185] The requirements are that everyone should have a minimum amount of property and that the inequalities in property distribution should not undermine human life in society.[186] The principles of

179 Munzer *A Theory of Property* 206; Reich 1964 *The Yale Journal* 736.
180 Bell and Parchomovsky 2005 *Cornell Law Review* 560; Munzer *A Theory of Property* 206.
181 Reich 1964 *The Yale Journal* 736; Vandevelde 1980 *Buffalo Law Review* 354.
182 Alchian 1965 *II Politico* 828.
183 Munzer *A Theory of Property* 207.
184 Munzer *A Theory of Property* 227.
185 Munzer *A Theory of Property* 227.
186 Munzer *A Theory of Property* 227.

justice and equality are effectively combined, because the inclusion of "justice" morally regulates how benefits and burdens are shared amongst persons; while "equality" indicates why and when it is morally acceptable for persons to be treated differently.[187]

In order to understand the combined principles of justice and equality, Rawls' theory of justice is first examined. The aim is not to give a complete account of Rawls' justice theory, but to indicate how he proposes the principles of justice in a manner that can assist in the allocation of resources. Rawls' theory is based on the idea that society is a system of cooperation between equal persons for mutual advantage.[188] In this society of cooperation, wherein conflicts between differing individual interests exist, Rawls held that the principles of justice should define the appropriate distribution of benefits and burdens.[189] Furthermore, if society is indeed seen as "a system of cooperation between equal persons"[190] for mutual advantage, free and rational persons who want to further their own interests would accept an initial position of equality to define their associations.[191] The question then arises which principles of justice persons would agree on in their associations. Rawls[192] argued that the correct principles of justice are those that are chosen by rational, self-interested humans or parties in their "original position".[193] In Rawls' hypothetical supposition, humans are deprived of their knowledge, own desires, talents, class or status in their "natural position" and operate from "behind a veil of ignorance".[194] From behind this "veil of ignorance",[195] according to Rawls, humans are unable to tailor principles to their own advantage, because they are unaware of their own interests. This "veil of ignorance" prevents parties from realising their own conception of the good,[196] and it is from this situation that no one is advantaged or disadvantaged in the choice of principles, and no one is able to design principles to favour his or her particular condition.

187 Munzer *A Theory of Property* 227.
188 Rawls *A Theory of Justice* 47, 53; Rawls 1980 *The Journal of Philosophy* 515-522; Rawls 1985 *Philosophy & Public Affairs* 223-226.
189 Rawls *A Theory of Justice* 10, 53.
190 Freedman *The Cambridge Companion to Rawls* 96.
191 Rawls *A Theory of Justice* 10.
192 Rawls *A Theory of Justice* 10-11.
193 Johnson, Pete and Du Plessis *Jurisprudence A South African Perspective* 180; Rawls *A Theory of Justice* 11.
194 Munzer *A Theory of Property* 233; Rawls *A Theory of Justice* 11; Tisdell 2003 *Social Justice Research* 409.
195 Rawls *A Theory of Justice* 11.
196 Rawls *A Theory of Justice* 11.

As a corollary to Rawls' hypothetical supposition, further questions have to be answered related to what exactly the principles of justice are that people tailor from behind the "veil of ignorance" and how these principles of justice find application in the allocation of resources (or property). In order to answer these questions it is in the first instance necessary to determine which "resources" or "goods" should be distributed in accordance with Rawls' justice principles. It was explained that the goods to be distributed in society by the principles of justice are those things (or "primary goods") that everyone presumably wants and include *inter alia* basic rights, liberties, opportunities, powers and wealth. Rawls categorises these "primary goods" into two categories.[197] The first category relates to things such as basic rights, liberties and powers, while the second category relates to *inter alia* wealth, income, power.[198] These two categories respectively speak to two different justice principles. Rawls' first justice principle is based on the idea that, from behind the "veil of ignorance", all of us would agree to an equal distribution of things, unless a certain amount of inequality will be to everybody's advantage. In light hereof, Rawls' first principle of justice is that each person is to have an *equal right* to the most extensive basic liberty compatible with similar liberty for others.[199] The second principle of justice holds that social and economic *inequalities* should be arranged so that they are both reasonably expected to be to everyone's advantage.[200] These two principles of justice, which respectively speak to equal liberty and social inequality, may also be applied to the distribution of property.

Rawls' first principle of justice applies to basic rights and liberties, and includes the right to hold personal or private property. The principle requires everyone to have an *equal right* to private property, and not that everyone have an *equal amount* of private property.[201] Rawls' second principle may also be applied to property, given that property is just one factor amongst various others that affect the social and economic position of a person. The second principle of justice permits inequalities in the

197 Johnson, Pete and Du Plessis *Jurisprudence A South African Perspective* 183; Munzer *A Theory of Property* 233.
198 Johnson, Pete and Du Plessis *Jurisprudence A South African Perspective* 183.
199 Rawls *A Theory of Justice* 302; Rawls 1985 *Philosophy & Public Affairs* 227.
200 Rawls *A Theory of Justice* 302 Rawls 1985 *Philosophy & Public Affairs* 227; Tisdell 2003 *Social Justice Research* 409.
201 Munzer *A Theory of Property* 237.

distribution of property as long as they advance the position of the least advantaged.[202] The Rawlsian view of property is significant for two reasons. Firstly, it favours a relatively equal distribution of property;[203] and secondly, it sheds some light on "achieving a minimum" in society.[204] When applied to property, the "achievement of a minimum" is interpreted as providing a minimum amount of property (including *inter alia* food, shelter and health care) to all in order for them to lead a decent human life.[205] According to the justice and equality principle, unequal property holdings are justifiable if everyone in society has a minimum amount of property and if the inequalities do not undermine a decent life. However, the question arises whether everyone in society should not enjoy a minimum amount of property. This theory paths the way for property reform and redistribution so that everyone can enjoy a minimum.

Apart from these guidelines for the allocation of property, Rawls' theory further assists in the possible justification of the existence and necessity of different forms of property, namely private and public property. Reference is in the first instance made to the justification of private property. In order to meet essential, basic human needs, people need private property rights to *inter alia* clothing, modest housing and other resources they may need.[206] As for the justification of public property, the principle of justice and equality supports the idea that materials for public facilities such as roads, schools or hospitals and natural resources, or public provision of services, must be made available to all. This principle seems to provide an identical justification for public property as the utility and efficiency principle. However, where the utility and efficiency principle focuses on the preferences of persons, the principle at hand (which advocates a minimum amount of property) only affects the things that are necessary for a decent human life.

It follows that certain forms of property may either be available for private use, or be categorised as public property available for public use. Depending on the

202 Munzer *A Theory of Property* 236.
203 Munzer *A Theory of Property* 237.
204 Munzer *A Theory of Property* 241.
205 The exact amount and kinds of property may however differ from society to society. A decent life, in terms of this thesis, therefore means that certain basic human needs must be met. Munzer *A Theory of Property* 244.
206 Thus, the principle of justice underscores the necessity of property necessary for a decent human life.

circumstances, public property is sometimes more desirable than private property, and *vica versa*. It is for example self-evident that it is desirable for land to be set aside for the building of a network of roads as there is a need for mobility of people and goods. For this purpose access to much of the road system should typically be unrestricted.[207] In light of the broader context of this thesis, it is therefore sometimes possible to justify public property in preference to private property, as a private property regime can simply not always sufficiently supply certain needs in property, or at least, can be inadequate.[208]

2.3.2 Conclusion

The significance of this brief exposition of some theoretical principles of property is threefold. Firstly, different property principles may be put forward to make a case for the allocation of property rights in a particular way where the use of a thing or resource is questioned; where it is uncertain which human interests are relevant when property rights are allocated; or where the content and limitations of property rights need to be specified.[209] Secondly, the theoretical principles highlighted the existence and legal recognition of private and public forms of property. The discussed property principles should also be employed to decide in favour of or against a particular form of property. The value of the discussion of property principles is then acknowledged to *inter alia* provide normative justifications and reasons for allocating property rights in a particular way; to indicate which human interests are relevant when property rights are allocated; and to specify the content, nature, limits, types or forms of property rights. In the third place, the property principles ultimately stimulate the understanding of the concept of property. For example, in light of the discussed property principles, property may be regarded as a social institution because the allocation of property in a particular manner provides a means to achieve social order. Apart from being a social institution, property is also a legal institution. Property is a legal institution because the law defines the content and forms of different forms of property and it provides a basis for the regulation or allocation of property rights between individuals with respect to the property in question.

207 Shavell 2002 http://www.law.harvard.edu/programs/olin_center/papers/pdf/399.pdf
208 Shavell 2002 http://www.law.harvard.edu/programs/olin_center/papers/pdf/399.pdf
209 Barnes *Property Rights and Natural Resources* 56.

In order to understand the legal concept of property better, reference is made to "property rights regimes" or "property regimes". Glück[210] argues that the "complex of rights and duties" that characterise the relationship of individuals to one another with respect to a "thing", "object" or other public or private resource, defines the property regime. It may be a private property regime, a common property regime or a public property regime. Therefore, in order to provide content and meaning to the different property regimes, and ultimately to the concept of property, the following section examines various existing property regimes.

2.4 Property regimes

2.4.1 Introduction

The preceding discussions reveal that property, as a legal concept, has an allocative function. A number of theoretical principles informs the specific way in which property is allocated. It is submitted that when property rights are allocated in terms of these theoretical principles, a complex set of rights and duties is established that characterises the relationship of individuals amongst each other with respect to a particular "object", "thing" or "resource". According to Glück,[211] this "complex of rights and duties" defines the property regime within which an "object", "things" or "resource" is regulated.

This section differentiates between existing property regimes to provide clarity on the relevance and importance that a particular property regime within which a resource is regulated has for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource. Barnes[212] effectively argues three facets that can assist in the clarification of the content and meaning of existing property regimes. Firstly, he holds that a property regime involves *property rights* that define the property holder's rights or entitlements in respect of the use of a particular thing or

210 Glück 2002 *Forest Policy and Economics* 129.
211 Glück 2002 *Forest Policy and Economics* 129.
212 Barnes *Property Rights and Natural Resources* 61.

resource.[213] Secondly, a property regime includes a body of *property rules* under which the particular property right or entitlement is exercised.[214] These two features (property rights and property rules) presuppose the existence of the third facet of property regimes, namely a supporting legal structure.[215] The latter is important, because property rights are never purely abstract rights, but rather legal rights infused with the values of a community that sustains the legal system.[216] These three facets effectively combine various other diverse aspects that typically form part of a discussion of property regimes. The diverse aspects include, *inter alia,* the different forms or types of property rights that exist within a property regime; the characterisation of the relationship between individuals with respect to the allocated thing or resource in a particular property regime;[217] the kinds of things that can be allocated and protected and in which way; *vis-á-vis* whom; and with which legal rights or enforcement mechanisms.

As property literature generally differentiates between three primary property regimes, namely private property, common property and public property, the content and meaning of these three property regimes are explained and discussed. In order to provide a comprehensive account of the three distinct property regimes and to include the diversity of matters raised above, the discussion is structured to include an examination of the system of property holdings of the particular property regime, as well as the rules that entrench the property holdings. The discussion is focused in such a way as to provide clarity on the relevance that a particular property regime within which a resource is regulated has for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.

213 Barnes *Property Rights and Natural Resources* 61.
214 Barnes *Property Rights and Natural Resources* 61.
215 Barnes *Property Rights and Natural Resources* 61.
216 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 14. Pienaar 1986 *TSAR* 295; Pienaar and Van der Schyff *Law Environment and Development Journal* 188; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 56.
217 Demsetz 1967 *The American Economic Review* 350; Welch 1983 *Policy Sciences* 166.

2.4.2 Private property regime

From the outset, as indicated in chapter 2.2.1 above, "private property" raises considerable complexities that are difficult to resolve. The discussion on private property that is undertaken here, although it may contain references to potentially complex and abstract concepts or principles, primarily aims to provide a clear and concise explanation of the content and meaning of a private property regime.

2.4.2.1 Attributes of private property

As indicated above, it is the "complex of rights and duties" between people regarding a resource that defines a property regime.[218] Therefore, in order to define the private property regime, one has to understand this "complex of rights and duties". Reference is in the first instance made to the basic attribute of a property right. In a private property regime, ownership is a pivotal property right. As indicated below, ownership is not the only right that can be acquired in a private property regime. However, as a property right, ownership provides to its holder, whether it is held by the Government or an individual, the exclusive authority to determine how the resource, or thing, in question is used.[219] In a private property regime, it is a specific individual member of society[220] or the Government as proprietor that holds the property right.[221] The property right therefore enables the private individual to determine how the resource in question shall be used.[222]

In addition to the attribute of a property right that enables its holder to determine the resource's use, *private property rights* provide two other attributes that may clarify the private property regime. In the first instance, private property rights afford to their holder an exclusive right to the services of the resource.[223] It is necessary to briefly differentiate between "the right to determine the use of a resource" and "the right to services of the resource", as brought forward by the attributes of property rights thus

218 See chapter 2.3.2 above.
219 Goldberg 2012 *Harvard Law Review* 1640; Van der Walt *Constitutional Property Law* 109.
220 Or a legal (judicial) person.
221 Waldron 1985 *Oxford Journal of Legal Studies* 327.
222 Waldron 1985 *Oxford Journal of Legal Studies* 327.
223 Alchian 2008 http://econlib.org/library/Enc/PropertyRights.html

far.[224] If, for example, an owner of a house has the right to determine whether to rent it out, and if so, to which tenant, the owner exercises his or her right to determine the use of the resource or house. On the other hand, the right to the services of the resource refers to the situation of actual rental income that the owner receives when he or she rents out the house. The last attribute of a private property right noted here is that it includes the right to delegate, sell or rent the property.[225] A holder of a private property right therefore may, in exchange for a gift or whatever price the owner and buyer mutually determine, delegate, sell or rent any portion of the property right.[226]

In light of the three attributes referred to, three main elements are highlighted that underlie a private property regime, namely the exclusive right of the individual owner to decide on the use of the resource in question; the exclusive right to the services of the resource; and the right to exchange or alienate the resource at mutually agreeable terms. When the relationship or correlation between a private individual and a resource is based on these three attributes of private rights, the correlation may be described as a right of exclusion that is expressed by the idea of "ownership".[227] The concept of "ownership" is therefore regarded a term peculiar to the private property regime.[228] It should, however, be noted that "ownership" is only one possible way of allocating private property rights in a private property regime.[229]

The concept of ownership in a society is usually reflected in the political, juridical, philosophical, economic, social and religious system of such a society.[230] Naturally therefore, the content, protection, nature and extent of private ownership rights that exist between legal subjects in respect of property will differ from society to society and can therefore not be defined in absolute terms. However, from the available literature it may be accepted that "ownership" generally refers to the most "complete", "strong" or "absolute" right that a legal subject can have regarding property, a resource

224 Alchian 2008 http://econlib.org/library/Enc/PropertyRights.html
225 Alchian 2008 http://econlib.org/library/Enc/PropertyRights.html
226 Alchian 2008 http://econlib.org/library/Enc/PropertyRights.html
227 Harris "Is Property a Human Right" 65; Waldron 1985 *Oxford Journal of Legal Studies* 327.
228 Waldron 1985 *Oxford Journal of Legal Studies* 327.
229 Waldron 1985 *Oxford Journal of Legal Studies* 328.
230 Van der Walt and Pienaar *Introduction to the Law of Property* 40.

or a thing.[231] Notably also, it is common to find the content of ownership described by a number of rights or entitlements that the owner holds. The entitlements of an owner that are usually distinguished include *inter alia* the entitlement to control, the entitlement to use, the entitlement to encumber, the entitlement to alienate and the entitlement to vindicate the property.[232] These rights or entitlements of the owner are recognised and protected by law.[233] If the entitlements of the owner or ownership itself are for example infringed upon, a number of remedies will be available to the owner. Depending of the specific legal system or context at hand, such remedies include for example real remedies (the *rei vindicatio, actio negatoria,* interdict or a declaratory order), delictual remedies (the *actio ad exhibendum, condictio furtiva* and the *actio legis aquiliae*) and the enrichment action.[234]

However, ownership rights do not always refer to *individual ownership.* The law provides for two or more individuals to share property.[235] In the case of co-ownership, joint-ownership, or ownership in common, the co-owners are entitled to a share in the entire property.[236] The co-owners may regulate their rights and duties in respect of the joint property by an agreement.[237] The rights and duties of the co-ownership are in turn enforceable by a claim for damages,[238] an interdict[239] or subdivision (*actio communi dividundo*).[240]

It is of particular importance to note that these "absolute and complete" rights of individual ownership or rights in respect of joint property are not so "absolute" as one

231 Alchian 1965 *II Politico* 818; Katz 2008 *University of Toronto Law Journal* 278; Kaser *Eigentum und Besitz im älteren römischen Recht* 195; Vandevelde 1980 *Buffalo Law Review* 328; Van der Walt *Constitutional Property Law* 109; Welch 1983 *Policy Sciences* 166.

232 See chapter 2.2.1 above; Alchian 1965 *II Politico* 818; Katz 2008 *University of Toronto Law Journal* 313.

233 Alchian 1965 *II Politico* 818.

234 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 241-267; Van der Walt *Die Ontwikkeling van Houerskap* 35, 111; Van der Walt and Pienaar *Introduction to the Law of Property* 144-164.

235 Van der Walt and Pienaar *Introduction to the Law of Property* 48-57.

236 Alchian 1965 *II Politico* 820; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 133; Van Warmelo 1957 *Tijdschrift voor Rechtsgeschiedenis* 125, 128.

237 Alchian 1965 *II Politico* 821.

238 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 136; Van der Walt and Pienaar *Introduction to the Law of Property* 55.

239 Van der Walt and Pienaar *Introduction to the Law of Property* 55-56.

240 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 136; Van der Walt and Pienaar *Introduction to the Law of Property* 55-56; Van Warmelo 1957 *Tijdschrift voor Rechtsgeschiedenis* 135, 138.

may expect.[241] In fact, various limitations and duties are generally imposed on the rights or entitlements of an owner in a private property regime. Private property rights may therefore be limited in various ways. States, for example, have a significant degree of discretion to limit private property rights. States may limit the use of these rights or entitlements of an owner by statutory measures such as statutes, ordinances or regulations.[242] These statutory limitations to private property imposed by the state need a brief explanatory note. Whereas a private individual owner of a residential property is allowed to use his property as he sees fit, the state may restrict the use rights by, *inter alia* strict zoning requirements, rates and taxes, or even to limit the number or type of animals that may be held on the premises. Apart from limitations imposed by the state, the private, exclusionary ownership rights may also be limited by other individuals in terms of limited real rights (the rights of others),[243] and in terms of creditors' rights.[244]

With regard to the duties generally imposed on an owner, reference is made to the maxim "*sic utere tuo ut alienum non laedas*". In terms of this maxim, an owner may exercise his or her indefinite right to use, control, and dispose of the property in question, provided that the use of the owner's right does not injure that of his or her neighbour's property. Additionally, a holder of a private exclusionary right to property is obliged to use his or her property in such a way that it will not be a nuisance to other owners or property holders in the same community. Any property use that disturbs another person in the free use, possession, or enjoyment of his or her property or which renders its ordinary use or occupation physically uncomfortable will become a nuisance. Should these duties not be carried out by an owner, it is the duty of the state to restrain such acts. It may therefore be submitted that although private property rights are "strong", and "absolute" individual rights, they cannot be used without limitation or restriction imposed by either the state or other private individuals.

241 Van der Walt 2002 *TSAR* 254; Van der Walt *Constitutional Property Law* 109.
242 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 343-356; Van der Walt *Constitutional Property Law* 109; Van der Walt and Pienaar *Introduction to the Law of Property* 82-86.
243 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321; Van der Walt and Pienaar *Introduction to the Law of Property* 87-88.
244 Van der Walt and Pienaar *Introduction to the Law of Property* 86-87.

2.4.2.2 "Things" or "objects" susceptible to private property

The system of private property holdings generally refers to a "thing" as the "object" of a property right. In a non-legal sense "things", in general, include corporeal things (such as a tree or a dog) or incorporeal things (such as a dream or a song).[245] As the law does not recognise all these things as legal "things" or "objects" in relation to private property rights, it is necessary to determine the characteristics of things that are susceptible to private property rights.

The Roman private law casts some light on the scope and meaning of things or objects that are legally recognised as the object of a private property right. Scholars[246] explain that the concept of a thing (*res*) had a threefold meaning in terms of the Roman law. Firstly, in the narrowest sense, a *res* denotes a singular,[247] defined,[248] juristically independent[249] physical[250] thing.[251] Kaser[252] states that things, interpreted narrowly, were susceptible to the private property right of ownership. Secondly, interpreted wider, a *res* denotes everything that can be the object of a private right.[253] The third, and widest, interpretation of the concept of *res* denotes property in general (the total of objects of economic value in a person's estate or *patrimonium, bona*).[254] From the

245 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 4.
246 Kaser *Roman Private Law* 80; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 121.
247 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 41.
248 Sonnekus and Neels *Sakereg Vonnisbundel* 24.
249 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 41.
250 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 41.
251 Kaser *Roman Private Law* 80.
252 Kaser *Roman Private Law* 80.
253 In terms of the second and wider interpretation of a *res*, various categories were developed to classify things. These include *res corporales* and *res incorporales*. Things resorting under *res corporales* are corporeal things or things that may be touched, while *res incorporales* denotes incorporeal things. Incorporeal things are mostly rights. However, it is stated that this classification was not of significant relevance in the Roman law. In the pre-classical and early classical Roman law, an important classification of things within commerce were made *inter alia* between *res mancipi* and *res nec mancipi*, between *res mobiles* (movable things) and *res immobile* (immovable things), between *res fungibiles* and *res non fungibiles*, between *res consumptibiles* and *res non consumptibiles*, between divisible and indivisible things, between single and joint things as well as *fructus* (fruits), which are still generally accepted in the contemporary law. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 9; Bähr and Hoffmann *Grundzüge des Bürgerlichen Rechts* 229; Kaser *Roman Private Law* 80; Maine *Ancient Law* 161; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 25-26; Van der Merwe and De Waal *The Law of Things & Servitudes* 21-26, 33-34; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 144-147; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 123-125.
254 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 13; Bassenge *et al Palandt Bürgerliches Gesetzbuch* 55; Bowen 1925-1926 *Cornell Law Quarterly* 43.

three Roman law modes of interpreting a thing or object, scholars deduced various characteristics that assisted in establishing which things may, or may not, be regarded as an object of a private property right. The characteristics include corporeality, impersonality, independence, susceptibility to human control and the use and value it has for the legal subject. These characteristics receive attention below.

The first characteristic relates to corporeality and incorporeality.[255] Corporeal things are tangible and can therefore be felt or touched.[256] Corporeal things may include *inter alia* clothes, gold and silver.[257] The modern law definition of corporeality goes further than its Roman law counterpart and encapsulates objects that occupy space and are capable of sensory perception by any of the five senses of the human being.[258] Contrary thereto, incorporeal things are intangible and cannot be touched[259] and consist of *inter alia* legal rights such as personal and praedialservitudes.[260] Corporeal things are generally accepted to be susceptible to private property rights.[261] The question whether incorporeal objects may qualify as objects relating private rights gave rise to various academic opinions.[262] The German private law codification, for example, only recognises corporeals as things.[263] It seems, however, as if

255 G 2 12; Erlank *Property in Virtual Worlds* 231; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 16; Waldron *The Right to Private Property* 34.

256 G 2 13; Inst 2 2 1; D 1 8 1; Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 14.

257 G 2 13.

258 Joubert and Faris (eds) *The Law of South Africa* 27 114; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 16-17; Sonnekus and Neels *Sakereg Vonnisbundel* 24.

259 G 2 14.

260 G 2 14; Inst 2 2 2; D 1 8 1.

261 Waldron *The Right to Private Property* 34.

262 In acknowledging incorporeals as things, the doctrine of legal subjectivity is being complicated. The doctrine of legal subjectivity dictates that rights should be distinguished from one another according to their objects. Four classes of legal objects can be distinguished, namely things, interests of personality, immaterial property and performances. The nature of the object will thus qualify the right as either a real right, personality right, immaterial property right or personal right. This interpretation, that rights should be distinguished from one other according to their objects, implies the recognition of real rights with regard to incorporeals, and makes it hard to reconcile with the doctrine of legal subjectivity in the private law, for it would be difficult to distinguish between the different rights. The second argument raised against the inclusion of incorporeals as things is that it is "illogical and jurisprudentially impossible to acknowledge that one right could be the object or another right". Thirdly, the inclusion of incorporeals within the concept of things, could be in conflict with the traditional conception that a real right, for a real right merely confers "direct physical powers over a thing". Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 14, 15; Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 21.

263 See section 90 of the *Bürgerlichen Gesetzbuch* (German Civil Code); Bassenge *et al Palandt Bürgerliches Gesetzbuch* 57; Wolff and Raiser *Sachenrecht* 177-178; Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 4.

jurisprudence from Germany challenges this stance as it has came to accept incorporeal objects as things susceptible to private property rights.[264] In South Africa the existence of incorporeal things and real rights relating to them are recognised. This is discussed in chapter 3.3.2 below.[265]

The second characteristic that must be present before a thing can be susceptible to private property rights is its impersonal nature. The impersonality of a thing points to the general principle of Roman and Roman-Dutch property law[266] that, according to the doctrine of legal subjectivity, humans are not regarded as things. Humans do not function as legal objects, but legal subjects.[267] It should therefore be clear that a human being is a legal subject who may be a holder of a right with respect to a thing or legal object, but may never be the object of the right.[268] Things are regarded as external to humans and therefore to be of an impersonal nature.[269]

The third aspect of the character of a thing is its independence. A thing must have a juridically independent, distinguishable legal existence[270] to qualify as a thing in terms of the private property law.[271] In this regard an approved sectional title plan will, for example, constitute a new thing even though it still forms part of a piece of land or building.[272]

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264 *BVerf GE* 58, 300; *Ex parte Eloff* 1953 1 SA 617 (T).

265 *Ex parte Eloff* 1953 1 SA 617 (T). The creation of a *usufruct* over mineral rights was taken for granted.

266 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 19.

267 Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 22; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 17; Van der Merwe *Sakereg* 20.

268 However, the object of a personality right is not external to a human but consists of aspects of the holder of the right's personality. According to development in the medical and dental science, the human body becomes objectified to a certain extent. The *Human Tissue Act* 65 of 1983 stipulates the possibility to donate a body or tissue after death. The donation of tissue and blood by living persons is also provided for in the *Human Tissue Act* 65 of 1983. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 20; Cloete 2003 *Obiter* 414.

269 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 19; Erlank *Property in Virtual Worlds* 236.

270 It is not required that things must be physically independent from its environment, juridical independence is sufficient. Badenhorst *et al Silberberg and Schoeman's The Law of Property* 20; Erlank *Property in Virtual Worlds* 236; Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 23; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 18.

271 It is indicated that a building will normally not be regarded as a thing separate and independent from the land to which it is attached. Badenhorst *et al Silberberg and Schoeman's The Law of Property* 20; Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 23; Van der Merwe *Sakereg* 21.

272 Incorporeal things in the form of other rights or natural forces, such as electricity or heat do not meet the requirement of independence. However, incorporeal things will also meet the requirement of independence if the requirement is widely interpreted "as stating that the needs

In the fourth instance, a thing must be capable of being subject to human control before it can be classified as an object for purposes of a private property right.[273] Control refers to the possibility of a human to enforce and protect the private property right in the specific thing.[274] Air in its entirety, the sun or an inaccessible shipwreck at the bottom of the sea therefore do not qualify as objects that can be acquired by a private property right, for it is humanly impossible to enforce and protect the specific thing.[275]

A thing must, in the fifth and last instance, be of use or value for a person, for its use or value would be the only cause for a human to desire the appropriation of a thing.[276]

In the light of the above, a thing may therefore be the object of a private property right if it is an independent corporeal object (or incorporeal object, depending on the legal jurisdiction), which is susceptible to legal control and which is valuable and useful to a legal subject or person.[277]

It must at this stage be stated that if a thing conforms to all five the attributes indicated above and is therefore accepted as being susceptible to private property, it does not mean that the thing in question is restricted to the private property regime. It is indicated below that "things" susceptible to the private property regime may also be regulated by the common or public property regime, provided that the nature of the "thing" conforms to the proposed property regime's requirements. The opposite is also true, because "things" or "objects" of the common or public property regime may in certain instances be regulated by the private property regime. However, it is imperative to note that not all "things" can be regulated by a particular property regime at all times.

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of legal practice determine what the law regards as independent". Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 20, 21; Joubert and Faris (eds) *The Law of South Africa* 27 116; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 18.

273 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 21; Erlank *Property in Virtual Worlds* 238; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 19; Van der Merwe *Sakereg* 22.

274 Hennekens *Openbare zaken naar publiek- en privaatrecht 23;* Mostert and Pope (eds) *The Principles of The Law of Property in South Africa* 23.

275 Three determinative factors may be held that enable a human to acquire exclusive control over an object namely physical, legal and moral excludability. Barnes *Property Rights and Natural Resources* 26-29. See also Maine *Ancient Law* 150.

276 Erlank *Property in Virtual Worlds* 238; Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 19; Van der Merwe *Sakereg* 22.

277 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 21, 22.

As per the characteristics of private property "things" discussed above, some "things" can be disqualified from the private property regime because of its nature. The sun is, for example, disqualified from being regulated by the private property regime because of the fact that the sun does not conform to the five characteristics of private property.

2.4.2.3 The relevance of private property

Many benefits can be listed to argue that a private property regime is a suitable system for implementation in a country for specific purposes such as to regulate specific resources. At the most elementary level, as indicated in chapter 2.2.1 above, people who are accustomed to a private-orientated property legal system intuitively want to know what is theirs and how they can protect it. A well-defined private property right is particularly useful for an individual holder to know what is his or hers; to protect the property in question; and to undertake various actions in respect of that property. In addition, a private property right brings along certainty in the sense that it provides its holder with enforceable authority to ensure that he or she is able to execute his or her private property right. Given the legal certainty provided by private property rights, private property further promotes economic prosperity, welfare, freedom, justice, peace and liberty.[278] Nonetheless, private property rights do have their shortcomings. Economic development may for example be inhibited if private property remains in the hands of a few individuals, while the privately owned resources could have been utilised to enhance economic development of a whole country's population. Regrettably, private property has also been used in South Africa to keep white privilege in place and to hinder land reform in the pre-constitutional era.[279] Although the constitutional transformation in the country rectified these historical injustices, it is accepted that the possibility still exists (in South Africa, as well as in other countries) that private property can be used to discriminate against people by denying people access to privately owned resources.

278 See chapter 2.3 above; Grafton, Squires and Fox 2000 *Journal of Law & Economics* 679; Rose 1996 *Washington and Lee Law Review* 267; Ziff *Principle of Property Law* 11-30.

279 Pulido 2010 *Annals of the Association of American Geographers* 16.

2.4.3 Common property regime

2.4.3.1 Attributes of common property

The existence of property that is not subject to an individuals' private right of exclusion or ownership accentuates the necessity and relevance of alternative property regimes. The Institutes of Gaius is an important historic source indicating the existence of property that does not exclusively belong to a private individual, but to the people at large. Things that cannot be owned privately are classified by Gaius as being *res extra nostrum patrimonium.*[280] Both *res divini iuris*[281] and the class of *res humani iuris*[282] are included in this category of *res extra nostrum patrimonium*.[283] The distinction between the three sub-categories of *res humani iuris* may be of significance when interpreting the common property regime and public property regime respectively. The three sub-categories of *res humani iuris* are a) *res omnium communes*, which are things that are common to all of mankind,[284] b) *res publicae* that are things which belong to the state but are nevertheless destined to be used by the general public,[285] and c) *res universitates*,[286] which are things that belonged to a city for the use and enjoyment of

280 G 2.1.

281 *Res divini iuris* were religious things dedicated to the gods. Since the Reformation all religious things became susceptible to private ownership and resort under *res in commercio.* Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 30; Van der Merwe and De Waal *The Law of Things & Servitudes* 19; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

282 Van der Merwe *Sakereg* 23; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

283 Van Warmelo 1957 *Tijdschrift voor Rechtsgeschiedenis* 194.

284 Rose *Law and Contemporary Problems* 923; Van der Merwe and De Waal *The Law of Things & Servitudes* 17.

285 Van der Merwe and De Waal *The Law of Things & Servitudes* 18; Van der Vyver "The Ètatisation of Public Property" 261; Wieling *Sachenrecht* 24.

286 *Res universitatis* were things that belonged to a *universitas* (corporative body). In terms of the Roman law, *res universitates* were things that were the common property of a city and available for the use of its inhabitants, such as theaters and parks. A distinction has to be made between corporate bodies or juristic persons that are recognised within the public law and those recognised in the private law. Juristic persons in the public law, such as municipalities, may be similar to public things. Private law juristic persons, such as companies or close corporations, may be classified as *res in commercio*. This differentiation is of particular importance when the concept of public property is discussed below. The reason for this investigation is to determine whether water as natural resource is kept by the state as a public thing, or is it being held as a private commodity. Inst 2 1 6; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 29, 30; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 144; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122, 123.

its inhabitants. In terms of Roman law, *res omnium communes* (common things)[287] were things that were available for the use and enjoyment of the "entire human race",[288] and were therefore common or available to all citizens collectively.[289] Because of their features, things categorised under the category of *res communes omnium* could not belong to any person individually and were therefore asserted to have no owner.[290] These things were perceived as "objects" subjected to special group entitlements, which allowed all interested parties to make use of them. Habdas[291] indicates that a citizen's exclusion from using *res omnium communes* was even treated as a violation of his right of personality, unless limitations on use were introduced by the state. The contemporary notion of "common property" is directly linked to the Roman law concept of *res omnium communes.*[292] In line with the Roman law explanation of *res omnium communes*, the contemporary term of "common property" is frequently used to refer to "interests for which there is a shared right of use conferred on all."[293]

In line with these historical statements, Barnes[294] defines common property as rights of access rather than rights of exclusion. He does not focus on common property as "things", but as "rights". The term "open access" is also used to describe the position where everyone holds a shared right of use in the common property resource at hand.[295] In general, open-access resources allow unrestricted access to certain resources to all members of society.[296] However, one should be careful of the ambiguity involved in the use of the terms "common property" and "open-access resources", for not all common property is necessarily managed in a fully open-access system.[297] Ziff argues that something more restrictive than pure open access is usually

287 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25; Van der Merwe *Sakereg* 23.
288 Van der Vyver "The Ètatisation of Public Property" 264.
289 Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek* 20; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 144.
290 Gaius *Institutes* 2.1.1 makes no distinction of *res communes omnium*.
291 Habdas 2011 *TSAR* 628.
292 The statutorily determined "common property" in sectional titles should not be confused with common property as used in this context against the background of the Roman law.
293 Ziff *Principles of Property Law* 8.
294 Barnes *Property Rights and Natural Resources* 153.
295 Barnes *Property Rights and Natural Resources* 153; Ziff *Principles of Property Law* 8.
296 Barnes *Property Rights and Natural Resources* 2; Page 2011 *Property Law Review* 93.
297 Ziff *Principles of Property Law* 8.

intended when common property is discussed.[298] The example of an open park may illustrate this more "restrictive" idea of common property.[299] Anyone has an equal right of access to the park.[300] However, restrictions on what one may use the park for to the degree that such uses become arbitrary, renders the park a collective property.[301] Arguably, contemporary common property is therefore a property regime that allocates rights including, but not limited to, ownership, management, use, exclusion and access of a shared resource to a specific community or group of people.[302] Common property refers to a particular social arrangement regulating the preservation, maintenance, and consumption of a common resource. While the group has relatively free but monitored access to the shared resources, there are rules and mechanisms in place that allow the group to exclude outsiders from using the resource.[303] On the other hand, open-access resources represent a regime where no one owns or exercises control over the resources. As no individual or group has the legal capacity to restrict access to the resource, anyone is allowed to enter or harvest the open-access resource in question. It would therefore be an erroneous assumption to equate an open-access regime with the common property regime.[304]

Common property refers to the distribution of property rights[305] in resources in which a number of group members are co-equal in their rights to use the resource.[306] Schlager and Ostrom[307] identify five property rights that are relevant for the use of common property resources. These include a) the right of access or the right to enter a specified area to enjoy non-subtractive benefits such as hiking or sitting in the sun; b) the right of withdrawal or the right to obtain resource units such as fishing or diverting water; c) the right of management or the right to regulate or transform the

298 Ziff *Principles of Property Law* 9.
299 Barnes *Property Rights and Natural Resources* 154.
300 Waldron *The Right to Private Property* 41.
301 Barnes *Property Rights and Natural Resources* 153; Ziff *Principles of Property Law* 9.
302 Barnes *Property Rights and Natural Resources* 153; Crow and Sultana 2002 *Society & Natural Resources: An International Journal* 711; Hess 2006 http://dlc.dlib.indiana.edu/dlc/contentguidelines; Ziff *Principles of Property Law* 9.
303 Ostrom 2003 *Journal of Theoretical Politics* 239; Tortia 2011 http://web.unitn.it/files/download/15312/1211tortia.pdf
304 Ruddle "Changing the Focus of Coastal Fisheries Management" 63.
305 Property rights, including ownership rights, management rights, use rights, exclusion rights and access rights.
306 Ciriacy-Wantrup and Bishop *Natural Resources Journal* (15) 714; Grafton, Squires and Fox 2000 *Journal of Law & Economics* 681; Waldron *The Right to Private Property* 41; Welch 1983 *Policy Sciences* 166.
307 Schlager and Ostrom 1992 *Land Economics* 250.

resource by making improvements; d) the right of exclusion, which includes the right to determine who will have an access right; and e) the right of alienation. These rights in common property belong to those people who fit within a certain group or class.[308] It can therefore not be inferred that common property is "everybody's property". Rather, users who are not members of a class or a group of co-equal owners are excluded from using the resource.[309] This might also be the reason why scholars often use the term *communal ownership*[310] when referring to common property.[311]

2.4.3.2 "Things", "objects" or resources susceptible to common property

Chapter 2.4.2.2 above indicates that not all "things" can be "objects" of private law rights. A number of characteristics must be present before a "thing" may be regarded a legal object of a private right.[312] This section questions whether and to what extent "things" can be the "objects" of common property rights. However, one should be cautious to refer to common resources as "things" or "objects" as one would do in private property language. Common property resources do not relate to "things" or "objects" that are available to all, but rather to the *use* of such things that are available to all.[313]

The discussion starts by referring to the Roman law division of things, as it lists a number of resources of which the uses are available to all. The air (*aer*), sea (*mare*), seashore (*litora maris*) and running water (*aqua profluens*)[314] were typical "things" categorised under *res omnium communes*. Entitlements to these common "things" were protected under Roman law. A citizen's exclusion from using *res omnium*

308 Ziff *Principles of Property Law* 9.
309 Ciriacy-Wantrup and Bishop 1975 *Natural Resources Journal* 715; Demsetz 1967 *The American Economic Review* 354; Waldron *The Right to Private Property* 41.
310 Harris states that communitarian property is a global term to designate a wide range of land-holding arrangements that subsist alongside conventional forms of private property. The content of communitarian property will depend on the specific social and economic variables. It is stated that nothing unites this category of communitarian property, other than its contrast with individual or joint private property. The regime of communitarian property is dependent on conceptions of ownership interests. Practically, this would mean that a community of persons has the benefit of trespassory rules excluding other people from the resource, in the sense that it is their "private property". Harris *Property and Justice* 103.
311 Demsetz 1967 *The American Economic Review* 354; Ziff *Principles of Property Law* 8.
312 See chapter 2.4.2.2 above.
313 Ziff *Principles of Property Law* 9.
314 Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56; Diósdi *Ownership in Ancient and Pre-Classical Roman Law* 31; Van der Merwe *Sakereg* 23-24; Voet 1 8 3.

communes was treated as a violation of his rights of personality, justifying an action for solace or hurt feelings (*actionem iniuriarum*) unless limitations on use were introduced by the state.[315] Although *res omnium communes* could not be subject to private ownership, it should be noted that ownership of a specific portion thereof were possible when, for example, air is compressed into a gas cylinder.[316]

In contemporary law, terms such as "the commons", "common-pool resources" and "open-access resources" are frequently, but also confusingly, used by scholars when they refer to "things", "objects" or "resources" of common property. In other words, these terms are often used to refer to "interests for which there is a shared right of use conferred on all",[317] or to "things" which are by its nature incapable of private ownership.[318] One should be careful of the ambiguity that attends to the use of these terms. In order to establish a shared language for when these terms are used, the terms "the commons", "common-pool resources" and "open-access resources" are defined respectively.

For purposes of this study, the term "commons" has two characteristics. The first is that the commons refers to systems where it is difficult to limit human access. The second characteristic of the commons is that one person's use of the commons does not subtract a certain quantity from another user.[319] Representative of these two characteristics of the commons, knowledge and the digital world are two examples that may be labelled as part of the "commons". In contrast to the commons, "common-pool resources" are generally so large that it is difficult, but not impossible, to define recognised users and exclude other users altogether. Ostrom[320] highlights a second characteristic and argues that each person's use of common-pool resources subtracts benefits that other users might enjoy. Scholars[321] often refer to fisheries and forests as common-pool resources that are of great concern in this era of environmental

315 Habdas 2011 *TSAR* 628.
316 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 25; Van der Vyver "The Ètatisation of Public Property" 264.
317 Barnes *Property Rights and Natural Resources* 153; Ziff *Principles of Property Law* 8.
318 Rose 2003 *Law and Contemporary Problems* 95.
319 For example, where one person uses open air to breath, he or she does not hamper anybody else's use of the open air.
320 Ostrom 2008 http://www.environmentmagazine.org/Archives/Back%20Issues/July-August%202008/ostrom-full.html
321 Ojanen *et al* 2014 http://www.environmentalevidencejournal.org/content/3/1/19.

degradation. Other common-pool resources may for example include irrigation systems, grazing systems, lakes, oceans, and the atmosphere of the Earth.[322] In the third and last instance, the term open-access resources refers to resources that are characterised by unrestricted access to all members of society.[323] Open-access resources may consequently be defined as common-pool resources that anyone can enter or utilise.[324] It should at this stage be reiterated that common property refers to the distribution of property rights[325] in resources in which a number of group members are co-equal in their rights to use the resource.[326] In light hereof, it may be stated that the usual common property management regime is characterised by specified access and use rules of the specific group of people in question.

Notably however, the "commons", "common-pool resources" and "open access resources" often face challenges of environmental degradation because of the level of unrestricted access for all members of a society.[327] Various factors[328] may be identified that favour common property in assuring the integrity of a resource. These include, in the first instance, the resource's indivisibility.[329] The resource may have traits that make it unsuited for physical division or demarcation.[330] Either the resource cannot be bounded (such as the high seas), or it may be mobile over a large territory (such as the air or water). The second factor that favours the use of common property, is the

322 Maine *Ancient Law* 148; Ostrom 2008 http://www.environmentmagazine.org/Archives/Back%20Issues/July-August%202008/ostrom-full.html

323 Barnes *Property Rights and Natural Resources* 2; Page 2011 *Property Law Review* 93; Grafton, Squires and Fox 2000 *Journal of Law & Economics* 680.

324 Ostrom 2008 http://www.environmentmagazine.org/Archives/Back%20Issues/July-August%202008/ostrom-full.html

325 Property rights, including ownership rights, management rights, use rights, exclusion rights and access rights.

326 Ciriacy-Wantrup and Bishop *Natural Resources Journal* (15) 714; Grafton, Squires and Fox 2000 *Journal of Law & Economics* 681; Waldron *The Right to Private Property* 41; Welch 1983 *Policy Sciences* 166.

327 Cox *et al* 2009 *Southern Economic Journal* 958; Ostrom 2008 http://www.environmentmagazine.org/Archives/Back%20Issues/July-August%202008/ostrom-full.html; Tisdell 2003 *Social Justice Research* 404-405.

328 McKean and Ostrom 1995 http://www.fao.org/docrep/v3960e/v3960e03.htm#common%20property%20regimes%20in%20the%20forest:%20just%20a%20relic%20from%20the%20past

329 McKean and Ostrom 1995 http://www.fao.org/docrep/v3960e/v3960e03.htm#common%20property%20regimes%20in%20the%20forest:%20just%20a%20relic%20from%20the%20past

330 McKean and Ostrom 1995 http://www.fao.org/docrep/v3960e/v3960e03.htm#common%20property%20regimes%20in%20the%20forest:%20just%20a%20relic%20from%20the%20past

administrative efficiency associated with it.[331] Even if the common-pool resources are divisible, the administrative support to enforce individual property rights may not be available. To counteract the tendencies of resource degradation, Governments often intervene and adopt institutional management approaches to regulate access to these resources.[332] Consequently, the commons, common-pool resources and open-resources may be governed and managed by a wide variety of institutional arrangements, including but not limited to private ownership and public ownership. If private ownership is introduced as the property right regime within which the resource is regulated, definite property rights are granted to a specific individual whereby he or she is granted access to the resource.[333] If public or state ownership is introduced, the state retains formal property rights and controls individual access and use through various access and use restrictions. Under public or state ownership, resource use decisions are made by Government officials who are authorised "agents" or "managers" of the resource.[334]

There is no automatic association between the terms of the "commons", "common-pool resources" and "open-access resources" and the common property regime as such in terms of the possibility of state intervention. These resources merely assist in identifying resources that may potentially be governed by the common property regime, which is characterised by the access and use rights of a specific group of people.

2.4.3.3 The relevance of common property

The discussion thus far has posited that the common property regime is characterised by the *status quo* where access to a particular "common" resource or territory is limited to, or reserved for, a defined user group and where operational and access rules for that particular group are specified.[335] Various examples exist where people organised themselves in ways that allow common resources (which uses are available to all) to

331 McKean and Ostrom 1995 http://www.fao.org/docrep/v3960e/v3960e03.htm#common%20property%20regimes%20in%20the%20forest:%20just%20a%20relic%20from%20the%20past
332 Ruddle "Changing the Focus of Coastal Fisheries Management" 65.
333 Libecap "State Regulation of Open-Access, Common-Pool Resources" 547-548.
334 Libecap "State Regulation of Open-Access, Common-Pool Resources" 548.
335 Ruddle "Changing the Focus of Coastal Fisheries Management" 63.

be used productively.[336] The common property regime is for example well suited to the management of "common-pool resources" such as forests and fisheries. When aspects such as the competing uses of individuals and the high population pressure are taken into account, the allocation of property within a group is arguably a more efficient regime than, for example, the private property regime.[337] By creating a common property regime, the particular group of individuals that use the resource may institute collective management or administrative rules.[338]

Based on the erroneous view that the common property regime can be equated with an open-access regime, as explained above, some scholars maintain that the common property regime is largely to blame for *inter alia* resource depletion, pollution, poverty and the misallocation of capital.[339] It is not the common property regime, but rather the problems of resource degradation often associated with open-access regimes, which gave rise to the phrase "tragedy of the commons".[340] The term "the tragedy of the commons" was first introduced by Hardin.[341] In order to explain his argument, Hardin refers to a pasture "open to all".[342] In this "open" pasture, Hardin holds, each herdsman would increase his or her use of the common pasture, knowing that he or she would receive all the benefits from such use to themselves.[343] Hardin therefore argued that the individual herdsmen would increase his or her use of a common pasture knowing that they would receive all the benefits from such use to themselves, while the negative costs (such as the results of overgrazing) are shared amongst others.[344] In fact, even if the number of animals exceeds the capacity of the pasture, each herder is still motivated to add more animals since the herder receives all of the proceeds from the sale of animals and only a partial share of the cost of overgrazing. Hardin[345] states:

336 Barnes *Property Rights and Natural Resources* 154.
337 Glück 2002 *Forest Policy and Economics* (4) 132.
338 Ostrom, Gardner and Walker *Rules, Games, & Common-Pool Resources* 5; Waldron *The Right to Private Property* 41.
339 Ciriacy-Wantrup and Bishop *Natural Resources Journal* (15) 713-714; Cox *et al* 2009 *Southern Economic Journal* 958; Demsetz 1967 *The American Economic Review* 355; Waldron *The Right to Private Property* 8; Welch 1983 *Policy Sciences* 166.
340 Grafton, Squires and Fox 2000 *Journal of Law & Economics* 680; Page 2011 *Property Law Review* 93; Rose 1986 *The University of Chicago Law Review* 712.
341 Hardin 1968 *Science* 1243-1248; Ostrom *et al* 1999 *Science* 278.
342 Hardin 1968 *Science* 1244.
343 Barnes *Property Rights and Natural Resources* 2; Demsetz 1967 *The American Economic Review* 356; Hardin 1968 *Science* 1244.
344 Demsetz 1967 *The American Economic Review* 354; Hardin 1968 *Science* 1244; Rose *Law and Contemporary Problems* 93.
345 Hardin 1968 *Science* 1244.

> Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Arguably, the use of private pastures would, for example, not lead to the same tragic result of resource degradation, because the private owner is more likely to conserve his or her property.[346] However, although the nature of these open-access resources lends itself to over-exploitation, it is the historical failure to establish effective regulatory alternatives to *open-access resources* that have resulted in many forms of natural resource degradation.[347] The same can however not be said of the common property regime. In fact, despite the fact that no unanimous opinion exists concerning the optimal design regarding the allocation of use and access rights in a common property regime, it seems as if literature emphasises the success and benefits of the common property regime.[348] Rose[349] for example argues that community-based solutions to resource management in terms of the common property regime often show more success and efficiency than, for example, governmental intervention into resource management.

2.4.4 Public property regime

2.4.4.1 Attributes of public property

The discussion that dealt with the common property regime in chapter 2.4.3 above indicated the Roman law recognition, existence, and sub-categorisation of property that did not exclusively belong to a private individual, namely that of *res extra commercium*.[350] *Res publicae,* or public property, represents one such category. Van der Vyver indicates that Roman law writings were not as meticulous as one would expect in distinguishing between the sub-categories of *res extra commercium,* namely *res omnium communes* (common property) and *res publicae* (public or state

346 Ziff *Principles of Property Law* 14.
347 Barnes *Property Rights and Natural Resources* 3.
348 Ruddle "Changing the Focus of Coastal Fisheries Management" 65.
349 Rose "Common Property, Regulatory Property, And Environmental Protection: Comparing Common Pool Resources To Tradable Environmental Allowances" 1-23.
350 Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56; Rose 1996 *Wash. & Lee L. Rev* 270.

property).[351] This is clear when one investigates the fact that rivers and ports were regarded as "public things" and were at the same time "common to all persons."[352] In addition to the difficulties regarding the distinction between *res omnium communes* and *res publicae,* research indicates that in the course of legal history, some things which in Roman law had been regarded as *res omnium communes* have been converted into *res publicae*.[353] Nonetheless, despite these uncertainties, it is for the purpose of this chapter necessary to refer to the sub-category of *res publicae,* to establish the relevance and importance of the property regime within which *res publicae* (public property) is regulated to facilitate access to the resource; the extent of a Government's regulatory powers; and the nature, extent, protection of used rights that can be acquired in a resource.

The Roman law concept of r*es publicae* included things belonging to the public; which had to be used in the interest of the public; and which were open to the public by operation of law.[354] The classic examples of Roman law *res publicae* were *inter alia* bridges, roads, harbours and rivers.[355] This preliminary Roman law understanding of *res publicae* arguably provides a theoretical foundation for understanding the public property regime. The term *res publicae* (public property) seemingly describes the *character* of the ownership of public property, namely public or state ownership; and it describes the *use* to which the property is put, namely that the property should be used in the public interest.[356] Understanding of the dimensions of the public property regime necessitates brief elaboration on the character of public ownership and the understanding that property should be used in the public interest.

Scholars[357] accept that, in the course of legal history, many of the objects which Roman legal writings had singled out as instances of *res omnium communes* have

351 Joubert and Faris (eds) *The Law of South Africa* 27 120; Van der Merwe and De Waal *The Law of Things & Servitudes* 18; Van der Vyver "The Ètatisation of Public Property" 265.
352 Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56; Van der Merwe *Sakereg* 24; Van der Vyver "The Ètatisation of Public Property" 265.
353 Van der Vyver "The Ètatisation of Public Property" 261.
354 Rose 2003 *Law and Contemporary Problems* 96.
355 Rose 2003 *Law and Contemporary Problems* 96; see also Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56.
356 Barnes *Property Rights and Natural Resources* 154.
357 Kaser *Roman Private Law* 81; Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 24; Van der Vyver "The Ètatisation of Public Property" 261.

been converted into *res publicae,* and in a further development, *res publicae* transformed into the notion of state-owned property.[358] This brings us to the concept of ownership. It should in the first instance be noted that ownership as it functions in private law, generally reflects the idea that property vests in a recognisable entity.[359] The term ownership is, however, also frequently used when public property is under discussion.[360] Two interpretations serve to guide the question in which "recognisable entity" the "ownership" of public property vests. The first interpretation is that the "ownership" of public property usually vests in a Government agency, public authority or the state, and is therefore commonly referred to as "state or public ownership".[361] It should at this stage be emphasised that this public property conception of "ownership" is detached from the self-serving and exclusionary interests normally associated with private ownership.[362] This public property understanding of "ownership" is critical to distinguish between private and public property.[363] The distinction between private ownership and public ownership is illustrated by Reeve with reference to private and public transport.[364]

Under a private property regime, the owner of a vehicle is allowed to exclude any other person from the use of his or her means of transportation. Contrary thereto, under a public property regime, the state or state departments as "public owners" or "holders" of public transportation have a duty not the exclude an individual from using the public transport in question and to make the use thereof available to all.[365]

358 Van der Vyver "The Ètatisation of Public Property" 261.
359 See chapter 2.4.2.1 above.
360 Barnes *Property Rights and Natural Resources* 154.
361 The terms "public property", "state property" or "collective property" are often used to refer to the property regime describing the states', or some public agency's responsibility to control the resource in question. Barnes *Property Rights and Natural Resources Studies in International Law* 154; Page "Reconceptualising property: Towards a sustainable paradigm" 94; Rose 1986 *The University of Chicago Law Review* 716; Waldron *The Right to Private Property* 41; Ziff *Principles of Property Law* 9.
362 Rose *Law and Contemporary Problems* 99; Van der Schyff "South African Natural Resources, Property Rights, and Public Trusteeship" 329; Barnes *Property Rights and Natural Resources Studies in International Law* 154.
363 It is necessary to differentiate between "private ownership" and "public ownership", because similar to a private individual, a public authority may typically enjoy the rights of "possession, use, management, income and capital" of public property.
364 Reeve *Property* 33.
365 Barnes *Property Rights and Natural Resources* 155; Rose *Law and Contemporary Problems* 99.

Rose raises another argument for the "ownership" of public property. She argues that in many cases, property rights in public property are not controlled by the state or Government, but rather by the society at large.[366] In this argument, Rose calls the "owner" of the public property the "unorganised public".[367] If this argument is followed, it may be stated that public property creates multiple stakeholders who all have a say about how the resources concerned may be used.[368] However, the "unorganised public" is usually dependent on the state or (democratically elected) Government to control the public property on its behalf.

In light hereof, the distinction between the "state" and the "public" as public owners, is useful for understanding two possible sides of the same "public property-ownership-coin". More specifically, this dual understanding of "public ownership" is significant for understanding how the concept of ownership is separated from the actual use and access rights of the public in a public property regime. Whereas the "ownership" of public property vests in the state or even the citizenry at large, the control and management usually resides with a group of elected individuals who are representatives of the state, while the access and use rights reside with a subset of the citizenry.

The second aspect brought forward by the term *res publicae* that may be used as a foundation of the public property regime, is that the property in question is to be structured in such a way that the use thereof serves the public or the collective interest. In this sense the legal title that vests in the state or public authority must be structured in such a way that the property in question is controlled in a manner that prioritises the interest of the public.[369] Waldron holds that this argument leaves open two very important questions.[370] First, it must be determined what is the "public interest". Given a conception of the public interest, it should in the second instance be determined what procedures should be used by the state to apply the conception of public interest to particular cases.

366 Page "Reconceptualising property: Towards a sustainable paradigm" 94; Rose 1986 *The University of Chicago Law Review* 714.
367 Rose 1986 *The University of Chicago Law Review* 721.
368 Page "Reconceptualising property: Towards a sustainable paradigm" 95.
369 Waldron *The Right to Private Property* 40.
370 Waldron 1985 *Oxford Journal of Legal Studies* 328.

Like the concept of property, the concept of "public interest" is well known and widely used. However, like the concept of property,[371] the concept of public interest is difficult to define. Mostert[372] argues that the possible formulation of a definition of the public interest in the context of property law is complicated by the fact that other similar terms, such as "public use", "public weal" (or "common good") or "public purpose" are used to denote concepts that overlap to varying extents with the term public interest. Mostert[373] provides guidance for understanding the public interest when she argues that the term refers to factors that could influence the well-being of the community as a whole. Such factors may include *inter alia* economic, state security and legal interests.[374] In terms of this broad understanding of the public interest, the "public owner" of public property may then rely on these factors to justify the nature, extent and protection of use and access rights to the publicly owned resources.[375]

The state or public authority is therefore authorised to establish use and access rules to the general public to ensure that the property is used in such a way that it promotes the public interest.[376] Various "degrees" of use and access rules with regard to public property can be imposed by the public owner. The "lowest degree" of use and access rules or limitations is seen in the way the public owner regulates public property such as sidewalks, parks, beaches and town squares. These resources may be used freely without any state-imposed limitations because despite the unrestricted use rights of the public, the property will still be able to meet its designated public objectives.[377] Use and access rights to public property may, however, be limited or restricted to a greater extent to promote the public interest or to obtain a specific public objective. Public schools and universities will for example fall within this category where certain limitations are imposed. Although school and university buildings are public property, they may only be used and accessed by their (often paying) members and not in an

371 See chapter 2.2 above.
372 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 22.
373 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 22.
374 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 22.
375 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 22.
376 Barnes *Property Rights and Natural Resources* 155; Welch 1983 *Policy Sciences* 166.
377 Demsetz 1967 *The American Economic Review* 354; Rose 1996 *Wash. & Lee L. Rev* 267.

unrestricted manner by the general public.[378] The state as public owner may also implement extreme limitations or restrictions to access or use rights of public property when it is required so by a specific public objective. The terminal building of an airport is a typical example of public property where access to the public is severely restricted.[379] The public is only allowed in a terminal building under strict conditions, such as firm security controls. In light of this discussion of the state or public authority's authorisation to establish various "degrees" of use and access rules to the general public, it is clear that certain forms of property should be held by the state and kept open to the public, or subject to what the Roman law called the "*jus publicum*" (public right) to protect the public interest.[380] Notably, in order to establish concrete and specific public rights, a state must specify its own legal regime. The state, by virtue of its sovereignty,[381] therefore has the freedom and right to define and determine the scope of public rights recognised.[382]

The character of public ownership and the use or access rights in public property as discussed, highlighted two main attributes of the public property regime, generally. Firstly, public property separates ownership from the actual use of a resource, because whereas the "ownership" of public property vests in the state, the control and management reside in a group of elected individuals (the state), and the statutorily governed access and use rights reside with a subset of the citizenry (the public). Secondly, the forms of property or resources in a public property regime aim to satisfy the needs and purposes of the public or society as a whole, whatever the needs or purposes are and however they are determined.[383] Therefore, no private individual has such an intimate association with any form of public property that he or she can make decisions about its use or access without acknowledgement of the public interest.

378 Anon 2008 http://www.dmlp.org/legal-guide/access-public-property
379 Anon 2008 http://www.dmlp.org/legal-guide/access-public-property
380 Rose 1986 *The University of Chicago Law Review* 713.
381 Cohen 1927-1928 *The Cornell Law Quarterly* 8; Katz 2008 *University of Toronto Law Journal* 293, 294; Waldron *The Right to Private Property* 41.
382 Flores-Mimiça and Hervé-Espejo "Chile: Early Attempts to Develop Access and Benefit-Sharing Regulations" 231.
383 Waldron 1985 *Oxford Journal of Legal Studies* 328-329.

2.4.4.2 "Things", "objects" or resources susceptible to public property

As already indicated, in terms of the Roman law concept of *res publicae*, certain things belonged to the state or public in public ownership and were destined to be used by and in the public interest of an entire community.[384] Examples of these things in Roman law include public roads, bridges,[385] perennial rivers (*flumina*), riverbanks and harbours (*porta*).[386] Significantly, some "public things" may technically resort under the private property regime if one applies to it the five characteristics to which private things in a private property regime must conform.[387] However, the listed public things are unsusceptible to private ownership rights because of their public function, which is to promote the public interest or to fulfil certain needs of a given society.[388] The "function" of property is therefore an important indicator to characterise a thing as being public.[389] In light hereof, public things that serve a public function cannot be owned by private individuals and cannot be regulated in a private property regime.

2.4.4.3 The relevance of public property

In order to establish the importance and relevance of the public property regime, the discussion above referred to the Roman law concept of *res publicae* from which various principles for the public property regime can be derived. The discussion showed that, in a public property regime, certain things are owned by the state (or general public).[390] Furthermore, in such a public regime, the public owner structures the use and access rights to public things in such a way that it serves the public interest. In terms hereof, the public property regime is a useful mechanism with reference to which each state may develop a legal framework for the use and access of property that serves the public interest or the needs of a given society.

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384 Van der Vyver states that *res publicae* belonged to the Roman people. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 26. Van der Vyver "The Ètatisation of Public Property" 265.
385 Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 144.
386 Inst 2 1 2; Van der Merwe and De Waal *The Law of Things & Servitudes* 19; Van der Vyver "The Ètatisation of Public Property" 265.
387 See chapter 2.4.2.2 above.
388 Habdas 2011 *TSAR* 630.
389 Habdas 2011 *TSAR* 634, 636, 639, 643.
390 See chapter 2.4.4.1 above.

In the public property regime, the question of property rights allocation is answered by the application of the rule that access to and use rights of certain public resources should be determined by the public or collective interests of the society as a whole. Therefore, if there is a question about how or by whom public resources are to be used, it can be resolved by favouring the use or access right that is most closely related to the public interest.[391] Notably, however, the effectiveness and efficiency of a public property regime depends on good organisational and procedural aspects of the public owner.[392] In addition, due to the fact that the public interest does not have a universal meaning, the public interest or public objectives of the specific public authority at hand must be clearly formulated to be of any help when access and use rights are established for the general public.[393]

It is also possible to identify relevant aspects of the public property regime from the view of use and access rights that are held by the public. When governmental decisions are taken relating to some public property, the administrative law generally allows all affected persons to present their views by way of a public participation process.[394] The involvement of the public is desirable in the sense that it helps to elicit the information and facts necessary for fair governmental action.[395] Public involvement is not only desirable, but it is also important for the implementation of *inter alia* the ideal of democracy.[396]

391 Waldron 1985 *Oxford Journal of Legal Studies* 328.
392 Waldron *The Right to Private Property* 40.
393 Glück 2002 *Forest Policy and Economics (4)* 132.
394 See for example sections 56, 59, 69, 70, 115, 116 and 118 of the Constitution.
395 Waldron *The Right to Private Property* 40.
396 Bonfield 1970 *University of Pennsylvania Law Review* 541.

2.5 Concluding remarks

2.5.1 Revisiting the aim of the chapter and methods used

The aim of this chapter was to examine perspectives on the concept of property to indicate the relevance of the particular property regime within which a resource is regulated for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.[397]

The inquiry of this chapter started with an exposition of the difficulties in defining property. It became evident that one must not understand the concept of property as only referring to a "thing" or an "object". Property is a rather abstract concept that is hard to pin down to one clear and concise definition due to various factors.[398] One of the factors that renders a definition of property difficult is the trend that "property", which was traditionally regarded as a private law concept, progressively changes to become a matter of public law. In the second part of this chapter, various theoretical principles were explored that govern the concept of property.[399] The theoretical principles provided various valuable insights for understanding the concept, regulation and allocation of property. The insights that were provided included *inter alia* normative justifications and reasons for the allocation of property rights in a particular way. It indicated which human interests should be regarded as relevant when property rights are allocated and it provided guidance in the specification of the content, nature, limits, types or forms of property rights. Ultimately, therefore, the theoretical property principles strenghten understanding of the changing concept of property in the sense that different theoretical principles may be used to allocate property rights in different ways. The theoretical discussion of the various property principles that focused on the allocation of property rights accumulated into an inquiry of the property rights and duties that characterise the relationship between individuals with respect to different resources; or in other words, an inquiry into property regimes.[400] The inquiry

397 See chapters 1.3.2 and 2.1 above.
398 See chapter 2.2 above.
399 See chapter 2.3 above.
400 See chapter 2.4 above.

developed into an examination of the meaning and relevance of three property regimes, namely private, common and public property.

In essence, the three property regimes define or locate individuals in relation to one another, both within the group (in the case of common property), and with individuals that fall outside the group. They provide a conceptual schema that arrays property rights to be held by authorised users, claimants and owners.[401] The three regimes therefore determine who has the legitimate authority to use the resource in a predetermined manner. They are furthermore useful mechanisms to regulate[402] access to and control of scarce resources.[403]

In light of the main objective of this chapter, it is imperative to provide a concise account of the relevance that a particular property regime within which a resource is regulated has for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.

2.5.2 The relevance and importance of property regimes

Private property regimes are the most familiar in property scholarship. In fact, it is not only the layman, but often also lawyers that view property as a concept representative of the private law.[404] This "intuitive" private law-inclined idea of property that people often hold is distinctive to those who are accustomed to a private-orientated regime, because they typically want to know what is theirs, how and to what extent they may use it and how they can protect what is theirs.[405] In light of these examples that emphasise the rights and duties of private individuals, it seems as if the concept of individualism underlies the regime of private property. The individualistic nature of private property affects the regulation of access to a resource within a private property regime. As indicated above,[406] ownership is not the only right that can be acquired in

401 Schlager and Ostrom 1992 *Land Economics* 249.
402 Rose 1989-1990 *Tennessee Law Review* 577.
403 Rose 1989-1990 *Tennessee Law Review* 584.
404 See chapter 2.2.1 above.
405 See chapter 2.1 above.
406 See chapter 2.4.2 above.

a private property regime. However, as property right, ownership provides to its holder the exclusive right to determine access to and control over things;[407] the exclusive right to the services of the resource; and the right to exchange the resource at terms that are mutually agreeable to the individual[408] as right-holder. Although it is often accepted that private ownership gives the owner "absolute and complete" rights in respect of a "thing" or the property in question, the private property ownership rights are not so "absolute" as one may expect. In fact, the private property regime comprises of various rules and practices that provide certain powers to the Government to regulate and limit ownership rights and other private property rights. States or Governments, for example, have a wide range of regulatory powers and have the discretion to limit the private property rights by way of *inter alia* statutory measures.[409] Apart from the limitations imposed by the state, the extent of private, exclusionary ownership rights may also be limited by private property rights of other individuals in terms of limited real rights (the rights of others), and creditors' rights. In addition to these limitations, further duties are imposed on an individual in a private property regime. For example, in terms of the maxim of "*sic utere tuo ut alienum non laedas*", an owner may exercise his or her indefinite right to use, control and dispose of the property in question only to the extent that the use of the owner's right does not damage that of his or her neighbour's property. Should this duty not be carried out by an owner, it is the duty of the state to restrain such acts that damage the neighbour's property. Notably, these rights or entitlements of the owner (which are restricted by limitations and duties) are recognised in law and protected by various private law legal remedies. In essence, the rules governing access and use of resources in a system of private property are organised around the idea that resources are separate objects, each assigned and therefore exclusively belonging to an individual, while its use may be limited by the state or other private individuals.

"Common property" or the "common property regime" is often contrasted with the private property regime, because the private property regime acknowledges that property may belong to a certain private individual, while the common property regime

407 See chapter 2.4.2.1 above.
408 Or legal (judicial) person.
409 See chapter 2.4.2.1 above; Bassenge *et al Palandt Bürgerliches Gesetzbuch* 1082.

refers to “things” that are open to all individuals.[410] The contrast between private property and common property is also evident from Barnes’ account which defines common property as rights of access rather than private rights of exclusion.[411] People organise and manage themselves in groups that allow common resources (which uses are available to all) to be used productively. These community-based resource management practices are then also the main attributes that constitute the nature of the common property regime.[412] Various property rights were identified that are relevant for the regulation of access and use rights in common property resources. These access and use rights belong to those people who fit within a particular group or class. The rules that govern access to and control of resources in the common property regime are organised on the basis that each resource is in principle available for the use of every member of society alike. In the case of finite resources, the common property regime requires procedures for determining a fair allocation of the extent of uses allocated to individual members of the group or society. It was held that the common property regime is particularly well suited for the management of “common resources”, because the common property regime is a community arrangement that regulates the preservation, protection, maintenance, and consumption of the resource. Notably, however, the “commons”, “common-pool resources” and “open-access resources” often face challenges of stressed or degrading natural resources because of competing uses of individuals and the high population. To counteract these tendencies of degradation, Governments often intervene and adopt institutional management approaches to protect and to regulate access to these resources so that can be used not only by this generation, but also by future generations. Consequently, the commons, common-pool resources and open resources may be governed and managed by a wide variety of institutional arrangements, including but not limited to private and public ownership.[413] In terms of the possibility of state intervention, there is no automatic association between the terms of the “commons”, “common-pool resources” and “open-access resources” on the one hand, and the common property regime on the other hand. These “common” resources merely assist in identifying resources that may potentially be governed by

410 See chapter 2.4.3.1 above.
411 See chapter 2.4.3.1 above.
412 See chapter 2.4.3.1 above.
413 See chapter 2.4.3 above.

the common property regime, which is characterised by access and use rights of a specific group of people.[414]

In the third and last instance, the nature of a public property regime was explored by reference to the separation of the ownership, control and management of the property on the one hand, and the actual use thereof on the other. In a public law regime, "ownership" usually vests in the state that controls and manages public property by a group of elected individuals, while the statutorily regulated use and access rights reside with the public.[415] In a public property regime, the extent of use and access rights to resources must be structured, allocated, protected and governed in such a way that it meets the needs and purposes of society as a whole, and not only the needs of individuals.[416] It can therefore be accepted that, in a public property regime, the state or public authority is authorised to establish use and access rules to the general public to ensure that the property is used in such a way that it promotes the public interest. The extent of the Government's concomitant powers has been argued and various examples were provided to indicate that the "public owner" (the Government or state) may impose various "degrees" of use and access rules in relation to public property.[417] The "lowest degree" of use and access rules or limitations was seen in the example of how the public owner regulates public property such as sidewalks, parks, beaches and town squares. Use and access rights to public property may, however, be limited or restricted to a greater extent to promote the public interest or to obtain a specific public objective, such as in the cases of schools, university buildings and even terminal buildings of airports.

2.5.3 The way forward

The broad research question that underpins this study is how and to what extent the German concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA. This theoretical chapter was specifically dedicated to providing contextual information on

414 See chapter 2.4.3 above.
415 See chapter 2.4.4.1 above.
416 See chapter 2.4.4.1 above.
417 See chapter 2.4.4.1 above.

the concept of property and specifically the relevance and importance of different property regimes against which both the South African and German property regimes within which water is managed can be evaluated. As such, the chapter did not focus on, for example, the notions of public trusteeship in South African law or *öffentliche Sache* in German law. The discussion does, however, sketch the context and basis for understanding the statutorily introduced public trusteeship and *öffentliche Sache*-based property regimes in water resources law to be explored in chapters 4, 6 and 7.

Chapter 3

Property in the context of South African law

3.1 Introduction

With the introduction of the *National Water Act* 36 of 1998 (NWA) in South Africa's water regulatory regime, the foundations of the country's existing water law system changed fundamentally.[1] The differentiation between private and public water was abolished and the direct link that existed between land ownership and access to water was rejected, for example.[2] A new regulatory regime came into being that does not differentiate between different forms or types of water resources, but that applies to "all water" in South Africa.[3] The accompanying legal framework further acknowledges that all water use rights are placed under the centralised control of the state or public trustee to *inter alia* improve the distribution, management, use, conservation and equality of access to this scarce resource.[4]

Statutory transformation of this nature has inevitable and important implications. It has for example been argued that the changed system brought about a redefinition and reallocation of property rights to natural resources;[5] a transformation which will inevitably impact on the nature, form, extent, limits and protection of access and use rights that can be acquired in water as a natural resource. The concept of property arguably informs an understanding of some of the consequences of the said transformation if one considers the relevance of the particular property regime within which a resource is regulated for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.

1 Long title of the NWA; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in South Africa* 340.
2 See section 5.1.1 and 5.1.2 of the *White Paper on a National Water Policy for South Africa*.
3 The long title of the NWA.
4 Sections 2 and 3 of the NWA; Principles 2 and 3 of the *White Paper on a National Water Policy for South Africa* of 1997.
5 Boyce *Natural Assets: Democratizing Ownership of Nature* 19-23.

This chapter focuses on the concept of property in South African law. The objective of this analysis is to establish a South African property rights paradigm against which the statutorily introduced, public trusteeship-based property regime in water resources law can eventually be evaluated.

The discussion below elaborates on the concept of property in South African jurisprudence and focuses on the distinction between private and public property, the development of the notion of constitutional property, an explanation of the extent of constitutional protection of property, as well as the regulation of property in South Africa. The emergence of a stewardship concept related to natural resources in particular is considered in brief. This development might influence the regulation of property and even perhaps the property regime within which such resources are regulated.

This chapter comprises two main parts. The first part provides an historical account of the development of the South African concept of property and the accompanying legal context within which development took place. The aim is to indicate the historical development of different types and forms of property in the country. The historical analysis is further necessary to understand the meaning of the concept of property in the present. To show the development in recent years, the second part of this chapter scrutinises the post-1996 understanding of property and focuses on the content, meaning, types and forms of property, as well as on the constitutionally directed protection and regulation of property.[6]

6 While describing the right of South Africans to a just and fair society, the Bill of Rights establishes a framework within which regulation and allocation of water should take place. Although the Constitution guarantees the protection of property, the state may in certain instances interfere with an individual's property rights. Section 2.1.7 of the *White Paper on a National Water Policy for South Africa* of 1997.

3.2 Historical perspectives on the development of the concept of property in South Africa

3.2.1 Introduction

Scholars[7] hold that the principles that best portray the legal reality in South Africa before the dawn of the constitutional dispensation include that private law regulated the acquisition, protection and transfer of private property, while public law regulated the liberty and equality of citizens. The private law character of property in pre-constitutional South Africa is evident. The private character of the law of property is also affirmed by Badenhorst *et al* who hold that property law "has always been regarded as the pith and essence of private law".[8] It follows that in pre-constitutional South Africa, property was mainly defined and regulated within a private property regime.[9]

This section offers historical perspective on the legal context, development, forms and types of property acknowledged in South African law. The examination is not a comprehensive legal historical study, but is included in this chapter to indicate *inter alia* how and to what extent legal history guided the development of a context-specific contemporary South African concept of property.[10] It outlines the sources of the South African property law and indicates the historical development of types and forms of private and public property. Essentially, the discussion explains and provides insight into the private law character of South African property law[11] and creates understanding for some contemporary developments that lead towards a concept of property that ties in closely with public law. The discussion on the historical development of the South African concept of property divides into four broad periods, namely the period prior to colonisation;[12] the period of Roman-Dutch rule spanning

7 Currie and De Waal *The Bill of Rights Handbook* 537; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 1.
8 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 6. See also Van der Merwe *Sakereg* 7.
9 The relevance and importance of a private property regime was examined in chapter 2.4.2 above.
10 Serfontein 2013 *Journal of Juridical Science* 2.
11 Van der Walt 1988 *De Jure* (vervolg) 307.
12 See section 3.2.2 below.

from 1652 to the beginning of the 19th century;[13] the colonial period under British control from 1806[14] and the period under Apartheid rule.[15]

3.2.2 Property prior to colonisation

Prior to the colonisation of South Africa, African customary law governed property rights in South Africa.[16] Scholars[17] indicate the said African customary law was not written down, but orally conveyed as part of the traditional African customary systems. The oral tradition complicates a compilation of the legal history preceding the colonisation of South Africa. It is for example difficult to pinpoint the types and forms of early African customary law property within the different tribal areas, each with its unique social, political and economic context.[18] Due to the lack of adequate documented sources an in-depth discussion of the early African customary law property principles and property concept is excluded from the scope of this study. It is sufficient to note Adult and Rudman,[19] who hold that observations made by British colonial administrators and anthropologists assist in providing basic property-related principles attributable to pre-colonial African tribal societies. Although it is arguably an oversimplified view, existing literature indicates that early African customary law did not acknowledge private ownership of land, but guaranteed the right to use communal land to every member of the tribe.[20]

Scholars[21] hold that a more accurate legal historical inquiry into the development of the concept of property in the South African context is possible for the period following the Dutch conquest of the Cape of Good Hope in 1652.[22] Lawyers started to collect

13 See section 3.2.3 below.
14 See section 3.2.4 below.
15 See section 3.2.5 below.
16 Tewari 2009 *Water SA* 693.
17 Ault and Rutman 1979 *Journal of Law and Economics* 164; Humby, Kotzé and Du Plessis (eds) *Introduction to Law and Legal Skills in South Africa* 145-146; Mostert and Pope (eds) *The Principles of the Law of Property in South Africa* 16; Miller and Pope *Land Title in South Africa* 3; Tewari 2009 *Water SA* 694-695; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 95; Van der Walt *Die Ontwikkeling van Houerskap* 558-582.
18 Ault and Rutman 1979 *Journal of Law and Economics* 165.
19 Ault and Rutman 1979 *Journal of Law and Economics* 165.
20 Ault and Rutman 1979 *Journal of Law and Economics* 165.
21 Du Bois and Visser 2003 *Transnat'l L. & Contemp. Probs* 604; Milton "Ownership" 657; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 95.
22 Currie and De Waal *The Bill of Rights Handbook* 532; Hahlo and Kahn *The South African Legal System and its Background* 567-575; Lewis *Water Law Its Development in the Union of South*

sources and codified legal customs during this period, and their work can be used for legal analysis.[23]

3.2.3 Property subsequent to Dutch colonisation

3.2.3.1 Introduction

With the establishment of a refreshment station at the Cape of Good Hope by the *Vereenigde Oost-Indische Compagnie* (VOC),[24] the law of Holland or the Roman-Dutch law was transplanted into the southern areas of South Africa.[25] Roman-Dutch law was derived from two main sources, namely Roman law and Germanic customary law.[26] Although both legal sources played a central role in the development of property in South Africa, scholars[27] argue that Roman law is the most important source of South African property law. In fact, according to scholars[28] no other field in South African private law has been influenced by the Roman law to such a great extent. The important role of Roman law is clear from Van der Merwe's observation that modern property law is still founded on the dogmatic foundations of the Roman law.[29] The foundations of modern property law that have been borrowed from the Roman property

Africa 5; Miller and Pope *Land Title in South Africa* 3; Tewari 2009 *Water SA* 693; Van der Walt *Die Ontwikkeling van Besit en Houerskap* 436-438.

23 Currie and De Waal *The Bill of Rights Handbook* 532; Hahlo and Kahn *The South African Legal System and its Background* 567-575; Miller and Pope *Land Title in South Africa* 3; Tewari 2009 *Water SA* 693; Van der Walt *Die Ontwikkeling van Besit en Houerskap* 436-438.

24 According to the legal doctrine of that time, the Cape was a *res nullius* (thing without an owner), and became Dutch territory and property of the VOC by way of *occupatio.* Hahlo and Kahn *The South African Legal System and its Background* 566-575; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 95; Van der Walt *Die Ontwikkeling van Houerskap* 436.

25 Due to the scarcity of written legal literature of the Cape during this period, general remarks will be made on the legal sources that were applied. Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 97; Van der Walt *Die Ontwikkeling van Houerskap* 436.

26 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 6; Van der Walt 1988 *De Jure* (vervolg) 307.

27 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 7; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 133; Van der Merwe *Sakereg* 7.

28 Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 133; Van der Merwe *Sakereg* 7.

29 Van der Merwe *Sakereg* 7.

law include *inter alia* the differentiation between ownership and holdership;[30] and the distinction between ownership and limited real rights.[31]

In order to provide historical perspectives on the Roman-Dutch private law concept of property subsequent to the Dutch colonisation, it is necessary to outline what is meant by "property" in this context. As indicated in chapter 2.2, property is a complex term that is difficult to define. It is not the aim of this section to define private property in South Africa. Badenhorst *et al*,[32] however, provide a simple but valuable framework for understanding property in private law. They argue that property in private law generally has two different meanings, namely the legal relationship between a person and an object (a right in a legal object) and the object to which the right relates. These two meanings in turn guide the structure of this discussion.

3.2.3.2 Property as rights

Van der Walt refers to three legal sources that provide insight into the concept of property, namely legislation, customs and the 17th and 18th century's scholarly writings of the Roman-Dutch law.[33] Van der Walt[34] indicates that the most important source highlighting the development of the concept of property, is the writings of Roman-Dutch legal scholars. The works of Grotius (*Inleidinge tot de Hollandsche Rechts-geleerdheid*), Voet (*Commentarius ad Pandectas*) and Van Leeuwen (*Rooms-Hollandsch Regt* and *Censura Forensis*) played a significant part in the development of the South African law of property.[35] These Roman-Dutch scholarly works allow us to differentiate between and elaborate on the meaning and forms of property law concepts that were applied in South Africa after Dutch occupation.

30 Van der Merwe *Sakereg* 7.
31 Van der Merwe *Sakereg* 7.
32 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 9.
33 Van der Walt *Die Ontwikkeling van Houerskap* 437; Van der Walt 1988 *De Jure* (vervolg) 322.
34 Van der Walt *Die Ontwikkeling van Houerskap* 437.
35 For example, the modern South African property law on original acquisition of property is very much informed by the principles of the Roman law, while the derivative acquisition of landownership through registration has been influenced by the Germanic law. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 6-7; Van der Walt *Die Ontwikkeling van Houerskap* 437.

According to Currie and De Waal,[36] scholars of the Roman-Dutch private law tradition preferred to conceptualise property as a legal relationship between persons and corporeal things. The legal relationship was typically characterised by ownership and other real rights. Ownership epitomised the most comprehensive real right in property.[37] Notably, this Roman-Dutch private law character of ownership corresponds with the argument posited earlier in terms of which ownership is regarded as a pivotal property right in a private property regime.[38] In his *Inleidinge tot de Hollandsche Rechts-geleerdheid*,[39] Grotius distinguished between two forms of ownership, *dominium plenum* ("full ownership" or "absolute ownership"),[40] and *dominium quasi aut minus plenum* ("qualified ownership", where the title to the property and the use thereof are separated).[41] Grotius held that *dominium plenum* provided a person with permission to do with his or her property whatever he pleased, as long as the use was not forbidden by law.[42] The principle of *dominium plenum,* as the pre-eminent private right over property, prevailed (and developed) in South Africa after the arrival of the Dutch.[43] This development of *dominium plenum* is evident from different forms of land tenure that were introduced by the VOC. The land tenure system provided land use rights in terms of formal land grants to some inhabitants residing in the Cape.[44]

In the year 1657, the VOC decided that the settlement at the Cape should become economically self-sufficient.[45] In light of this aim, the VOC expressed its intention to make grants of land to certain "freemen" or employees of the VOC to cultivate land.[46] The decision of the *Raad van Politie* (Council of Policy) of 21 February 1657[47] in terms of which the VOC formally decided to make grants of land to freemen,[48] referred not only to "ownership", but specifically to the concept of "full ownership" or *vollen*

36 Currie and De Waal *The Bill of Rights Handbook* 536.
37 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 58.
38 See chapter 2.4.2 above.
39 See Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 41-193 for Grotius' account of property.
40 Van der Walt 1988 *De Jure* 307, 319.
41 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 54; Milton "Ownership" 659.
42 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 54.
43 Milton "Ownership" 659; Wessels *History of the Roman-Dutch Law* 484-485.
44 Milton "Ownership" 659.
45 Milton "Ownership" 659.
46 Milton "Ownership" 659-660.
47 Milton "Ownership" 660.
48 Guelke "Freehold farmers and frontier settlers, 1657-1780" 66; Milton "Ownership" 660.

eigendom.[49] In terms of the decision made by the *Raad van Politie,* the first grants stipulated that the land would remain the property of the grantee to do with as he or she like, and included the right to sell, lease or alienate the land, subject to notice given to the *Raad van Politie*.[50] Grotius' concept of private ownership was therefore transplanted into South Africa by way of grants to land. Notably, however, over a period of time, the *Raad van Politie* became progressively tight-fisted in providing these grants, because the VOC's officials were concerned with retaining control over the available land for fiscal and policy reasons.[51] Consequently, in 1717, the VOC instructed that no further grants *in eigendom* should be made.[52]

Apart from the strong ownership rights in terms of the grants *in eigendom* made by the VOC*,* other forms and types of real rights in property also developed in the Cape under Dutch rule. For example, during the later decades of the seventeenth century pastoralists began to move away from the direct vicinity of the VOC's settlement into the interior of the Cape Colony.[53] These itinerant farmers did not receive grants of "full ownership", but the VOC approved *leeningsplaatsen* (loan farms)[54] to them. These loans were not legal titles to land, but merely licenses to occupy the land.[55] *Leeningplaats* tenure was an attractive option for pastoralists. Not only was this form of tenure very informal and easy to obtain,[56] but it provided most, if not all, the benefits and advantages of the grants *in eigendom.*[57] Another form of land holding, namely *leenings eigendom* (loan ownership) emerged. Although *leenings eigendom* also did not confer the right of ownership, it conferred more security to the occupier than the system of *leeningsplaatsen.*[58] Yet another form of land holding, namely *erfpacht*

49 Milton "Ownership" 660.
50 It is however not entirely certain what the *Raad van Politie* intended when it referred to the concept of ownership. It is for example not entirely clear whether they intended the principle of *dominium plenum* as advocated by Grotius, or whether it was some sort of quasi-feudal tenure. Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 54; Milton "Ownership" 660.
51 Milton "Ownership" 661.
52 Guelke "Freehold farmers and frontier settlers, 1657-1780" 78.
53 Guelke "Freehold farmers and frontier settlers, 1657-1780" 66; Milton "Ownership" 662.
54 Guelke "Freehold farmers and frontier settlers, 1657-1780" 66, 78; Miller and Pope *Land Title in South Africa* 4; Milton "Ownership" 661-663.
55 Originally, *leeningsplaatsen* were obtained without the payment of any fee, but after the year 1714 the situation changed to where an occupier was required to pay annual rent to the VOC. Milton "Ownership" 662.
56 Milton "Ownership" 662.
57 Guelke "Freehold farmers and frontier settlers, 1657-1780" 78-79; Miller and Pope *Land Title in South Africa* 5; Milton "Ownership" 663.
58 Milton "Ownership" 663.

tenure,[59] was introduced by the VOC in 1732. *Erfpacht* enabled its holders to lease adjoining land for fifteen years. Significantly, in all three instances of *leeningsplaatsen, leenings eigendom,* and *erfpacht* tenure, the VOC retained ownership of the land while the occupier received rights of use.[60] These three tenure practices of the Dutch rule indicate that the ownership of land (in the traditional form of Roman-Dutch *dominium plenum*)[61] was not a universal feature in the Cape. In fact, the traditional *dominium plenum* was confined to relatively few people that initially received grants *in eigendom* and entirely overshadowed by the practices of common loan tenure.[62] Apart from the concept of *dominium plenum* and the practices of common loan tenure, other forms or types of rights to private property were incorporated and developed in South Africa. These include *inter alia* limited real rights that an individual could obtain over the property of another person, including but not limited to servitudes, pledge, mortgage and building grants and leases.[63]

In the prominent system of loan tenure, the formal *dominium* in land resided in the VOC.[64] The title to the property and the use thereof were therefore separated as the landholder merely enjoyed determined rights that conferred to him or her virtually all the benefits of *dominium* in land.[65] This principle of separation between the title of property and its use rights is of particular significance within the broader context of this study, since it is of crucial importance to determine how and to what extent the title and use rights of water resources can be separated, and if so, what the legal implications thereof might be.[66] This line of thought leads to the important question of which kinds of things could in terms of Roman-Dutch law be the objects of private, individual ownership rights, and which things fell outside the scope of private ownership rights. In order to answer this question, it is necessary to examine the notion of property as objects or "things".

59 Miller and Pope *Land Title in South Africa* 5; Milton "Ownership" 663.
60 Milton "Ownership" 663.
61 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 54.
62 Milton "Ownership" 664.
63 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 321-439; Van der Merwe *Sakereg* 65; Van der Walt 1988 *De Jure* 17.
64 Guelke "Freehold farmers and frontier settlers, 1657-1780" 94; Milton "Ownership" 664.
65 Milton "Ownership" 664.
66 See chapter 4.3.3 below.

3.2.3.3 Property as objects or things

As stated above, lawyers accustomed to the Roman-Dutch legal tradition, initially conceptualised property as a legal relationship between persons and corporeal objects.[67] Due to socio-economic developments, a number of incorporeals eventually came to be regarded as legal objects or things.[68] Property was then narrowly defined as the object of the relationship between persons and things.[69] In light hereof and due to the particular focus of this study, the present discussion mainly focuses on property as objects or things. Chapter 2.4.2.2 above indicates that "things" can be categorised by virtue of their nature or function. Depending on *inter alia* their nature and function and the subsequent categorisation in terms thereof, things are regulated by different property regimes. It was for example argued that a thing may be regulated in a private property regime if it is an independent corporeal object (or incorporeal object, depending on the legal jurisdiction), which is susceptible to legal control and which is of value and use to a legal subject or person.[70] Such object or thing may, however, also be regulated in a common or public regime depending on its function. In other words, the same thing can be regulated by different property regimes. However, some things (such as air or public rivers) can be excluded from being regulated by, for example, a private property regime because of their nature or function.[71]

Apart from categorising things according to their nature, Van der Merwe[72] holds that a thing can be categorised in terms of the particular role that it fulfils in the legal sphere. The latter way of categorising is based on Roman law and makes a distinction between things that fall in commerce (*res in commercium*, which were susceptible to private rights) and things that are not susceptible to private rights (*res extra commercium*), because they fall outside of commerce.[73] In terms of this categorisation, and with the help of the works of Roman-Dutch scholars, it is possible to determine which things

67 See chapter 2.2.1 above. A limited amount of incorporeals were eventually regarded as "things". Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188.
68 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188; Van der Merwe *Sakereg* 24-25.
69 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188.
70 Badenhorst *et al Silberberg and Schoeman's The Law of Property* 21, 22; See chapter 2.4.2.2 above.
71 See chapter 2.4.3.2 above.
72 Van der Merwe *Sakereg* 27.
73 Van der Merwe *Sakereg* 28.

were in terms of Roman-Dutch law susceptible to private property rights, and which were not. A difference of opinion existed between Roman-Dutch scholars Grotius and Voet regarding the classification of things. In his work titled "Introduction to Dutch Jurisprudence", Grotius for example stated that all things belong to humans, but for different purposes. He therefore divided all things into four categories with a view to them being the object of ownership. Grotius' four categories include things that belong to all persons in common (*res omnium communes*);[74] things that belong to a large society or community of persons (*res publicae* and *res universitates*);[75] things that belong to individuals (*res singulorum*); and things that belong to no one (*res nullius*).[76] In contrast, Voet[77] made a differentiation between things that are susceptible to private or public ownership on the one hand, and things that are not susceptible to any form of ownership rights.

3.2.3.3.1 *Res in commercio*

Due to the different Roman-Dutch scholarly opinions, Van der Merwe[78] suggests that when the category of *res in commercio* is discussed, the discussion should focus on things that are susceptible to private property rights and that fall within commerce. Things that fall within commerce can be sub-categorised into further categories. The first categorisation is made between things that belong to someone (*res alicuius*) and things that are susceptible to ownership, but which do not in a particular moment in time belong to a specific person (*res nullius*).[79] In turn, Van der Merwe[80] argues that in the case of *res in commercio* one can differentiate between things that belong to private individuals (*res singulorum*) and things that belong to judicial or legal persons (*res universitates*).[81] Examples of *res universitates* included *inter alia* markets, theatres, guildhalls, churches and churchyards or cemeteries that belonged to local

74 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 42.
75 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 42.
76 Grotius therefore moved away from the traditional Roman law distinction between *res publicae* on the one hand and things belonging to corporate bodies (*res universitates*) on the other. Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 42, 43; Van der Vyver "The Ètatisation of Public Property" 275.
77 Van der Merwe *Sakereg* 29; Voet *Commentarius ad Pandectas* 1.8.9.
78 Van der Merwe *Sakereg* 28.
79 Van der Merwe *Sakereg* 29; Van der Vyver "The Ètatisation of Public Property" 276-277.
80 Van der Merwe *Sakereg* 28-29.
81 The latter categorisation is important to understand how the VOC became the "owner" of land at the Cape, and should therefore be briefly elaborated upon.

cities, state or other authorities as corporate bodies.[82] *Res universitates* can, however, only be classified as being *res in commercio* if one accepts the fact that the state and its divisions can be regarded as judicial persons and that the judicial person in question has the capacity to either own property in its private- or in its public capacity. It is imperative to differentiate between things that belong to the state in its public capacity to serve a specific public purpose (*res publicae*)[83] and things that belong to the state as a judicial person in a private capacity. Only the latter can, according to Van der Merwe, be regarded as *res universitates in commercio* (in commerce).[84]

In contrast, Voet[85] regarded *res universitates* as *res extra commercium* (being out of commerce). In fact, certain authorities regard things belonging to a corporate body (*universitas*) to be public or essentially similar to public things that fall outside the sphere of private law.[86] If this categorisation of *res universitates extra commercium* is accepted, a distinction should be made between juristic persons that are recognised by public law (such as municipalities or other state institutions) and juristic persons of private law (such as companies and banks) that hold property. According to Badenhorst *et al*,[87] there is no reason why the holding of property by the latter class of juristic persons should not be regarded as falling within the sphere of private law, and depending on the nature and function of the thing in question, why the former cannot hold property as a private law owner.

3.2.3.3.2 *Res extra commercium*

For present purposes, the most relevant examples of things of *res extra commercium* (things that cannot be privately owned or are out of commerce) are *res omnium communes* and *res publicae.* From this classification it is clear that the law acknowledges the existence of property that fulfils the needs of the public and not only

82 De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.1.16; Voet *Commentarius ad Pandectas* 1.8.1.
83 *Res publicae,* which serves a specific public purpose, is rather regarded as *res extra commercium;* Van der Merwe *Sakereg* 29.
84 Van der Merwe *Sakereg* 28-29.
85 Voet *Commentarius ad Pandectas* 1.8.10.
86 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 29.
87 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 29-30.

the individual through private ownership.[88] As indicated in chapter 2.4.3 above, *res omnium communes* are common things and the use thereof is available to all. In terms of Roman law, the air, flowing water, the sea and seashore were regarded as typical examples of common things.[89] All individuals therefore had the right of access and use of these common things.[90] In line with the Roman law, Roman-Dutch scholars such as Grotius,[91] Voet[92] and Van Leeuwen[93] described the air, flowing water and the sea as common things. However, the Roman-Dutch scholars did not agree with the Roman law categorisation or status of the seashore.[94] The majority Roman-Dutch scholars, including Grotius, Groenewegen and Van Leeuwen, argued that the seashore should be regarded as *regalia* (the crown's property), and should rather be categorised as public things (*res publicae*).[95]

Res publicae are things that belong to the state (although not in private ownership), but which are nevertheless dedicated and available to the use of the general public.[96] In Roman-Dutch law, harbours, public rivers, public roads and public buildings were typical examples of *res publicae.*[97] It seems as if the view of the majority of Roman-Dutch scholars was transplanted into South African property law. It is for example indicated below[98] that in terms of the *Seashore Act* 21 of 1935, the sea and seashore were regarded as public property belonging to the State President as "public owner".

3.2.3.4 Conclusion

Since the Dutch occupation of the Cape of Good Hope, Roman-Dutch private law regulated the acquisition, protection and transfer of private property. The discussion above shows that property in private law generally has two different meanings, namely

88 Adopted from the uses or functions of *res extra commercium* in Roman law. See for example Kaser *Roman Private Law* 80-81.
89 I 2.1.1; D 1.8.2.1.
90 Van der Merwe *Sakereg* 30.
91 De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.1.17.
92 Voet *Commentarius ad Pandectas* 1.8.3.
93 Van Leeuwen *Rooms-Hollandsch Regt* 2.1.11.
94 De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.1.17, 21; Voet *Commentarius ad Pandectas* 1.8.3; Van Leeuwen *Rooms-Hollandsch Regt* 2.1.11.
95 De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.1.15; Van der Merwe *Sakereg* 30.
96 Van der Merwe *Sakereg* 31.
97 De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.1.24-25, 21; Voet *Commentarius ad Pandectas* 1.8.8; Van Leeuwen *Rooms-Hollandsch Regt* 2.1.12.
98 See section 3.2.4.3 below.

the legal relationship between a person and an object (a right in a legal object) and the object to which the right relates. It was indicated that scholars of the Roman-Dutch private law tradition preferred to conceptualise property as a legal relationship between persons and corporeal things. The legal relationship was typically characterised by ownership and other real rights. Ownership epitomised the most comprehensive real right in property.[99] On the other hand, it was indicated that in the case of property as the object of the relationship between persons and things, one can differentiate between objects or things that are susceptible to private property rights (*res in commercio*), while others, due to their nature and function, fall outside commerce.

3.2.4 Property and the British influence

3.2.4.1 Introduction

The rule of the VOC ended in September 1795 with the British conquest of the Cape.[100] However, the VOC's system of administration of justice, based on the Roman-Dutch law was maintained by the British through the *Proclamation* of 11 October 1795.[101] Accordingly, the legal regime in which land was owned in the Cape remained as it was under the Dutch rule.[102] After a brief interval of Dutch rule between 1803 and 1806, the Cape was once again taken over by the British in 1806.[103] From 1806 onwards,[104] the Government, administration and the judicial organisation were re-shaped along English law lines.[105] The strong Roman-Dutch law character of the South African law of property could not resist influences from English law in total. The discussion below

99 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 58.

100 Currie and De Waal *The Bill of Rights Handbook* 532; Hahlo and Kahn *The South African Legal System and its Background* 567-575.

101 De Waal 1999 http://www.ejcl.org/33/art33-1.html

102 Milton "Ownership" 664.

103 Humby, Kotzé and Du Plessis (eds) *Introduction to Law and Legal Skills in South Africa* 104; Van der Walt *Die Ontwikkeling van Houerskap* 437-438.

104 Since 1825, the societal character of the Cape changed drastically with the arrival of about 5000 British settlers. Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 98.

105 For example, the British law of evidence, the English mercantile law and jury system were introduced at the Cape. Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 99.

however shows that the private law foundation of the Roman and Roman-Dutch law property concepts remained strong and relevant in South Africa despite the English law influence. The South African property law has only been influenced to a limited extent by English law.[106] The discussion is divided into two parts. The first part focuses on English law influences on private property, while the second part examines to what extent the concept of public property (*res publicae*) was still recognised and applied in South Africa after the British occupation.

3.2.4.2 Private property

3.2.4.2.1 The Cradock Proclamation

In the Proclamation of 6 August 1813, Sir John Cradock introduced a new form of land tenure in the Cape Colony that, according to him, was more suitable to the growing prosperity of the Colony, namely that of perpetual quitrent.[107] According to Cradock, the existing land tenure system did not provide sufficient legal certainty to its holders. He therefore introduced a more formal land tenure system. The preamble of the Proclamation announced that agriculture, which was essential for the prosperity of the Colony, would be encouraged if "all improvements to the soil" belonged to the holder as his own and are exclusively secured to him and his heirs.[108] Milton argues that although the Proclamation did not specify it explicitly, the characterisation of this new tenure suggests that the intention was to confer the entitlements usually associated with the Roman-Dutch law concept of *dominium plenum* ("full ownership") upon the grantee in return for an annual rent to the Government.[109] This legal development indicates that the Government intended to create a form of tenure that was free from the controls of Government associated with the *leeningsplaatsen, leenings eigendom,* and *erfpacht* tenures under the Dutch rule.[110] Milton[111] argues that the Government offered "perfect title to lands" that enabled the holder to hold the land hereditarily and to do with the property as he or she thought proper. The holder was entitled to sell or

106 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 7.
107 Lewis *Water Law Its Development in the Union of South Africa* 4; Miller and Pope *Land Title in South Africa* 6; Milton "Ownership" 665.
108 Milton "Ownership" 665.
109 Milton "Ownership" 665-666.
110 Milton "Ownership" 666.
111 Milton "Ownership" 666.

alienate the property after informing Government.[112] As indicated, the holder was only required to pay an annual rent for this "irrevocable title".[113] It appears that one of the English law influences on the South African law of property was the development of a new form of land tenure, namely perpetual quitrent.[114]

For nearly sixty years officials at the Cape implemented the Proclamation of Sir Cradock without any clarity as to the exact legal rights and duties obtained by holders of land under this tenure.[115] It was only in the Cape Supreme Court case of *De Villiers v Cape Divisional Council* in 1874[116] and the appeal case of *Divisional Council of the Cape Division v De Villiers* in 1877,[117] that the nature of the tenure of Cradock's Proclamation was clarified. The judgments indicated that the Proclamation's land tenure system created a form of ownership that was similar to Grotius' concept of absolute, exclusive, full ownership that were reflected in the VOC's initial grants of land.[118]

3.2.4.2.2 The content and scope of land ownership

The land tenure system introduced in 1813 by the Cradock Proclamation gradually changed the existing attitude towards land ownership in South Africa. The older idea that applied under the Dutch rule in terms of which landholders enjoyed only such rights that were granted to them by the Company (VOC),[119] was eventually replaced by the idea that landholders were entitled to certain incidents of enjoyment of the land as "natural rights" of ownership to property.[120] The concept of a "natural right" of land ownership was derived from and influenced by the English law.[121]

The development of the concept of a "natural right" of landownership developed in England as a result of the Industrial Revolution. This development was regarded as a

112 Milton "Ownership" 666.
113 Milton "Ownership" 666.
114 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 7.
115 Milton "Ownership" 667.
116 *De Villiers v Cape Divisional Council* 1874 5 Buch pages [50, 62].
117 *Divisional Council of the Cape Division v De Villiers* 1877 2 (AC) page [567].
118 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 54; Milton "Ownership" 668.
119 See chapter 3.2.3.2 above.
120 Milton "Ownership" 671.
121 Hall *The Origin and Development of Water Rights in South Africa* 29; Milton "Ownership" 670.

transformation of the English law of land ownership.[122] Where land was in the earlier rural society of England valued for its fertility according to the physical nature of soil and water, it became valued for industrial activities in the urban and industrial society.[123] Due to the Industrial Revolution, landowners' expectations regarding the use of land (and natural resources attached to land), progressively changed to provide for industrial or mechanical needs.[124] These expectations of property owners received legal recognition in the form of "natural rights to ownership",[125] which were introduced from English law to the South African property. In line with this, ownership can be described with reference to the different expectations, entitlements or powers of ownership.[126] Although it is impossible to compile an exhaustive list of entitlements of ownership, the different expectations, entitlements or powers cast some light on the fact that ownership potentially conferred the most comprehensive control over a thing, such as land.[127] Some of the entitlements included *inter alia* the entitlement to use a thing (*ius utendi*), the entitlement to the fruits, including the income of a thing (*ius fruendi*), the entitlement to consume and destroy a thing (*ius abutendi*) and the entitlement to possess a thing (*ius possidendi*).[128] According to this understanding, ownership in South Africa conferred the most comprehensive or complete control over a thing, and meant that the right of ownership entitled the owner to do with his or her things as he or she thought fit.[129] This understanding is acceptable in light of the very first clear definition[130] of the concept of ownership that was later laid down in the South African case law in *Johannesburg Municipal Council v Rand Townships Registrar*.[131] The viewpoint was held that:

> Dominium is the unrestricted and exclusive control which a person has over a thing. In as much as the owner has the full control, he also has the power to part with so much of his control as he pleases. Once the owner, however, he remains such until he has parted with all his rights of ownership over the thing.

122 Milton "Ownership" 670.
123 Milton "Ownership" 671.
124 Subsequent to the Revolution, the private property system for example enabled a property owner to dam and control flowing water found on his or her land to drive his or her machinery. Milton "Ownership" 671.
125 Milton "Ownership" 671.
126 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92.
127 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92.
128 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92-93.
129 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 91.
130 Van der Walt *Die Ontwikkeling van Houerskap* 453.
131 *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD para [1314, 1319].

It is therefore safe to submit that the Roman and Roman-Dutch law with their private law character remained the key drivers of South African property law. This submission is supported if cognisance is taken of the fact that, in *Union Government v Marais*,[132] the court explicitly referred back to the Roman law and held that an owner is allowed to enjoy the normal use of his or her property. This is also the foundation on which the judgment of *Prinsloo v Shaw*[133] rests. The court held that a resident in a town is entitled to the "ordinary comfort and convenience of his home".[134] In light of these interpretations of ownership that allows for a comprehensive right to use one's property, one can argue that the concept of ownership in South Africa continued to be characterised by the Roman and Roman-Dutch private property law principles of exclusive and absolute use.[135] This understanding of ownership prevailed for years. In fact, years later, in the case of *Gien v Gien*,[136] ownership was defined as the most comprehensive real right that a person can have in respect of a thing. The point of departure was that a person could, in respect of immovable property, do with and on his or her property as he or she pleased.

The South African concept of ownership was therefore interpreted as an "individualistic" and "absolute" right.[137] Whereas the notion of "individuality" referred to the idea that the owner had exclusive control over the thing in question, the "absoluteness" of ownership implied that ownership was, in principle, an unrestricted right.[138] The idea of "absolutism" is reflected in the Roman law maxims of *superficies solo cedit* and *cuius est solum eius est usque ad inferos et ad coelom.*[139] The former maxim means that buildings erected on immovable property form part of the land and is therefore the property of the landowner, while the latter refers to the fact that the

132 *Union Government v Marais* 1920 AD par [240, 246].
133 *Prinsloo v Shaw* 1938 AD par [570, 575]; Van der Walt 1988 *De Jure* (vervolg) 325.
134 *Prinsloo v Shaw* 1938 AD par [570, 575].
135 Van der Walt 1988 *De Jure* (vervolg) 323; Van der Walt 2001 *The South African Law Journal* 271.
136 The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he or she pleases. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 91; *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and others* 3215/06 2007 74 (ZAFSHC) par [74]; *Gien v Gien* 1979 2 SA 1113 (T) par [1120].
137 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92.
138 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92; Maine *Ancient Law*.
139 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92.

legal rights of a landowner extend over the surface of land, the space above the land and the soil below.[140]

3.2.4.2.2.1 Ownership of the space above and below the surface

It is uncertain whether the Accursian Gloss or Roman law maxim of *cuius est solum eius est usque ad inferos et ad coelum* was applied in the Roman-Dutch law.[141] Pienaar,[142] however, argues that the maxim was adopted by English law in the sixteenth century and eventually applied in South Africa under the English rule.[143] The *cuius est solum*-maxim postulated land as a three-dimensional unit.[144] The three-dimensional unit referred to the legal rights of an owner over his land that extended over the surface of land, the space above the land, and the soil below.[145] In terms of the *cuius est solum*-maxim, the land owner owned all that was on the surface, below, or the space above his or her land. As becomes clear from the case of *London and SA Exploration Company v Rouliot,*[146] the maxim emerged as a defining element of the concept of land ownership in South Africa when De Villiers CJ stated that "the theory of the law is that the owner of land owns upwards to the skies and downwards to the centre of the earth..." This principle naturally has implications for the natural rights attached to land ownership because every land owner has the ability to freely use the space above or below his or her land. Notably, the *cuius est solum*-principle generally had limiting effects on neighbouring owners' natural rights to their property. A neighbour could, for example, use his or her land for industrial purposes and produce smoke, effluents or wastes that are either released into the atmosphere or disposed of on a waste dump. Scholars[147] argue that the complexities of harmonising the uses of neighbouring landowners were managed under the doctrine of "nuisance". Scholars[148] hold that "nuisance", in the sphere of neighbour relations, has been

140 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92.
141 Thompson *Water Law a Practical Approach to Resource Management & the Provision of Services* 27.
142 Pienaar 1989 *THRHR* 216, 220.
143 Milton "Ownership" 671; Van der Merwe *Sakereg* 31.
144 Milton "Ownership" 671.
145 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 92.
146 *London and SA Exploration Company v Rouliot* 1891 SC at par [91].
147 Milton "Ownership" 671.
148 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111.

imported into the South African property law from English law.[149] This doctrine of "nuisance" leads to the important question of possible limitations to ownership rights.

3.2.4.2.2.2 Limitations imposed on ownership

The scope of the right of ownership could, as a result of English law influences, be restricted by numerous limitations imposed by the law. Limitations were divided into three categories, namely restrictions imposed in the interest of neighbour relations; public law limitations and individual restrictions that were imposed in a particular or specific case.

The first category of limitations imposed on ownership includes restrictions imposed in the interest of neighbour relations. As indicated above,[150] scholars[151] hold that "nuisance", in the sphere of neighbour relations, has been imported into the South African property law from English law.[152] In fact, Van der Merwe[153] argues that the English law of nuisance was formally introduced into South African property law through case law.[154] In the context of neighbour relations, the notion includes conduct whereby a neighbour's health, well-being or comfort in the occupation of his or her land is interfered with.[155] Through the notion of nuisance, an owner's entitlement to use his or her land is restricted by the fact that neighbours have similar rights of use of their own land that must be respected.[156] The influence of "nuisance" in South Africa is evident from the judgment of *Van der Westhuizen v Du Toit.*[157] The court obliged, and therefore restricted, the property owner in question to refrain from causing any nuisance when he or she exercises his or her use rights to property. The Appellate Division in *Regal v African Superslate (Pty) Ltd* (Regal-case),[158] however, rejected the view that the English law of nuisance had been incorporated into the South African law. The court in the Regal-case held that disputes in the field of the law of neighbours

149 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111.
150 See section 3.2.4.2.2.1 above.
151 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111.
152 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111; Van der Walt *The Law of Neighbours* 4.
153 Van der Merwe *Sakereg* 185.
154 See *Holland v Scott* 1882 2 (EDC) par [307].
155 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111.
156 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111.
157 *Van der Westhuizen v Du Toit* 1912 CPD para [184, 190].
158 *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A).

had to be solved with reference to South African common law, which comprises of Roman and Roman-Dutch law.[159] The common law provides for neighbour relations by means of real remedies, each providing use and enjoyment rights to a neighbouring property owner. Examples of this include *inter alia* the *actio negatoria,*[160] the *actio finium regundorum,*[161] the *actio aquae pluviae arcendae*,[162] the *cautio damni infecti*,[163] the *operis novi nuntiato*,[164] the *interdictum quod vi aut clam*,[165] the *interdictum de arboribus caedendis*[166] and the *interdictum de glande legenda.*[167] It therefore seems as if there is uncertainty regarding the legal foundation of neighbour relations in South Africa. Van der Merwe[168] argues that the South African law of neighbours is not exclusively founded on one legal system. He argues that neighbour law is rather founded on rules and principles that were derived from Roman, Roman-Dutch as well as English legal rules.[169]

This submission is supported if cognisance is taken of the fact that the more recent judgment of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*[170] held that the Regal-case, with its reference to the Roman and Roman-Dutch law, did not necessarily "outlaw" all the neighbour law references to English law. Rather, it affirmed that South

159 *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) para [106E-G, 115A, 120C-E].

160 This Roman-Dutch law action was a remedy by which an owner of immovable property could prevent interference with his or her property rights by prohibiting his or her neighbour from engaging in a kind of activity on the defendant's property which constituted the exercise of a servitude in respect of the plaintiff's property. Milton "Ownership" 680.

161 The *action finium regundorum* was a remedy for encroachment cases. It functioned as a declaratory order to confirm the position of boundaries. Van der Walt *The Law of Neighbours* 137.

162 The action *actio aquae pluviae arcendae* rests upon the principles that one has a right to do any acts for the improvement of benefit of his or her own land to the prejudice of his neighbour. The *actio aquae pluviae arcendae* was confined to instances of potential damage caused by surface rain water. Van der Merwe "Neighbour Law" 766.

163 The *cautio damni infecti* enabled a neighbour to lodge a formal protest against the potentially harmful condition of existing structures or excavations on neighbouring property. Van der Merwe "Neighbour Law" 773.

164 D.39.1; A protest or warning against a new work.

165 The *interdictum quod vi aut clam* was a proprietary remedy and had been applied to drainage conflicts. Van der Walt *The Law of Neighbours* 208.

166 The Law of the Twelve Tables provided that a landowner whose property was affected could request a pruning of the overhanging branches. If this request was not complied with, he or she could employ the *interdictum de arboribus caedendis.* Mousourakis *Fundamentals of Roman Private Law* 153-154.

167 If the fruits of a plant or tree fell on adjoining land, the owner of the plant or tree was allowed to collect his or her fruit every second day. These rights could be enforced by the *interdictum de glande legenda.* Mousourakis *Fundamentals of Roman Private Law* 154.

168 Van der Merwe *Sakereg* 185. See also Van der Walt *The Law of Neighbours* 2.

169 Van der Merwe *Sakereg* 185.

170 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 1 SA 350 (T) at para [371 E-F].

Africa's neighbour law consists of numerous propriety and delictual rules that were derived from Roman, Roman-Dutch as well as English legal rules.[171] De Villiers J in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* argued that the Regal-case did not prohibit the use or reference to English law, but held that the Roman and Roman Dutch law authorities should first be considered when a dispute in neighbour relations arises. Van der Merwe[172] provides a possible justification for the legal plurality of South Africa's neighbour laws. He argues that both the Roman, Roman-Dutch and English legal system's neighbour laws are all based on the same ancient rule, namely the doctrine of *sic utere tuo ut alienum non laedas.*[173]

Apart from the notion of nuisance within the field of neighbour relations that limited the content and scope of ownership rights under the British rule, a second category of ownership rights-limitations should be noted. The second category included public law limitations.[174] As understanding of the detrimental impact of land-use practices on neighbouring landowners and the public in general developed, public law limitations or restrictions emerged.[175] Public law limitations were imposed by the state on all owners of a particular kind of property for the benefit of the society as a whole (or in the interest of a certain section of the society).[176] In the pre-constitutional era, the state regulated the land tenure system of South Africa by numerous legislative measures.[177] State regulation has been obvious in the control of environmental pollution in cities or towns. The pursuit of public health control also resulted in control measures administered by governmental bodies. Public law limitations further resulted from extensive pollution control measures in respect of the air, water, waste, noise and radiation.[178] Chapter 3.2.5 indicates how and to what extent limitations were imposed or supported by the Apartheid Government.

171 Van der Merwe *Sakereg* 185.
172 Van der Merwe *Sakereg* 185.
173 *Holland v Scott* 1882 2 (EDC) par [307]; Van der Merwe *Sakereg* 185.
174 The wide variety of restrictions imposed by public law, make an extensive discussion of the various restrictions impossible within the limited scope of this chapter.
175 Rabie "The Impact of Environmental Conservation on Land Ownership" 289.
176 Rabie "The Impact of Environmental Conservation on Land Ownership" 289.
177 See Kleyn and Boraine *Silberberg and Schoeman's The Law of Property* 165-168 for a brief consideration of public law limitations in terms of the *Subdivision of Agricultural Land Act* 70 of 1970 and *The Advertising on Roads and Ribbon Development Act* 21 of 1940.
178 Rabie "The Impact of Environmental Conservation on Land Ownership" 289.

In terms of the third and last category, some property rights limitations were imposed individually. Chapter 2.4.2.1 above indicated that individual restrictions can be imposed on an owner for the benefit of a third party. For example, an owners' exercise of his or her ownership rights could be limited when a limited real right in respect of a thing is vested in a third person (*res in re aliena*).[179]

3.2.4.2.3 Concluding remarks

Subsequent to the introduction of a new land tenure system by the Cradock Proclamation of 1813, landholders were entitled to certain incidents of use and enjoyment as "natural rights" of land ownership. Although the Proclamation did not specify it explicitly, the characterisation of this new tenure suggested that the intention was to confer entitlements to the Roman-Dutch law concept of *dominium plenum* ("full ownership") upon the grantee.[180] According to this understanding, ownership conferred the most comprehensive or complete control over a thing.[181]

It should, however, be acknowledged that, together with the existing common law, the English law notion of "nuisance" influenced the concept of ownership in South Africa in the sphere of neighbour relations. Not only the English law, but also the Roman law provided for neighbour law principles that were incorporated into the South African property law. The exclusivity and absoluteness ascribed to the common law property concept of ownership was influenced and restricted by the notion of "nuisance". This understanding of ownership prevailed for years. In fact, years later, in the case of *Gien v Gien,*[182] ownership was defined as:

> Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas. [...] Geen eienaar het dus altyd 'n onbeperkte bevoegdheid om na vrye welbehae en goeddunke sy eiendomsbevoegdhede ten aansien van sy eiendom uit te oefen nie.[183]

179 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 95.
180 Milton "Ownership" 665-666.
181 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 91.
182 *Gien v Gien* 1979 2 SA 1113 (T) par [1120].
183 The quotation from the case law can be translated as: "The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is

Although the British influence on the South African concept of private property cannot be denied,[184] this quote affirms that the Roman and Roman-Dutch law principles of exclusive and absolute use of private property remained the foundation of private property.

3.2.4.3 Public property

3.2.4.3.1 Judicial interpretation of public property

In contrast with the private law concept of ownership,[185] case law indicates that the Roman-Dutch law concept of public property was also entertained in South Africa subsequent to the British occupation. The reader's attention is drawn to two particular cases where the notion was discussed. The first is the case of *Hornby v Municipality of Roodepoort* (Hornby-case).[186] In the Hornby case, the owners of a farm established a township. They entered into an agreement with the Government in terms of which the landowners bounded themselves to transfer to the Government a number of stands “for public offices and public purposes”. One of these stands was marked and designated by the Surveyor-General as a “square”.[187] The Court's analysis of the legal nature of this "square" should be examined to clarify certain principles relating to the content and meaning of the Roman-Dutch law concept of public property or *res publicae.*

From the facts of the Hornby case, it is evident that the Town Council (municipality) effectively exercised control over a portion of the town square in the sense that it has built paths around it, planted trees in it, and erected a drinking fountain.[188] It is further evident that various buildings were erected facing the square. Some of the buildings,

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that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law. [...] Thus an owner does not always have an unlimited power to use his property in free comfort or convenience.”

184 The British influence is evident from the latter half of the quotation, in terms of which certain limitations or restrictions can be imposed on a property owner to limit the content and scope of exclusionary and absolute rights.

185 Van der Walt 1995 *SAPR/PL* 299.

186 *Hornby v Municipality of Roodepoort* 1918 AD page [286].

187 *Hornby v Municipality of Roodepoort* 1918 AD page [278].

188 *Hornby v Municipality of Roodepoort* 1918 AD page [280].

however, encroached upon the square. The plaintiff in this present case contended that the defendant (the Town Council) had an obligation to remove buildings that had been erected on a part of the town square and to keep the town square open for the public.[189] He held that this duty was imposed on the Town Council by section 59 of Ordinance 9 of 1912. Section 59 provides that a Municipal Council shall have the control and management of all squares and open places for the benefit of the public:[190]

> [...] which have been, or shall be at any time set apart and appropriated by proper authority for the use and benefit of the public, or to which the inhabitants of the municipality shall at any time have or acquire a common right; and the same shall be vested in the Council in trust to keep the same open for the use and benefit of the inhabitants.

In the Trial Court, the defendants (the Municipal Council) argued that the town square was crown land, and did not vest in the Council. Alternatively, they held that the portion of the town square on which the buildings had been erected was not set apart and appropriated by a proper authority for the use and benefit of the public.[191] The question before the court was whether the town square was *res publica* in the sense that the public had a "right of user" and not merely the property of the state.[192] The court decided that the square "had not been set apart and appropriated to the use of the public; that it was crown land held by the state for such public purposes as might determine, but not held as *res publica* for the benefit of the inhabitants generally".[193] The court therefore held that the Town Council has no duty to remove the buildings erected on the town square. The plaintiff appealed against this decision.

The appellant's case was based solely on the Ordinance of 1912. He held that the town square has been set apart and appropriated for the use and benefit of the public; and within the meaning of section 59 of the Ordinance, the square vested in the municipality in trust to be kept open.[194] The appellant claimed that the municipality should be ordered to carry out the trust and to remove the said buildings from the town square. On the other hand, the respondents contended that the square is not vested

189 *Hornby v Municipality of Roodepoort* 1918 AD pages [279- 280].
190 *Hornby v Municipality of Roodepoort* 1918 AD page [278].
191 *Hornby v Municipality of Roodepoort* 1918 AD page [280].
192 *Hornby v Municipality of Roodepoort* 1918 AD page [281].
193 *Hornby v Municipality of Roodepoort* 1918 AD page [286].
194 *Hornby v Municipality of Roodepoort* 1918 AD page [286].

in the Town Council, nor under its control, but rather crown land to which inhabitants of the town has no common right.[195] In his judgment, Innes CJ[196] held that, in order to apply section 59 of the Ordinance, the public must have a "common right of user" in respect of the square. The fact that the original owner had originally demarcated the area as a square and had filed a town plan on which the square figured, would have been conclusive evidence that he meant to confer upon the public a right to use it as such.[197] However, as the property was transferred to the state, the court had to decide whether and to what extent that position was affected by the transfer. Innes CJ held that the area in question was demarcated as a square, similarly described in the deed, and was transferred to the state as such.[198] He therefore adopted the view that the piece of land so described was intended for the use of the public. In fact, he held that when the ground was transferred as a square, it established the intention on the part of both parties to confer certain rights upon the public.[199] Innes CJ submitted:

> [T]he effect of the transfer was to constitute President Square [the square in question] an open space which the inhabitants had a right to use as a square, but which the State might at any time devote in whole or in part to public offices or public purposes. And that being so the public have a common right of user in regard to it which brings it within the statutory definition and consequently within the enacting provisions of sec. 59. It is vested in the council [town council or municipality], therefore, within the meaning of the Ordinance and is under its control, but subject always to the rights of the Government.

Both Innes CJ and Solomon JA accordingly held that although the square is now vested in the Town Council, it does not entitle the appellant to the relief claimed.[200] It is accepted that the square fell within the terms of section 59 of the Ordinance, and therefore under the control and management of the city council in trust (subject to the exercise by the Government of its proprietary rights). In terms of the trust, the city council is obliged to keep the square open for the use and benefit of the inhabitants of the town, but it imposed no duty on the Council to remove encroachments as contended by the appellant.[201] The property (town square) in this instance is therefore held as *res publicae*, because use rights and enjoyment thereof are available to satisfy

195 *Hornby v Municipality of Roodepoort* 1918 AD page [279].
196 *Hornby v Municipality of Roodepoort* 1918 AD page [286].
197 *Hornby v Municipality of Roodepoort* 1918 AD page [287].
198 *Hornby v Municipality of Roodepoort* 1918 AD page [287-288].
199 *Hornby v Municipality of Roodepoort* 1918 AD page [288].
200 *Hornby v Municipality of Roodepoort* 1918 AD page [289].
201 *Hornby v Municipality of Roodepoort* 1918 AD page [279].

the needs of the inhabitants of a town.[202] It can from the case law be submitted that the legal title and use of *res publicae* are separated; the title vests in the Town Council, while the use rights vest in the public.

Van der Walt v Rex[203] further sheds light on the application of the notion of *res publicae* in South African law. In this case the accused (a policeman) was convicted of counts of theft after he appropriated bags of cement and barbed wire which was left over after he had constructed a reservoir and fence for the South African Government at the police station. In the Court of first instance, the accused was found guilty on the charge of having misapplied public property in terms of section 38(33) of the Regulations published in *Government Notice* 790 of 1932 in *Government Gazette* of the 17th of June 1932.[204] Section 38(33) of the Regulations stipulates:[205]

> [S]tealing, withholding, misapplying, making unauthorised use of, losing by neglect or willfully injuring any public property or any property belonging to any other policemen, or to any police hand, mess, canteen, library, fund, club or other police institute; or any property belonging to a prisoner or other person in custody; or any found or unclaimed property or any exhibits in a criminal case.

On appeal, the accused raised the defence that the quoted *public property* Regulation in terms of which he was convicted, did not apply to the *privately owned* property (cement and barbed wire) of the Government that he appropriated.[206] In determining whether or not the abovementioned Regulations applied to the privately owned property of the Government, the Court distinguished between "Government property" or "state property" and "public property".[207] Bok J submitted that "public property" should in the South African law be understood as "property common to all of the people of the state", but reiterated that the present case was not concerned with things of which the use was common to all people of the country, but rather with things which were "capable of being stolen or lost through neglect of policemen".[208] The question was therefore whether the latter things could be regarded as public property within the meaning of the Regulation. The court scrutinised the Regulation and concluded that it

202 *Hornby v Municipality of Roodepoort* 1918 AD par [286].
203 *Van der Walt v Rex* 1939 GW 52 pages [53-55].
204 GN 790 in GG of 17 June 1932.
205 *Van der Walt v Rex* 1939 GW 52 pages [53-54].
206 *Van der Walt v Rex* 1939 GW 52 page [54].
207 *Van der Walt v Rex* 1939 GW 52 page [54].
208 *Van der Walt v Rex* 1939 GW 52 page [54].

was initially formulated to "regulate the care, safe custody and maintenance of arms, equipment, etc." that were placed in custody of a policeman in the ordinary course of his or her work.[209] The Regulation was specifically designed to render punishable breaches of duty in respect of such property.[210] Property that could generally be placed in the custody of a member of the Police Force would include "Government property" or "state property" such as arms, equipment, office furniture, and even certain categories of "private property" such as prisoners' property.[211]

The court contended that the notion of "public property" had a wider meaning than "Government property" or "state property". Bok J indicated that all state property could be public property, but there might be public property that could not be regarded state property.[212] Public property should therefore be understood as property that is common to all of the people of the state and should not be confused with property privately owned by the state.

Van der Vyver[213] holds that the juridical disposition of *res publicae* in earlier South African case law has focused largely on the state's competence in respect of the seashore and the public's entitlements with regard to perennial rivers. The discussion below therefore explores the relevance of *res publicae* with specific reference to case law that dealt with the sea, seashore and perennial rivers.

3.2.4.3.2 The seashore

As already indicated,[214] the seashore was regarded as *res omnium communes* in Roman law, with the implication that the use and enjoyment of the seashore were open to all. In contrast, Roman-Dutch scholars such as Grotius, Groenewegen and Van Leeuwen argued that the seashore should be regarded as *Regalia* (the crown's property), and should rather be categorised as public things (*res publicae*).[215] Due to

209 *Van der Walt v Rex* 1939 GW 52 page [55].
210 *Van der Walt v Rex* 1939 GW 52 page [55].
211 *Van der Walt v Rex* 1939 GW 52 page [55].
212 In light of the above views, the court dismissed the appellant's argument and held that the appropriated bags of cement and barbed wire were indeed public property (*res publicae*) within the meaning of the Regulation. *Van der Walt v Rex* 1939 GW 52 par [54-56].
213 Van der Vyver "The Ètatisation of Public Property" 287.
214 See chapter 2.4.3.2 above.
215 De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.1.15; Van der Merwe *Sakereg* 30.

the Roman-Dutch influences on the South African property law, the seashore came to be regarded as *res publicae.* In *Anderson & Murison v Colonial Government*,[216] the court indicated the implications of this and differentiated between *res publicae* and private state-owned property. In this matter, a ship was wrecked on Dassen Island, where after the ship-wreck and its cargo were sold to the applicants. The applicants attempted to remove and recover the cargo that had been washed ashore on the island, but were stopped by Government officials, who denied the applicants access to crown land above the high-water mark. The court held that the Government could indeed regulate access to state-owned land to, for example, protect sea birds during the breeding season. On the other hand, the court held that the Government could not prevent free access of any member of the public to the seashore (the land between the low-water and high-water mark)[217] since the seashore was *res publicae.*[218] De Villiers CJ held:[219]

> No doubt the Government are, in one sense, the custodians of the seashore, but they are such only on behalf of the public. They may, as Voet (1. 8. 9) points out, grant permission to individuals to build upon the seashore, and without such permission no one is at liberty so to build; but that permission is, I take it, subject to the condition that the rights of the public shall not be interfered with.

In light of this statement of De Villiers CJ, it was unclear where the ownership or legal title of the seashore as *res publicae* vested; what the nature and extent of the public's entitlements in respect of the seashore were and whether or not private individuals could acquire private ownership in the seashore. These questions were addressed in *Surveyor-General (Cape) v Estate de Villiers* 1923 AD 588 and *Consolidated Diamond Mines v Administrator, SWA*[220] respectively. In *Surveyor-General (Cape) v Estate de Villiers* 1923 AD*,* the appellant experienced difficulties in registering certain stands following the subdivision of land.[221] According to the initial grant to land issued in 1818, the land was described as extending "South East to the sea coast," and contained a condition that "the right of fishing shall be free as heretofore and the strand itself quite

216 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [293].
217 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [296].
218 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [293].
219 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [296-297].
220 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A); Van der Vyver "The Ètatisation of Public Property" 292.
221 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD par [588].

open to the public."[222] However, since the initial grant to land had been made, the Government altered the beachfront alongside the land in question through artificial constructions to *inter alia* protect the coastal railway line against exceptional high tides of the sea.[223] As a result of the constructions, the stands in question did not extend to the seashore. However, the stand's south-eastern borders did cross the high-water mark that existed at the time of the original grant in land. The Surveyor-General argued that the condition that the "right of fishing shall be free..." should hence be stipulated in the title deeds of the stands. Innes CJ[224] submitted that being a portion of the *Regalia*, the seashore must be regarded as the property of the crown.[225] He held that the seashore does not fall under the category of *res nullius*, but that the dominium of the beach must vest in someone, and in Innes' opinion, in the crown (currently the state).[226] On the question of the extent and nature of the public's rights or entitlements to the seashore, Innes CJ did not provide a clear answer, but assumed that the public had rights in respect of the beach for purposes of bathing and swimming. Kotzé JA, however, provided a clearer view and referred to the public's "right of free access and the legitimate use of the seashore."[227]

The state's competence to grant rights in respect of the seashore to private individuals came before the Appellate Division in *Consolidated Diamond Mines v Administrator, SWA.*[228] Fagan CJ summarised the legal position as he perceived it to be:

> It will be sufficient for my present purpose to say that I bear in mind that the public have certain simple rights to the foreshore such as to go onto it, to bathe, to fish, to dry nets and draw up boats; that any substantial interference with those rights would be a wrongful act…; but that I deduce from the authorities that the state may make a grant of special rights to corporations or private individuals to do more than simple acts of the nature I have indicated, to the extent even of alienation, 'subject to the proviso that it was not to prejudice the public welfare'.

In the above judgments, the courts confirmed that the legal title of *res publicae* vests in the state. The public has common-law entitlements in the use and enjoyment

222 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD par [588].
223 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD par [589].
224 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD para [593-594].
225 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD par [594].
226 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD par [594].
227 *Surveyor-General (Cape) v Estate de Villiers* 1923 AD par [623].
228 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) par [621-622]; Van der Vyver "The Ètatisation of Public Property" 292.

thereof. The competence of the state, as "public owner", to grant rights to private persons in respect of the seashore was also confirmed. It was along these lines that the judicial disposition of the seashore and the sea was laid down by the South African Parliament in the *Seashore Act* 21 of 1935. The long-title of the 1935 *Seashore Act* stipulated the intention:

> [t]o declare the State President to be the owner of the seashore and the sea within the territorial waters of the Republic; and to provide for the grant of rights in respect of the seashore and the sea, and for the alienation of portions of the seashore and the sea and for matters incidental thereto.

The legislature's formal declaration of ownership of the seashore and the sea enabled the state to grant use rights in the state-owned land not only to the public, but also to private individuals for the exploitation of *inter alia* minerals, precious stones, coal and oil.[229]

Notably, the promulgation of the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (NEM:ICMA) recently re-affirmed the public property status of coastal property.[230] The ownership of coastal public property hence vests in the citizens of the Republic of South Africa, and coastal public property is held in trust by the state on behalf of the citizens of the Republic.[231] The implications of this are, *inter alia,* that the state, in its capacity as public trustee of coastal public property, must ensure that coastal public property is used, managed, protected, conserved and enhanced in the interest of the whole community.[232] Access rights to coastal public property are regulated in terms of sections 8, 10 and 13 of the NEM:ICMA.

229 As owner, the state did not have to consider the public's common-law entitlements to the seashore and sea when the private rights were allocated. Van der Vyver "The Ètatisation of Public Property" 294.

230 Section 2(c) of the NEM:ICMA. Coastal public property consists of *inter alia* the seashore. Section 7(d) of the NEM:ICMA.

231 Section 11(1) of the NEM:ICMA.

232 Section 12(a) of the NEM:ICMA.

3.2.4.3.3 Perennial rivers

Perennial rivers is another category of things that were classified as *res publicae* in pre-constitutional South Africa. In *Butgereit & another v Transvaal Canoe Club*,[233] the right of canoeists to paddle along a perennial river was in question. The subject matter before court was whether restrictions imposed by the *Water Act* 54 of 1956 in the use of the river removed or destroyed the common-law entitlement or use rights of the public in respect of the perennial river.[234] Restrictions provided by the *Water Act* 54 of 1956 included "the control, conservation and use of water in a public stream for domestic, agricultural, urban and industrial purposes."[235] It was held in *Butgereit & another v Transvaal Canoe Club,*[236] that these restrictions did not destroy the common-law entitlement of the public in respect of the rivers. Therefore, save for the extent to which the public's common-law rights in respect of *res publicae* have been restricted by those in power, the entitlement of members of the public to the use and enjoyment of such objects remained intact.

The examples of the seashore, sea and perennial rivers as things classified as *res publicae* show that state-imposed restrictions on public property have indeed been a common practice in the South African law, but that the common-law entitlements of the public to use the *res publicae* remained unchanged.

3.2.4.3.4 Concluding remarks

Despite the fact that property has mainly been interpreted from a private law perspective in South African law, the above discussion showed that the concept of public property has been acknowledged and entertained in South Africa during British rule. It is further possible to identify at least six generic features of the concept of public property or *res publicae* under the British administration.

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233 *Butgereit & another v Transvaal Canoe Club* 1988 1 SA 759 (A); *Transvaal Canoe Union v Butgereit & another* 1986 (4) SA 207 (T).

234 *Butgereit & another v Transvaal Canoe Club* 1988 1 SA 759 (A).

235 Section 164 of *Water Act* 54 of 1956 further sanctioned the regulation of water sports by members of the public. For the sake of nature conservation, fishing in inland waters has also been subjected to restrictions. See for example chapter 5 of the *Nature and Environmental Conservation Ordinance* 15 of 1974; chapter 3 of the *Nature Conservation Ordinance* 8 of 1969.

236 *Butgereit & another v Transvaal Canoe Club* 1988 1 SA 759 (A) par [770-771].

As is evident from the discussed case law, the "function" or designation of property is an important indicator that can be used to characterise property as public.[237] If property serves a private function, it is categorised under *res in commercio.* In order to be categorised as *res publicae,* the function of the property in question will typically entail that it promotes the public interest or fulfils certain needs of a given society.[238] Property that serves such a public function generally includes *inter alia* town squares, public roads, beaches and water. Secondly, as indicated in the discussions of the cases of *Surveyor-General (Cape) v Estate de Villiers* 1923 AD and *Consolidated Diamond Mines v Administrator, SWA*,[239] the legal title of public property vests in the state. However, the state does not hold the property in the same title as property that is for sale (private property).[240] Reference was for example made to the judgment of *Anderson & Murison v Colonial Government*[241] wherein De Villiers CJ brought to the fore the idea that the state is the custodian of the seashore on behalf of the public. In the third instance, it was indicated that the state can not deprive the public of its common-law entitlements to the use and enjoyment of *res publicae*. It falls within the competence of the state (as "public owner") to regulate access to and use of *res publicae.* This fourth submission should be understood against the example posed above of the state's competence to restrict the access of the public to protect sea birds during their breeding season.[242] This feature is generically true for all forms of public property, as the state, in its capacity as owner, must take whatever measures if considered necessary to conserve and protect public property for present and future generations.[243] Fifthly, the example of legislation (the *Seashore Act* 21 of 1935) that "declare" property as being public,[244] indicates the importance of legislation in the characterisation of property as public property. In the last instance, as indicated in the long title of the 1935 *Seashore Act,* which provided for the grant of rights in respect of the seashore and sea, the state, as "public owner", has the competence to grant rights

237 See chapter 3.2.4.3.1 above; Habdas *TSAR* 626.
238 See chapters 2.4.4 and 3.2.4.3.1 above; Habdas *TSAR* 637.
239 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A); Van der Vyver "The Ètatisation of Public Property" 292.
240 Habdas *TSAR* 628.
241 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [296-297].
242 See chapter 3.2.4.3.2 above.
243 See for example section 12(b) of the NEM:ICMA.
244 Van der Walt 2008 *Stell LR* 325.

in respect to *res publicae* to private individuals. It is against this background that the concept of public trusteeship, as entrenched in the NWA, is evaluated below.[245]

3.2.5 The influence of Apartheid

Ever since South Africa was unified into the Union of South Africa as a self-governing *dominium* of the British Empire in the year 1910, the established property concepts were progressively and regrettably utilised as a tool promoting discriminatory practices.[246] Land, and as a result of the *cuius est solum*-maxim that was applied, the water[247] and minerals[248] found above and/or below the land, generally became the property of the white minority. An acceleration of discrimination progressively affected the rights of the black majority of South Africans, particularly with regard to their rights to land,[249] when the National Party (NP) came to power in 1948 and ultimately when the NP formally introduced the system of Apartheid.[250] From this point in time, the Apartheid regime vigorously developed through the promulgation of legislation. The development is particularly clear in property legislation that dealt with private and public property. For example, by means of the *Group Areas Act*,[251] South Africa was categorised into various race-based regions, leading to forced removals and evictions

245 See chapter 4.3.3 below.

246 The constitutional structure of the Union was consequently re-modelled according to the British legal system, which included the principle of a sovereign legislature. The *Union of South Africa Act* of 1909 united the post Boer War British and Afrikaans communities, and excluded black South Africans from political involvement. The sovereign parliament therefore represented only a minority of South Africans. The unified South Africa, with its "white-controlled parliament" further stimulated the development of the South African property law along the lines of discriminatory practices. Discriminatory property law measures included the *Natives Land Act* 27 of 1913 (which reflected the policy of the *Report of the Natives Affairs Commission* of 1905, namely to restrict Natives to acquire land). On its turn, the *Development Trust and Land Act* 18 of 1936 prevented Africans to own land in their own right. These statutes ignored the property rights of the majority of South Africans even before the formal introduction of the Apartheid regime. *Deeds Registry Act* 47 of 1937; Humby, Kotzé and Du Plessis (eds) *Introduction to Law and Legal Skills in South Africa* 25, 108; Mostert 2002 *The South African Law Journal* 401; Movik and De Jong 2011 *Law, Environment and Development Journal* 68; Tewari 2009 *Water SA* 702; *Union of South Africa Act* of 1909; Van der Walt 2008 *Stell LR* 325; Van Wyk and Oranje 2014 *Planning Theory* 352, 354.

247 Milton "Ownership" 672.

248 Van der Merwe *Sakereg* 190.

249 See for example the *Group Areas Act* 41 of 1950; Miller and Pope *Land Title in South Africa* 29, 31; Van der Walt 1995 *TSAR* 515.

250 Tewari 2009 *Water SA* 701; Van Wyk and Oranje 2014 *Planning Theory* 354.

251 *Group Areas Act* 41 of 1950. See also the *Bantu Homelands Citizenship Act* 26 of 197 and the *Bantu Homelands Constitution Act* 21 of 1971.

of black people from their land and homes.[252] The *Group Areas Development Act*[253] in turn excluded non-white people from living in white areas altogether.[254]

Similar discriminatory practices were present when it came to the public's use of public property. Local authorities were, for example, allowed to make regulations restricting the use of beaches only to specific races. The *Reservation of Separate Amenities Act*[255] authorised the creation of separate facilities for the different racial groups. One of the effects of this was that black people could not acquire use or access rights to the public property resources that were exclusively available to the whites. This lecacy has important implications for the context wherein property and related concepts, such as the concept of public trusteeship, should be interpreted today. The currently prevailing legal regime for example necessitates that results of past racial and gender discrimination must be redressed and that equitable access to opportunities and benefits of public property must be secured.[256]

During the 1980's, the opposition against Apartheid gained momentum.[257] The world's condemnation of the Apartheid regime[258] and the mounting civil disobedience[259] led to the demise of Apartheid, and eventually, the dawn of a new South Africa.[260]

252 Mabin 2007 *Journal of South African Studies* 405-429; Van der Walt 2001 *The South African Law Journal* 268; Van der Walt 2002 *SAJHR* 373.
253 *Group Areas Development Act* 69 of 1955.
254 Van der Walt 2001 *The South African Law Journal* 270.
255 *Reservation of Separate Amenities Act* 49 of 1953; *Reservation of Separate Amenities Amendment Act* 10 of 1960.
256 See section 2(b) and (c) of the NWA and section 2(d) of the NEM:ICMA.
257 Miller and Pope *Land Title in South Africa* 35.
258 Miller and Pope *Land Title in South Africa* 35; Coles 1993 *Boston College Environmental Affairs Law Review* 724; Van der Walt 2001 *The South African Law Journal* 279.
259 Miller and Pope *Land Title in South Africa* 35; Coles 1993 *Boston College Environmental Affairs Law Review* 724.
260 Miller and Pope *Land Title in South Africa* 38; Kleyn 1996 *SAPR/PL* 402; Van der Walt 2001 *The South African Law Journal* 279.

3.2.6 Concluding remarks: Property in pre-constitutional South Africa

As indicated already, the concept of property is difficult to define.[261] The pre-constitutional South African property concept followed the Roman and Roman-Dutch legal tradition in terms of which lawyers conceptualised property as a legal relationship between persons.[262] In this tradition, property was narrowly defined as the object of this relationship between persons and things.[263] Pienaar and Van der Schyff[264] argue that ownership founded in the Roman-Dutch legal tradition epitomised the most comprehensive and absolute real right in property. The property concept (in the form of ownership as a pivotal right in a private property regime) was to a limited extent influenced by the English law after the English occupation of the Cape. In the context of English law neighbour relations, an owner's entitlement to use his or her land was restricted in terms of the notion of nuisance.[265] Other limitations that affected the content and scope of ownership rights were public law limitations and individual restrictions.[266] Consequently, the comprehensive and absolute nature of ownership could be restricted.[267] However, it should be reiterated that, despite the English law influence, a private property regime founded on the Roman and Roman-Dutch law regulated the acquisition, protection and transfer of property in South Africa.

In contrast to the private law concept of property,[268] case law indicates that the Roman-Dutch law concept of public property was also entertained in South Africa. The case of *Hornby v Municipality of Roodepoort*[269] for example posited the argument that a town square is held as *res publicae* because use rights and enjoyment are available to satisfy the needs of the inhabitants of a town. The case further illustrated that the legal title and use of *res publicae* are separated to the extent that the title could vest in the Town Council, while the use rights vest in the public. In turn, the court in *Van*

261 See chapter 2.2 above.
262 A limited amount of incorporeals were eventually regarded as "things". Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188.
263 See chapter 3.2.3 above; Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188.
264 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 188.
265 See chapter 3.2.4.2.2.2 above.
266 See chapter 3.2.4.2.2.2 above.
267 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 111.
268 Van der Walt 1995 *SAPR/PL* 299.
269 *Hornby v Municipality of Roodepoort* 1918 AD par [286].

der Walt v Rex[270] distinguished between "Government property" or "state property" (which includes *inter alia* equipment and office furniture) and "public property".[271] The court held that "public property" has a wider meaning than "Government property" or "state property".[272] In fact, it was indicated that all state property could be public property, but there might be public property that could not be regarded state property.[273]

The juridical disposition of *res publicae* in pre-constitutional South African case law focused largely on the state's competence in respect of the seashore and the public's entitlements with regard to perennial rivers.[274] With regard to the seashore, the court in *Anderson & Murison v Colonial Government*[275] held that the Government could regulate access to state-owned land, but could not prevent free access of any member of the public to the seashore (the land between the low-water and high-water mark)[276] since the seashore is *res publicae.*[277] Notably, two of the implications of the seashore being *res publicae* are that the Government is the custodian of the seashore, and that the rights of the public are not to be interfered with.[278] Although the state is considered the custodian of the seashore, it is so only on behalf of the public.[279]

The development of both private- and public property in South Africa reached a low point during the Apartheid regime since the whole property regime was undermined. Apartheid resulted in severe racial discrimination *re* access and opportunities of the black majority of South Africans as becomes particularly clear from the limitation of the black majority's property rights to land.

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270 *Van der Walt v Rex* 1939 GW 52 pages [53-55].
271 *Van der Walt v Rex* 1939 GW 52 page [54].
272 *Van der Walt v Rex* 1939 GW 52 page [54].
273 In light of the above views, the court dismissed the appellant's argument and held that the appropriated bags of cement and barbed wire were indeed public property (*res publicae*) within the meaning of the Regulation. *Van der Walt v Rex* 1939 GW 52 par [54-56].
274 With regard to perennial rivers as *res publicae,* it was held in *Butgereit & another v Transvaal Canoe Club,* that restrictions imposed by the *Water Act* 54 of 1956, did not destroy the common-law entitlement of the public in respect of the rivers. *Butgereit & another v Transvaal Canoe Club* 1988 1 SA 759 (A) par [770-771].
275 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [293].
276 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [296].
277 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [293].
278 *Anderson & Murison v Colonial Government* 1891 8 (SC) par [296-297].
279 See chapter 3.2.4.3.2 above.

3.3 Constitutional perspectives on the concept of property

3.3.1 Constitutional reform

In 1991, the South African Government embarked on a process of negotiations with representatives of the non-white majority of South Africa to eradicate the system and legacy of Apartheid.[280] The goal of the negotiations was to develop a new Constitution that would promote *inter alia* the values of human dignity and to permit equitable access to resources for all South Africans.[281] The promulgation of the *Interim Constitution of South Africa* in 1993 (Interim Constitution)[282] was a ground-breaking step towards the construction of a non-Apartheid state and included a constitutional property clause that inevitably impacted the development of property in South Africa.[283] The constitutional property clause is contained in section 28 of the Interim Constitution.[284]

Van der Walt published extensively on the subject of section 28 of the Interim Constitution.[285] It is superfluous to repeat the discussion. It is, however, important for

280 Mostert 2002 *The South African Law Journal* 400; Van der Walt 1995 *TSAR* 518-519; Van der Walt 1995 *SAPR/PL* 299; Van der Walt 2008 *Stell LR* 326; Van Wyk and Oranje 2014 *Planning Theory* 352.

281 Coles 1993 *Boston College Environmental Affairs Law Review* 700; Kleyn 1996 *SAPR/PL* 402; Mostert 2002 *The South African Law Journal* 400; Van der Walt 1993 *SAPR/PL* 316-317; Van der Walt 1995 *South African Journal on Human Rights* 169; Van der Walt 2001 *The South African Law Journal* 258; Van der Walt 2004 *SAPR/PL* 47; Van der Walt 2008 *Stell LR* 326.

282 *Interim Constitution of the Republic of South Africa Act* 200 of 1993 (Interim or Transitional Constitution). Du Plessis *Re-Interpretation of Statutes* 141.

283 See Van der Walt 1993 *SAPR/PL* 296-319; Van der Walt 1994 *THRHR* 181; Van der Walt 2004 *SAPR/PL* 49; Van Wyk and Oranje 2014 *Planning Theory* 350.

284 Section 28 of the Interim Constitution stipulates:

> (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
>
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
>
> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

285 Van der Walt 1993 *SAPR/PL* 296-319; Van der Walt 1994 *THRHR* 181-203; Van der Walt 1995 *SAPR/PL* 299-345; Van der Walt 1995 *South African Journal on Human Rights* 169-209; Van der Walt 2002 *SAPR/PL* 258-278; Van der Walt 2004 *SAPR/PL* 46-89. In her scholarly work, Mostert has also published on the subject matter. See Mostert 2000 www.zaoerv.de/60_2000_1_a_295_330.pdf; Mostert *The Constitutional Protection and*

the present discussion to understand the constitutional transformation of the property concept. Van der Walt's viewpoints are therefore briefly outlined.

Van der Walt[286] investigates the phrase "rights in property" as used in section 28(1) to determine the meaning and scope of the concept of property in the Interim Constitution. He emphasises that the phrase "rights in property" should not be confused with the Roman law distinction between "rights in property" (*ius in rem*) and "rights to property" (*ius ad rem*) that applied only to corporeal things.[287] He holds that there was in fact no indication that the concept of property in the Interim Constitution should be restricted to corporeals alone.[288] In fact, he argues that section 28 guarantees property rights in a fairly wide manner.[289]

In his examination of exactly which interests may be classified as "rights in property", Van der Walt argues that there can be no doubt that ownership must be accepted as such a right in property.[290] When ownership is then described as a real right in property for purposes of the Interim Constitution, it does not change the ownership's common law, private-orientated character.[291] It merely indicates that the traditional concept of ownership forms part of the new, wider "conglomerate of rights collectively known as rights in property."[292] Parallel to ownership, limited real rights such as servitudes or real security rights[293] are also rights in property according to section 28(1).[294] Notably, the traditional interpretation of a real right excludes personal rights and rights that were not recognised in the past.[295] If this traditional approach was followed, constitutional protection would for example not be afforded to the rights of squatters for the undisturbed possession of their dwellings.[296] Such a view would have been

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Regulation of Property in South Africa and Germany 57-68; 85-86; Mostert 2002 *South African Law Journal* 400-428; Mostert 2003 *SAJHR* 567-592.

286 Van der Walt 1994 *THRHR* 191; Van der Walt 1995 *TSAR* 522; Van der Walt 1995 *South African Journal on Human Rights* 189.

287 Van der Walt 1995 *SAPR/PL* 307, 312-313.

288 Van der Walt 1995 *SAPR/PL* 312-313.

289 Van der Walt 1995 *SAPR/PL* 313.

290 Van der Walt 1995 *SAPR/PL* 313, 314.

291 Van der Walt 1995 *SAPR/PL* 301.

292 Van der Walt 1993 *SAPR/PL* 315; Van der Walt 1995 *SAPR/PL* 314.

293 See section 3.2.3.2 above.

294 Van der Walt 1995 *SAPR/PL* 316.

295 *Ex Parte Geldenhuys* 1926 (OPD) 155 par [164]; Van der Merwe *The Law of Things & Servitudes* 36-37; Van der Walt 1994 *THRHR* 193.

296 Mostert states that if only real rights were constitutionally protected, conflict would arise with the international notion of a wider property guarantee. See Mostert *The Constitutional Protection and*

unacceptable in the post-constitutional, transformative context of South Africa. Therefore, as with the concept of ownership, the private-law character of limited real rights remains unchanged, but forms part of a wider range of rights in property protected by the Interim Constitution. Other forms of property that qualified to be included in the category referred to as "rights in property" include *inter alia* lawful holdership, unlawful possession and common law land-use rights.[297]

In light of Van der Walt's account, it may be stated that the traditional private-law property concepts such as "things", "ownership" and "real rights" remain part of the constitutional property concept.[298] However, the constitutional concept is not limited to the traditional private law understanding of private property.[299] It may be submitted that with its reference to "rights in property", section 28 of the Interim Constitution introduced a concept of property that can be interpreted more widely than its pre-constitutional, private-law orientated counterpart.[300] It may therefore be stated that the Interim Constitution transformed the private law character of the South African property law.[301] Van der Walt[302] argues in this regard that the Interim Constitution "opens up new layers of meaning, in terms of which both public and private law can be reinterpreted or rewritten. In this view, the Interim Constitution creates public meaning for private law". This "wider understanding" of the traditional private law concept of property is one embodiment of the notion of transformative constitutionalism[303] in the property law sphere.[304] The wider understanding adds important value to the interpretation of the property concept of the *Constitution of the Republic of South Africa*, 1996 (the 1996 Constitution).

Regulation of Property in South Africa and Germany 197. See also *Diepsloot Resident's and Landowners Association v Administrator, Transvaal* 1993 1 SA 577 (T).

297 See section 3.2 above for examples of common law land-use rights.

298 Van der Walt 1993 *SAPR/PL* 315; Van der Walt 1995 *SAPR/PL* 314.

299 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 206.

300 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 205; Van der Walt 1995 *South African Journal on Human Rights* 189; Van der Walt 2004 *SAPR/PL* 49.

301 Van der Walt 1995 *SAPR/PL* 334; Van der Walt 2002 *SAPR/PL* 258.

302 Van der Walt 1995 *SAPR/PL* 334-335.

303 Transformative constitutionalism may in this context be defined as a long-term project of constitutional interpretation to transform South Africa's political and social institutions in a democratic and participatory direction. Klare 1998 *South African Journal on Human Rights* 146; Venter 2012 *McGill Law Journal* 722.

304 Van der Walt 2005 *TSAR* 656.

3.3.2 The property concept in terms of the Constitution

The Final Constitution came into effect on the 4th of February 1997. Section 25 of the Constitution protects property rights.[305] However, this section does not embody an unqualified positive guarantee of people's right to hold property.[306] It is rather a negative guarantee, which guarantees that property can only be interfered with when specific constitutional imperatives have been met.[307] The Constitutional Court held in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*[308] (The First Certification Case) that the negative property

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305 Section 25 of the Constitution reads:

(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

(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).

306 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 87; Van der Walt 1997 *SAPR/PL* 295-313; Van der Walt 2004 *SAPR/PL* 50.

307 Kleyn 1996 *SAPR/PL* 416; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 87; Van der Walt 1997 *SAPR/PL* 295-313.

308 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 10 BCLR 1253 (CC) para [71 and 72].

guarantee is appropriate to guarantee the right to property and that the "protection for the holding of property is implicit" to the negative guarantee of section 25.[309]

Although this section lists the constitutional requirements that should exist before a person can be deprived of property or before property can be expropriated, the notion or concept of "property" is not defined. The only guideline given in the section itself is that "property is not limited to land".[310] The discussion in section 3.3.1 above has already indicated that the meaning of "rights in property" in the Interim Constitution exceeds the traditional private law meaning of the concept. It is therefore necessary to determine what meaning can be attributed to the concept of constitutional property as provided for in the Final Constitution. The need to determine whether the particular use or access rights that might be acquired in terms of the NWA are regarded as property worthy of constitutional protection, speaks for itself in the context of this study.

3.3.2.1 The interpretive approach to the constitutional property clause

Legal interpretation[311] is a vast legal discipline and entails, amongst other aspects, the process of determining the meaning of a constitutional provision. Currie and De Waal[312] focus the scope of an enquiry into constitutional interpretation by stating that "the aim of interpretation is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision". Currie and De Waal's approach holds value for this chapter because, in the first instance, it underlines the need to determine the scope and meaning of the constitutional property clause (and its property concept); and secondly, to establish whether any law or conduct (such as property regulation), is consistent with the property clause or is constitutionally valid. This section is principally concerned with providing general principles or rules for constitutional interpretation. The general principles are applied in chapters 3.3.2.2 and 3.3.2.3 below to ascertain the meaning and scope of property

309 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 10 BCLR 1253 (CC) par [72]. See also Kleyn 1996 *SAPR/PL* 303; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 87-88; Van der Walt *The Constitutional Property Clause* 22.

310 See *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* 2015 6 SA 125 (CC) par [104].

311 Du Plessis *Re-Interpretation of Statutes* 134.

312 Currie and De Waal *The Bill of Rights Handbook* 145.

within the protective ambit of the Constitution[313] and to establish the constitutionality of the regulation of property in terms of section 25.[314]

In one of the Constitutional Court's most influential judgments, that of *S v Makwanyane*,[315] the court laid out the basic interpretive framework in terms of which each provision of the Bill of Rights must be interpreted. Scholars often refer to this interpretive framework as the "purposive approach".[316] According to Du Plessis,[317] the objective of a purposive approach in constitutional interpretation is to give effect to the underlying policy, object and purpose of the particular provision. Zimmerman[318] describes the purposive approach to constitutional interpretation as "nuanced, context-orientated and court driven". In terms of the purposive approach, no constitutional provision can be construed in isolation, but should be interpreted in context.[319] The context *inter alia* includes reference to the history and background leading to the adoption of the Constitution, other provisions in the Constitution and, in particular, the provisions of the Bill of Rights.[320] Zimmerman[321] scrutinises numerous contextual elements that might arguably inform the courts' purposive interpretation of the constitutional property clause. From her analysis, it is possible to briefly outline the contextual elements within which the constitutional property clause must be interpreted. These include aspects of constitutional foundational values; other relevant socio-economic rights to the extent that these relate to property rights; and the interpretive guidelines of the property clause itself.[322]

Section 39 of the Constitution provides the point of departure for the Constitutional Court's purposive approach towards the interpretation of the property clause. Section 39 stipulates that when a court, tribunal or forum must interpret the Bill of Rights, it

313 See chapter 3.3.2.2 below; See also Van der Walt 1994 *THRHR* 185-195.
314 See chapter 3.3.2.3 below; See also Van der Walt 1994 *THRHR* 185-195.
315 *S v Makwanyane* 1995 3 SA 391 (CC) par [403G].
316 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 524; Du Plessis *Re-Interpretation of Statutes* 96-97, 118-119; *DVB Behuising (Pty) Ltd V North West Provincial Government* 2000 4 BCLR 347 (CC) par [17]; Zimmerman 2005 *SALJ* 388.
317 Du Plessis *Re-Interpretation of Statutes* 96-97, 118-119.
318 Zimmerman 2005 *South African Law Journal* 388.
319 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 524.
320 *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* 2015 6 SA 125 (CC) para [103, 115]; Zimmerman 2005 *South African Law Journal* 388.
321 Zimmerman 2005 *South African Law Journal* 389-401.
322 Zimmerman 2005 *South African Law Journal* 389-401.

"must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law".[323] Section 1 of the Constitution provides constitutional values when it stipulates that the Republic of South Africa is one, sovereign, democratic state founded on the values of *inter alia* human dignity, the achievement of equality, the advancement of human rights and freedoms, supremacy of the Constitution and the rule of law.[324] The Constitutional Court in *Government of the Republic of South Africa v Grootboom*[325] (*Grootboom*-case) and *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue* (*FNB*-case)[326] interpreted these values. The court in the *Grootboom*-case stated that:[327]

> [t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.

The *FNB* judgment applied the said values to formulate an aim of interpretation as follows:[328]

> ...to 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 [and I would add 'and control'] of entrenched constitutional values.

It must be noted that the purposive approach does not only demand that a provision must be interpreted within the greater context of the values of the Constitution, but also that it is interpreted considering other rights, including the socio-economic rights entrenched in the Bill of Rights.[329] The Constitutional Court heard various cases

323 It is held that the focus on constitutional property to date has been the comparative functions of foreign law, rather than the international law. Van der Walt argues the value of an examination of foreign law and states that such an examination may provide different approaches, arguments, tendencies and trends that may assist in constitutional interpretation. Van der Walt *The Constitutional Property Clause* 6.

324 See Venter "The Rule of Law as a Global Norm for Constitutionalism" 91-104; Venter 2001 *PER* 33-44.

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

326 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue* 2002 7 BCLR 702 (CC) par [52].

327 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par [23].

328 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue* 2002 7 BCLR 702 (CC) at par [52].

329 *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* 2015 6 SA 125 (CC) par [42]; Zimmerman 2005 *South African Law Journal* 388, 395-397.

involving socio-economic rights.[330] These include cases on claims relating to *inter alia* the right to housing as outlined in section 26, and the rights to sufficient food, water, health care and social security stipulated in section 27.[331] In some of these cases, the court was confronted with potential conflicts between various socio-economic rights, such as the right of access to housing and education, and the right to property in terms of section 25 of the Constitution.[332] As early as 2011, the *Grootboom*-case provided an important interpretive guideline for the interpretation of the constitutional property clause when other socio-economic rights are concerned. Yacoob J stated that "[t]he right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights".[333] In *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others*[334] the Constitutional Court was confronted with a potential conflict between the right to property under section 25(1) and the right of access to basic education.[335] The court had to consider a challenge to an order evicting a public school from privately owned land.[336] If the court had read the constitutional property clause without having regard for the context provided by section 29, it would have impeded on the realisation of basic human rights.[337] The court however found that, on the one hand, there is a duty not to impair children's right to access to basic education; but on the other hand, it simultaneously enforced the right to private property under the constitutional property clause.[338] As the court was satisfied that alternative arrangements for the placement of the children for the 2011 school year had been made and that the learners' right to a basic education would be protected, the court granted a final eviction order on 11 December 2010. Ginsburg and Dixon hence submitted that the inclusion of socio-economic rights

330 See for example *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC); *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC); *Bengewenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC); *Machele v Mailula* 2009 8 BCLR 767 (CC); *Mazibuko v The City of Johannesburg and Others* 2010 3 BCLR 239 (CC).
331 Currie and De Waal *The Bill of Rights Handbook* 567.
332 Ginsburg and Dixon 2011 *Constitutional Court Review* 3.
333 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par [24].
334 *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* 2011 8 BCLR 761 (CC).
335 As provided for by section 29 of the Constitution.
336 *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* 2011 8 BCLR 761 (CC).
337 Ginsburg and Dixon 2011 *Constitutional Court Review* 3.
338 *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* 2011 8 BCLR 761 (CC).

in the Constitution undeniably prevents an "overly expansive reading"[339] of the right to property. Zimmerman therefore accurately holds that socio-economic rights "contribute to the backdrop" against which the court must view all fundamental rights, including the right of section 25.[340]

Interpretive guidelines for the purposive approach are determined by the constitutional property clause itself. Section 25 does not only protect private property against impermissible infringements (sections 25(1)-(3)),[341] but it also brings about transformation of existing patterns of private property (sections 25(4)-(9)).[342] The constitutional property clause therefore has a dual function, namely a protective and reformative function.[343] This dual function highlights that a justifiable and equitable balance must be sought between individuals and the social interest.[344] Thus, in the context of finding a justifiable and equitable balance between individual and social interests when section 25 is interpreted, it is necessary to examine the meaning and scope of the constitutional property concept.[345]

3.3.2.2 The meaning and scope of property within the protective framework of section 25

Section 25 of the Constitution does not contain a comprehensive definition of property. The interpretation clause, section 25(4), only indicates that "property is not limited to land". It is therefore up to the judiciary to determine the constitutional meaning and scope of property in terms of the Constitution.[346] As indicated above, courts adopted the purposive approach to interpret the Constitution. The same applies to interpreting a particular term or phrase within a constitutional provision. Therefore, whenever courts endeavour to attach meaning to a particular concept or notion, it should in the first instance be kept in mind that section 39 of the Constitution requires that when a

339 Ginsburg and Dixon 2011 *Constitutional Court Review* 5.
340 Zimmerman 2005 *South African Law Journal* 396.
341 Van der Walt 2001 *The South African Law Journal* 282.
342 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 521; Van der Walt 2001 *The South African Law Journal* 282.
343 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 524.
344 Van der Walt 2004 *SAPR/PL* 53.
345 Van der Walt *The Constitutional Property Clause* 53.
346 Ackerman J stated in *FNB* par 55 that the court needs to determine whether "that which is taken away...amount to property for the purpose of section 25?"; Van der Walt 1997 *SAPR/PL* 277.

court, tribunal or forum interprets the Bill of Rights, it “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Secondly, cognisance should be taken of the close relationship that exists between socio-economic rights; and that the constitutional property clause itself provides valuable interpretive guidelines that may guide the process of interpretation.

Although it is practically impossible to prescribe a *numerus clausus* of the kinds of property that would or should be protected by the constitutional property clause,[347] it is possible within the broader framework of this chapter to provide a number of examples of interests that we know enjoy constitutional protection. It should be emphasised, however, that the categorisation of a particular interest as “constitutional property”, would not magically elevate such an interest to a category of pre-existing recognised “traditional” property interests. The recognition and protection of traditional property interests in private law (or public law) differs from their recognition and protection in constitutional law. Where private law protection aims to secure “property-rule type protection for private rights against competing private parties”, constitutional recognition and protection provides “Bill of Rights-type protection” for private interests against the state and against competing constitutional interests of other parties.[348]

Van der Walt groups several examples of interests that enjoy constitutional protection under three main themes.[349] The first group of examples involves the “easiest cases”, or the cases that are relatively easy to identify as falling within the protective scope of section 25. The second group concerns rights to incorporeal property, while the third group involves slightly more "difficult instances", which involve non-contractual debts and claims (new property).[350]

347 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue* 2002 7 BCLR 702 (CC) par [54].
348 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168.
349 The typology was originally developed by Van der Walt. See Van der Walt *The Constitutional Property Clause* 63-66.
350 Van der Walt *The Constitutional Property Clause* 63-66.

3.3.2.2.1 Immovable and movable corporeal property

The first group of interests, where the property question hardly needs to be answered or discussed, includes immovable and movable corporeal property. Section 25(4) of the Constitution for example provides that "property is not limited to land". It can from this be deduced that land (as an immovable, corporeal object of property) forms part, but is not exclusive, to the constitutional property definition.[351] In addition to land, Van der Walt[352] adds “permanent attachments to land” as qualifying for constitutional protection. The two examples of land and permanent attachments to land are two legal objects that may be regarded as property. Notably, as indicated above,[353] property may refer to “objects” as well as “rights”. It is therefore submitted that not only the referred objects of immovable property, but also ownership rights in movable property will fall within the ambit of protection of the Constitution.[354] Murphy[355] is of the view that an unqualified right to property in a Bill of Rights opens constitutional protection to an indefinite number of incidents of ownership. Van der Walt,[356] however, limits the scope of constitutional property to “rights that are demonstrably vested in the claimant and that have some patrimonial value”. Badenhorst, Pienaar and Mostert[357] argue that the minimum requirement for an interest to qualify as constitutional property is that it must have vested in the claimant. They also argue, in support of Van der Walt’s view,[358] that the interest must have some kind of patrimonial value. In light of these proposed requirements, the first group of interests that may qualify for constitutional protection includes certain rights in land, permanent attachments to land, as well as movable corporeal property.[359]

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351 Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany A Comparative Analysis* 201; Roux “Property” 46-10; Van der Walt 2004 *SAPR/PL* 51; *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* 2015 6 SA 125 (CC) par [104].

352 Van der Walt *The Constitutional Property Clause* 63.

353 See chapter 3.2.3 above.

354 See Van der Walt 1993 *SAPR/PL* 315; Van der Walt 1995 *SAPR/PL* 314; Van der Walt 2004 *SAPR/PL* 59.

355 Murphy 1993 *THRHR* 628; Kleyn 1996 *SAPR/PL* 419.

356 Van der Walt *Constitutional Property Clauses* 353.

357 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* 11.

358 Van der Walt *Constitutional Property Clauses* 353.

359 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* 536; Van der Walt *The Constitutional Property Clause* 63-64; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 201; Van der Walt 2004 *SAPR/PL* 59; *Zondi v MEC for Traditional and Local Government Affairs* 2004 5 BCLR 547 N par [556D-E].

3.3.2.2.2 Incorporeal property

The second group of interests that qualify for constitutional protection concerns property rights. Van der Walt[360] argues that the party who relies on the protection of the constitutional property clause will have to prove the existence of the right and argue the reasons why the right in question should enjoy constitutional property protection. Van der Walt argues that immaterial property such as copyrights, patents and trademarks will be constitutionally protected, provided that the party who relies on constitutional protection proves the existence of the right.[361] The Constitutional Court has to date recognised certain intellectual property rights[362] and this position has been widely accepted by South African scholars.[363] Another form of incorporeal property that may technically enjoy constitutional protection is a commercial right that is based on contract, such as shares in a company.[364] It is also possible to add to this list of rights land-use rights that are based on contract, a court order or legislation.[365]

3.3.2.2.3 New property

The interests of the third group are all based on public-law participation claims against the state.[366] They include welfare rights (such as pensions, medical benefits and unemployment benefits) and forms of state "largesse" (such as licenses, permits and the use of public resources issued by the state).[367] These rights may be referred to as "new property"; a term that originated in American law.[368] Badenhorst *et al*[369] hold that there may be a less urgent need to acknowledge these types of participation rights as

360 Van der Walt *The Constitutional Property Clause* 64.
361 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 538; Van der Walt 2004 *SAPR/PL* 52.
362 *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International* 2006 1 SA 144 (CC) par [17].
363 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 323-332; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 201; Van der Walt 2004 *SAPR/PL* 52; Van der Walt and Shay 2014 *PER* 57.
364 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 201.
365 Van der Walt *The Constitutional Property Clause* 64.
366 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 11; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 202; Van der Walt *The Constitutional Property Clause* 65.
367 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 539; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 202.
368 Reich 1964 *The Yale Journal* 733.
369 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 11.

property, since they are to a large extent already protected by the socio-economic rights in the Bill of Rights. Nevertheless, Van der Walt[370] indicates that the Transkei High Court[371] and the Constitutional Court[372] touched upon the question of whether the so-called "new property" interests qualify as property that is protected by section 25. In an *obiter dictum* of the Transkei-case, the court suggested that the answer might be affirmative.[373] Regrettably, neither of the said court cases answered the question authoritatively.[374] The legal reasoning in *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* 2015 6 SA 125 (CC) (*Shoprite*-case) however stimulated this discourse in property scholarship. The Constitutional Court *inter alia* had to determine whether Shoprite Checkers's liquor licences constituted property in terms of section 25 of the Constitution. The Constitutional Court presented three judgments in determining whether liquor licences constituted property under the constitutional property clause.[375] The judgment written by Madlanga J suggested that the focus should fall on the question of whether a liquor licence share the attributes of more traditional kinds of property. Madlanga J found that it did, because a liquor licence is more than a mere permission to do something that would otherwise be unlawful. Once a licence is granted, it brings into existence an enforceable personal incorporeal right.[376] Such rights are clearly definable and identifiable by persons other than the holder; have commercial value; are capable of being transferred under administrative approval; and are sufficiently permanent, in the sense that their holder is, in terms of administrative law, protected against arbitrary revocation thereof by the issuing

370 Van der Walt 2004 *SAPR/PL* 55.

371 *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (Tk) par [1246J-1247A].

372 *In re:KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; In re: Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 7 BCLR 903 (CC).

373 When section 25 of the Constitution is interpreted, one must have regard to the history of South Africa in relation to notions of property and to the property clause in the Constitution. If section 25 of the Constitution is interpreted against this backdrop, it is possible to include new property interests to constitutional protection.

374 Van der Walt 2004 *SAPR/PL* 55.

375 To determine whether or not a liquor licence should constitute property under the constitutional property clause, the main judgment focused on the potential of the said licence to further other constitutional rights. On the strength of the close correlation between the holding of a licence and the fundamental right to choose one's trade or vocation, the main judgment affirmed a liquor licence to be property. Although the dissenting judgment by Madlanga J agreed that the licence was property, it argued that the main judgement's focus on property's potential to further other rights, rather than on what property actually is, diminishes the stand-alone right to property so that "it does little more than ride on the coat-tails" of other rights. *Shoprite*-case para [42, 139].

376 A personal right that entitles the holder thereof to trade liquor in accordance with the conditions attached to the licence.

authority.[377] It was held that a licence granted by the state to a person or corporation which endures for as long as the recipient conducts itself in accordance with the conditions attached to the licence, and which entitles the recipient to invest substantial sums on the understanding that the relevant administrative functionary is precluded from arbitrarily revoking the licence, must be worthy of the protection afforded by section 25 of the Constitution. It was therefore confirmed by the majority judgment of the *Shoprite*-case that "new property" as the holding of a grocer's liquor licence constitutes property for the purposes of section 25 of the Constitution.

The *Shoprite*-case is of particular importance in order to establish whether water use rights in terms of the NWA can resort within this category of "new property" and therefore be constitutionally protected. Due to the corresponding or similar regulation of liquor sales and water uses respectively, the judgment of the *Shoprite*-case may hold important implications for the property status of water use rights within the water regulatory regime of South Africa. This aspect is considered in chapter 4.3 below.

3.3.2.3 The regulation of property

3.3.2.3.1 Regulation in terms of section 25

Section 7(3) of the Constitution provides that the rights in the Bill of Rights (and therefore also the section 25 property right) are not absolute or unrestricted, and that their constitutional protection are subject to certain limitations.[378] According to Van der Walt,[379] the limitation of a property right means that a particular regulation or restriction of property is allowed, subject to prescribed legal requirements. In light of the object of this study, namely to inform and develop the concept of public trusteeship, it is necessary to understand if, when and to what extent the Constitution authorises the state to limit existing property rights. The Constitution controls the limitation of property through a combination of the general limitation clause (section 36 of the Constitution)

377 A licence could only be withdrawn in specific circumstances or under certain prescribed conditions.
378 Van der Walt *The Constitutional Property Clause* 72.
379 Van der Walt *The Constitutional Property Clause* 72.

and the constitutional property clause (section 25 of the Constitution) through the concepts of deprivation and expropriation.[380]

3.3.2.3.1.1 Deprivation

Section 25(1) of the Constitution provides for the deprivation of property as a specific category of limiting or regulating property.[381] Section 25(1) stipulates that "[n]o one may be deprived of property except in terms of law or general application, and no law may permit arbitrary deprivation of property. The available literature[382] suggests that it is difficult to define deprivations without referring to the distinction between deprivations and expropriations; and for this reason the present examination that deals with deprivation mostly focuses on distinguishing the two terms from one another.

Scholars[383] argue that deprivation comprises a vast category of property rights limitations, and that this includes, although it is not limited to, the narrower category of expropriations. The Constitutional Court in the *FNB*-case[384] affirmed this understanding of the notion of deprivation when it stated:

> In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide genus of interference, "deprivation" would encompass all species thereof and "expropriation" would apply only to a narrower species of interference.

The wider category of deprivations includes expropriations. However, the two terms should be differentiated. In terms of the *FNB*-case, a deprivation requires a regulatory interference with the use, enjoyment or exploitation of property,[385] while expropriation

380 Van der Walt *The Constitutional Property Clause* 72-73. See *Expropriation Act* 63 of 1975; *Expropriation Bill*, 2015.

381 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's the Law of Property* 540; Mostert 2003 *SAJHR* 572; Van der Walt *The Constitutional Property Clause* 101.

382 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 540; Mostert 2003 *SAJHR* 573; Van der Walt *The Constitutional Property Clause* 102.

383 Mostert 2010 *The South African Law Journal* 242; Van der Walt *The Constitutional Property Clause* 102. See also *Minister of Transport v Du Toit* 2005 10 BCLR 964 (CC) par [968].

384 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 7 BCLR 702 (CC) para [57-61].

385 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 7 BCLR 702 (CC) par [57].

involves the state's "taking" or "acquisition" of the title or right in property.[386] It seems, however, as if the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) (Mkontwana-case), has set the qualifying threshold for deprivations slightly higher.[387] The Mkontwana-case refers to a *substantial interference* with the use, enjoyment and exploitation of property resultant from the state's police power.[388] Despite the fact that the "stricter qualifying criterion" (the Mkontwana-test) has been adopted by the courts, it seems as if the wider *FNB*-criterion is generally preferred.[389] The definition of deprivation therefore does not require a direct or physical interference with the property at hand, but rather involves the question of whether the use, enjoyment or exploitation of property has been diminished.[390] In light of the above, limitations that are imposed in terms of, for example, land-use planning regulations, building regulations or environmental conservation laws will amount to deprivations, and not expropriations, because none of the examples "takes the property away",[391] but rather "imposes certain controls, regulations and restrictions on the use and exploitation of the property".[392]

3.3.2.3.1.2 Expropriation

Section 25 of the Constitution does not only refer to the concept of deprivation as a category of limitations of property, but it also makes provision for a narrower concept. The narrower concept, that of expropriation, is provided for in sections 25(2) and 25(3) read with section 25(4) of the Constitution.[393] In order to differentiate between the wide

386 Van der Walt *The Constitutional Property Clause* 102.
387 Van der Walt and Shay 2014 *PER* 57.
388 *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) par [32].
389 See *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC).
390 *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) par [41]; Van der Walt and Shay 2014 *PER* 58.
391 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para [18, 21, 32, 34, 48, 56, 57, 63, 64, 67-69]; *Beckenstrated v Sand River Irrigation Board* 1964 4 SA 510 (T) [par 515 B and C].
392 Van der Walt *The Constitutional Property Clause* 102.
393 Van der Walt and Shay 2014 *PER* 63.

category of deprivation and the narrower expropriation, it is necessary to lay down the requirements that must be met before a deprivation can be categorised as an expropriation. The courts have in various instances provided guidelines to identify these requirements.[394] The first major case to rule on the constitutional property clause was the Constitutional Court case of *Harksen v Lane NO,*[395] wherein Goldstone J stated that expropriation is characterised by the acquisition of rights in property by a public authority for a public purpose.[396] Notably, the *FNB*-case,[397] and the High Court judgment in *Agri South Africa v Minister of Minerals and Energy and Another*,[398] affirmed the requirement of property acquisition by the expropriator.[399] Although scholars such as Marais differ,[400] the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy* (Agri SA) has since concretised the requirements for expropriation by distinguishing it from deprivation:[401]

> Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation. There is therefore more required to establish expropriation although there is an overlap and no bold line of demarcation between sections 25(1) and 25(2). Section 25(1) deals with all property and all deprivations, including expropriation, although additional requirements must be met for deprivation to rise to the level of expropriation.

In addition to the general requirements in section 36 and section 25(1)[402] that apply to a deprivation, the requirements for a constitutionally valid expropriation further include

394 See *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) par [12]; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) par [421]; *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (SCA).

395 *Harksen v Lane NO* 1998 1 SA 300 (CC); Van der Walt 2004 *SAPR/PL* 73.

396 Mostert 2003 *SAJHR* 575.

397 For example the *Harksen*-case held that expropriation and deprivation are mutually exclusive. The *FNB*-case changed the nature of enquiry by relegating the distinction between deprivation and expropriation to a later stage of the process of determining the validity of limitation of property. The logic of the *FNB*-case means that a) expropriation is not seen next to or separate from deprivation, but as it were through deprivation and b) that the Court will always investigate the presence of deprivation before expropriation. Van der Walt *Constitutional Property Law* 186.

398 *Agri South Africa v Minister of Minerals and Energy and Another* 2011 3 SA 296 (GNP).

399 *Agri South Africa v Minister of Minerals and Energy and Another* 2011 3 SA 296 (GNP) at par [57]; *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par [18].

400 Marais 2015 *PER* 2987.

401 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par [48].

402 See chapter 3.3.2.3.1.1 above; Mostert 2010 *The South African Law Journal* 242.

state acquisition of property in the public interest and it must always be accompanied by compensation.[403] If an expropriation satisfies the requirements laid down in section 25, it will be a justified and valid limitation of the property right in question. This means that the property holder will have to accept the result of the expropriation. On the other hand, however, expropriation is only valid if and insofar as it is justified in terms of the constitutional requirements. If a limitation fails to justify the constitutional requirements, it is an unconstitutional and therefore invalid infringement.[404]

3.3.2.3.2 The emergence of a stewardship concept

In the context of this study that focuses on water as natural resource, it is necessary to determine to what extent the section 24 environmental right in the Constitution regulates or qualifies any use rights that are acquired in natural resources. Section 24 affords everyone the right to an environment that is not harmful to his or her health or well-being[405] and to have the environment protected for the benefit of present and future generations.[406]

Scholars such as Currie, De Waal, Kotzé and Du Plessis[407] indicate that when section 24 is read with section 7(2) of the Constitution, the state incurs both negative and positive duties to respect, protect, promote and fulfil the environmental right. Section 24(b)(i)-(iii) for example lists a number of positive state obligations, namely to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development.

To date, judicial guidance in respect of interpreting and clarifying the content, meaning and scope of the state's obligations has been limited to a few court cases that directly engaged with the substantive meaning of section 24.[408] The court cases include, *inter alia, BP Southern Africa (Ltd) v MEC for Agriculture, Conservation and Land Affairs*

403 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par [17]; Mostert 2003 *SAJHR* 572-573; Mostert 2010 *The South African Law Journal* 242; Van der Walt 2004 *SAPR/PL* 74.
404 Van der Walt *Constitutional Property Clauses* 140.
405 Kotzé 2007 *Review of European, Comparative & International Environmental Law* 2010; Section 24(a) of the Constitution.
406 Section 24(b) of the Constitution.
407 Currie and De Waal *The Bill of Rights Handbook* 527; Kotzé and Du Plessis 2010 *Journal of Court Innovation* 158, 165.
408 Kotzé and Du Plessis 2010 *Journal of Court Innovation* 165.

(the BP-case),[409] *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* (the Fuel Retailers-case)[410] and *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (the HTF Developers-case).[411]

In the BP-case,[412] the applicant sought an order to set aside a decision of the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs (the Department) refusing the applicant's application for authorisation to develop a filling/petrol station on a property in a commercial area in Midrand. When it considered the application, the Department based its decision on various decision-making guidelines.[413] The Department accordingly applied the so-called "distance stipulation" in terms of which an application for a new filling station would generally not be approved if the proposed station is situated within three kilometres of an existing filling station in urban, built-up or residential areas. The applicant in the BP-case argued that the authority's mandate to make a decision was limited to a consideration of environmental issues and should exclude socio-economic considerations such as a "distance stipulation". On the other hand, the Department relied on *inter alia* section 24 of the Constitution to argue that its mandate extended to cover both environmental and socio-economic aspects. In the judgment of the BP-case, the Constitutional Court confirmed that environmental authorities have a constitutional duty to give effect to section 24 of the Constitution. The constitutional duty includes the "taking of reasonable legislative and other measures", such as the development and application of decision-making guidelines. The court furthermore analysed the importance of sustainable development and stated that:[414]

409 *BP Southern Africa (Ltd) v MEC for Agriculture, Conservation and Land Affairs* 2004 5 SA 124 (WLD).

410 *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 10 BCLR 1059 (CC).

411 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 5 SA 512 (T).

412 *BP Southern Africa (Ltd) v MEC for Agriculture, Conservation and Land Affairs* 2004 5 SA 124 (WLD).

413 Some guidelines were characterised as socio-economic, while others were of strict environmental nature. Kotzé and Du Plessis 2010 *Journal of Court Innovation* 170.

414 *BP Southern Africa (Ltd) v MEC for Agriculture, Conservation and Land Affairs* 2004 5 SA 124 (WLD) page[25].

> Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia,* socio-economic concerns and principles.

Therefore, apart from the inclusion of socio-economic factors in decision-making powers, the Constitutional Court in the BP-case confirmed that the environmental right of section 24 should be interpreted in the context of inter-generational environmental protection and within the context of sustainable development.[415] Comparable to the BP-case, the Constitutional Court in the Fuel Retailers-case dealt with the nature and scope of an environmental authority's obligation to consider the social, economic and environmental impact of the proposed establishment of a filling or petrol station. The court also confirmed that socio-economic development must be balanced against environmental protection[416] and provided insight into the notion of "sustainable development".[417]

Notably, the court in the HTF Developers-case interpreted the substantive meaning and scope of section 24 as conferring upon authorities a stewardship role, whereby "the present generation is constituted as the custodian or trustee of the environment for future generations".[418] This judgment brings to the fore possible incorporation of a "stewardship ethic of public trusteeship".[419] Van der Schyff[420] is a proponent of its incorporation in South African environmental law when she states that the philosophical notion that Governments exercise a fiduciary trust on behalf of their people and that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace, has been embodied in section

415 *BP Southern Africa (Ltd) v MEC for Agriculture, Conservation and Land Affairs* 2004 5 SA 124 (WLD) page [25]; Kotzé and Du Plessis 2010 *Journal of Court Innovation* 171.
416 *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 10 BCLR 1059 (CC) para [44-45].
417 Currie and De Waal *The Bill of Rights Handbook* 526-527; Kotzé and Du Plessis 2010 *Journal of Court Innovation* 174.
418 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 5 SA 512 (T) at par [19].
419 Van der Schyff 2013 *The South African Law Journal* 369.
420 Van der Schyff 2013 *The South African Law Journal* 369-389.

24. Although the notion, as incorporated into the South African water law framework is discussed in the subsequent chapter, this development might influence the regulation of property and even perhaps the property regime within which such resources are regulated.[421]

3.4 Concluding remarks

The objective of this analysis is to establish a South African property rights paradigm against which the statutorily introduced, public trusteeship-based property regime in water resources law can eventually be evaluated.[422] This chapter examined the pre- and post-constitutional concept of property in South Africa.

3.4.1 The pre-constitutional private property paradigm

The chapter commenced with a historical discussion of the legal context, development, forms and types of property in South African law. The discussion covered the property concept in four broad periods in South African legal history, namely the period prior to colonisation;[423] the period of Roman-Dutch rule spanning from 1652 to the beginning of the 19th century;[424] the colonial period under British control from 1806;[425] which was followed by Apartheid rule.[426] It was indicated that early African customary law did not acknowledge private ownership of land, but guaranteed to each tribe member a right to use to the communal land. It was therefore submitted that a form of communal ownership existed in the period prior to Dutch colonisation. This "communal regime" stands in stark contrast to the private property regime that developed in South Africa subsequent to the Dutch occupation.

421 Van der Schyff 2013 *The South African Law Journal* 373.
422 The chapter provides a lens through which the statutorily introduced public trusteeship-based property regime may eventually be measured in the sense that it *inter alia* provides a theoretical foundation of the legal context within which the South African concept of property continues to develop; provides clarity on the development of the content, meaning, types and forms of property; establishes the scope, content, meaning and forms of constitutional protected property in South Africa; and elucidates whether the South African property law provides for the concept of public property, and if so, what it entails.
423 See chapter 3.2.2 above.
424 See chapter 3.2.3 above.
425 See chapter 3.2.4 above.
426 See chapter 3.2.5 above.

The discussion on the development of property in the period following the Dutch occupation of the Cape of Good Hope in 1652 indicated that a strong Roman-Dutch private law tradition was introduced and applied in South Africa.[427] In fact, since the arrival of the Dutch, the private law regulated the acquisition, protection and transfer of private property. In terms of the Roman-Dutch private law tradition, lawyers conceptualised property as a legal relationship between persons and corporeal things, although incorporeals were also eventually included. Ownership epitomised the most comprehensive and absolute real right in property and was the source of all other limited real rights in the private property regime, except perhaps for some statutorily created limited real rights. As a comprehensive right,[428] ownership afforded property owners permission to do with their property whatever they pleased, as long as the use was not forbidden by law.[429] In addition to the conceptualisation of property as a legal relationship between persons and objects, the object of this legal relationship between persons and things was also regarded as property.[430] The Roman-Dutch law categorised different objects or things according to the role that it fulfils in society. The categorisation was based on Roman law and distinguished between *res intra commercium* and *res extra commercium*.[431] *Res in commercio* were things that fell within commerce and which were susceptible to private property rights. The most important examples of things of *res extra commercium* (things that could not be privately owned or are out of commerce) are *res omnium communes*[432] and *res publicae.*[433]

427 See chapters 3.2.3 to 3.2.4 above.
428 Notably, the incidents of ownership were discussed in chapter 2 above and included the right to possess (which includes the right to exclude), the right to use, the right to manage, the right to the income of a thing, the right to the capital, the right to security, the right to transmissibility and the absence of term, the duty to prevent harm, the liability of execution, and residuarity. See chapter 2.4.2.1 above.
429 See chapter 2.4.2.1 above.
430 See chapter 3.2.3 above.
431 See chapter 2.4.3.1 above.
432 As indicated in chapter 2.4.3 above, *res omnium communes* are common things and the use thereof is available to all. All individuals therefore had the right of access and use of these common things.
433 As indicated in chapter 2.4.4 above, the category of *res publicae* includes things that belong to the state (although not in private ownership) but which are nevertheless dedicated and available to the use of the general public.

The South African property regime was also influenced by English law. Notably however, despite the English law influences, the property regime remained private in character. The English law notion of "nuisance" restricted the comprehensive and absolute nature of ownership. In terms hereof, a property owner could still use his or her property as he thought fit, but was restricted to the extent that no harm is done to the property or property rights of the neighbour. The exclusive and absolute use ascribed to the property concept of ownership was therefore influenced and restricted by the notion of "nuisance".

Despite it not originating in English law, the Accursian Gloss' notion of *cuius est solum eius est usque ad inferos et ad coelum* was applied in South Africa under English rule. In terms of this common law approach, the legal rights of an owner over his land extended over the surface of land, the space above the land, and the soil below.[434] Remarkably, in contrast with the overshadowing private law concept of ownership, the Roman-Dutch law concept of public property (or property unsusceptible to private ownership) was accepted in South Africa.[435]

Regrettably, after South Africa was unified into the Union of South Africa in 1910, the established property concepts were progressively utilised as a tool for promoting discriminatory practices. Land, and as a result of the *cuius est solum*-maxim that was applied, also the minerals below and the water flowing over or under land (in specific circumstances), mostly became the property of the white minority in a private property regime.[436] However, the rise of democracy and constitutionalism brought about drastic changes to property in the South African legal context.

3.4.2 The post-constitutional concept of property

The promulgation of the Interim Constitution was a ground-breaking step in the construction of a post-Apartheid state and included a constitutional property clause that impacted on the development of property in South Africa.[437] The traditional

434 See chapter 3.2.4.2.2.1 above.
435 See chapter 3.2.4.3 above.
436 See chapter 3.2.5 above.
437 See chapter 3.3.1 above; Van der Walt 2004 *SAPR/PL* 88.

private-law property concepts such as “things”, “ownership” and “real rights” were incorporated into the constitutional property concept.[438] The constitutional concept is not limited to the traditional private law understanding of private property. The Interim Constitution introduced a concept of property that can be interpreted more widely than its pre-constitutional, private law orientated counterpart.[439] It may therefore be stated that the Interim Constitution transformed the private law character of the South African property law.[440] In fact, in the words of Badenhorst *et al,*[441] it seems as if the “law of property, which has always been regarded as the pith and essence of the private law, is increasingly becoming the concern of public law.” The “wider understanding” of the traditional private law concept of property (as brought about by the Interim Constitution) added important value to the interpretation of the property concept of the Constitution.

Section 25 of the Constitution protects rights in property. However, this section does not embody an unqualified positive guarantee of a citizen’s right to hold property. It is rather a negative guarantee, which means that property can only be interfered with when specific constitutional imperatives have been met. It was, however, indicated that the negative property guarantee is appropriate to guarantee the right to property and that the “protection for the holding of property is implicit” to the negative guarantee of section 25.[442] As the notion or concept of “property” is not defined in section 25, it was necessary to determine the content, meaning and types of property that fall within the ambit of constitutional protection. For this reason, various constitutional interpretive guidelines were laid down. The *rationale* for enquiring into the principles of constitutional interpretation was dual. Not only was it undertaken to ascertain the meaning of a provision in the Bill of Rights (the constitutional property clause, and specifically the meaning of “property” as used in section 25), but also to establish whether law or conduct in the form of limitation or regulation is consistent with that provision. Against the interpretive guidelines, various examples of interests that may possibly enjoy constitutional protection were grouped together under three main

438 See chapter 3.3.1 above; Van der Walt 1993 *SAPR/PL* 315; Van der Walt 1995 *SAPR/PL* 314.
439 See chapter 3.3.1 above.
440 Van der Walt 1995 *SAPR/PL* 334; Van der Walt 2002 *SAPR/PL* 258.
441 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* 6.
442 See chapter 3.3.2 above.

themes.[443] The first group of examples comprised immovable and movable corporeal property. The second group concerned rights to incorporeal property and included copyrights, patents and trademarks. The third group involved non-contractual debts and claims (new property).[444] The interests of the third group are generally based on public-law participation claims against the state. They therefore include welfare rights (such as pensions, medical benefits and unemployment benefits) and forms of state "largesse" (such as licenses, permits and the use of public resources issued by the state).[445] In South Africa, public-law participation rights generally resort under the protection of socio-economic rights and it is not yet certain whether it falls under the protective scope of the Constitution.[446] Regulation in the field of *inter alia* natural resources regulation, land use planning and environmental conservation remains a rich source of constitutional challenges under the constitutional property clause, and the protection it affords.[447]

Chapter 3.3.2.3.2 above introduced a novel perspective to the discussion of the regulation of rights in natural resources, namely that of a "stewardship ethic of public trusteeship".[448] The stewardship ethic encapsulated in the notion of public trusteeship may potentially influence the regulation of property and even perhaps the property regime wherein such resources are regulated. It should be determined, for example, whether the existing notion of *res publicae* (public property) has been statutorily entrenched in South African water law; whether elements of the Anglo-American public trust doctrine have been introduced to South African water law; or whether the notion underpins a stewardship principle that merely emphasises and defines the National Government's fiduciary duty towards the resource.[449] Within the broader framework of this thesis that deals with water and water rights, the subsequent chapter focuses on the meaning and impact of the stewardship ethic of public trusteeship in the South African water regulatory framework.

443 The typology was originally developed by Van der Walt. See Van der Walt *The Constitutional Property Clause* 63-66.
444 See chapter 3.3.2.2 above.
445 See chapter 3.3.2.2.3 above; *Shoprite*-case par [13].
446 See chapter 3.3.2.2.3 above.
447 Van der Walt 2004 *SAPR/PL* 68.
448 Van der Schyff 2013 *The South African Law Journal* 369.
449 See chapter 1.2 above.

Chapter 4

The legal status of water in South Africa

4.1 Introduction

South Africa is a water scarce country[1] that faces unique water regulation challenges due to, *inter alia,* the country's political history. It is trite that access to land, and therefore water as natural resource attached to land, was previously restricted and available only to the white minority of the country due to South Africa's strict Apartheid policy.[2] The Constitution was adopted and immediately resulted in a new era of constitutional transformation, the commencement of transformative constitutionalism and the pursuit of social justice.[3] Chapter 2 of the Constitution contains the Bill of Rights, "a cornerstone of democracy in South Africa".[4] Of specific relevance for this study is the right to have access to sufficient water as enshrined in section 27(1)(b) in the Bill of Rights. The constitutionally entrenched right of access to sufficient water in combination with section 24 of the Constitution resulted in the adoption of the NWA.[5] The aim of the NWA is to bring about fundamental reform of the law relating to water resources.[6] The notion of public trusteeship[7] was statutorily enshrined as the mechanism through which the envisioned change could be realised.

A reflection on a number of contextual matters will aid the understanding of the core of the water law dispensation founded on the notion of public trusteeship. From a property law perspective, it is particularly important to determine whether the introduction of the notion of public trusteeship affected the legal status of water.

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1 See the preamble of the NWA.
2 See the introduction of the *White Paper on a National Water Policy for South Africa*, 1997.
3 Currie and De Waal *The Bill of Rights Handbook* 1, 7; Preamble of the Constitution.
4 Section 7(1) of the Constitution.
5 Section 24 of the Constitution stipulates that everyone has the right to *inter alia* have the environment protected. In terms of section 27(2) of the Constitution, the state must take reasonable legislative and other measures to achieve the progressive realisation of the right of access to water.
6 Long title of the NWA. Section 2 of the NWA states that it is the purpose of the Act to "ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled" taking into account factors *inter alia* the basic human needs of present and future generations, equitable access to water and the public interest.
7 See chapter 4.3.3 below.

The research question underpinning this thesis aims to determine how and to what extent the German concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA. It is towards this objective that this chapter first focuses on the historical development of the legal status of water in South African law. This history accentuates the nature and extent of the change brought about by the recent inception of the public trusteeship model.

Pienaar and Van der Schyff[8] draw attention to the fact that the history and development of water management principles that applied before the promulgation of the Constitution can be sub-divided into a number of phases in history. Therefore, in order to provide a full account of the development of the legal status of water before the promulgation of the Constitution, it is necessary to examine pre-colonial African customary law approaches to the regulation of water, Roman-Dutch law approaches as it applied after the Dutch occupation in 1652,[9] and English law influences in South Africa that followed after the British occupation in 1806. The discussion in the second part of this chapter dealing with the contemporary approaches to water as public property, outlines the characteristics of the statutorily entrenched, post-constitutional, public trusteeship paradigm for water resources regulation. The chapter concludes with a discussion on whether and to what extent the introduction of the public trusteeship model brought about changes regarding the legal status of water.

8 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 182.

9 According to the legal doctrine of that time, the Cape was a *res nullius* (thing without an owner), and became Dutch territory and property of the VOC by way of *occupatio.* Hahlo and Kahn *The South African Legal System and its Background* 566-575; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 95; Van der Walt *Die Ontwikkeling van Houerskap* 436.

4.2 An historical overview of the legal status of water in South Africa

4.2.1 Introduction

According to Pienaar and Van der Schyff,[10] the legal nature of water in South Africa has always been rather vague and not clearly defined. One of the reasons being that water has never been regarded as something that a person could "own", but rather as a public resource that was publicly regulated or controlled although exclusive use rights could be attained in some water resources to the extent it being classified as private water. It is important to analyse the extent of public regulatory and control measures linked to water use and to understand the full implications of the particular legal status awarded to water in different time periods to act as yardstick against which the legal status of water in contemporary law can be measured.

4.2.2 African customary law approaches

Prior to the Dutch colonisation of South African in 1652, African customary law governed the use and enjoyment of water as natural resource.[11] As indicated in chapter 3.2.2, the traditional African customary legal system was not formally recorded. The level of oral tradition of the traditional African customary law systems complicates any comprehensive account of the legal history of South Africa preceding colonisation. Based on the limited available sources, it is possible to provide an introductory overview of the legal nature of water under early African customary law.

Feris[12] indicates that the early African customary law treated water as part of the "commons". Feris's account must be understood with reference to the land tenure system that applied in the indigenous and customary communities. Within the early African customary communities, the chief controlled the rules of land tenure.[13] In terms of the land tenure system, land and water were free or common to all members of the community and could not be owned privately.[14] Access to water resources, as part of

10 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 181-182.
11 Tewari 2009 *Water SA* 694.
12 Feris 2012 *Law Environment and Development Journal* 11.
13 Tewari 2009 *Water SA* 695.
14 Feris 2012 *Law Environment and Development Journal* 11; Tewari 2009 *Water SA* 695.

the “commons”, was freely available to all members of the community, but where appropriate, was regulated in accordance with the interests of the entire community or tribe.[15] The African customary law thus seems to have recognised the common or public nature of water resources by availing water to the community or tribe as a whole, and not as a resource available for individual or private use.

African customary law was not a “phase of law” that had any dramatic ending point. Instead, it was tolerated by the later colonial political powers.[16] Historical sources indicate that the African communities were allowed to run as separate entities and to follow their existing legal regime under the African customary law after the Dutch colonisation of the Cape of Good Hope.[17] The African customary law on the one hand and the colonialist legal system on the other, resulted in a dual system of land ownership and as a result thereof, a dual system of water rights.[18] However, with the passage of time, the colonial community established and aligned itself in commercial terms with the African communities. Many African people were forced to work on Dutch East India Company farms and, as a result, lost their customary rights of access to land and water. The eventual encroachment onto native resources by the colonialists resulted in the subjugation of native resources.[19] As the Colonial Government did not take an interest in creating a formal policy for the African customary rule, the existing customary water resources law was eventually developed along the lines of the Dutch colonists’ water law regimes.[20]

15 Young *Public Trusteeship and Water Management* 20.
16 Young *Public Trusteeship and Water Management* 20.
17 Tewari 2009 *Water SA* 695; Young *Public Trusteeship and Water Management* 21.
18 Tewari 2009 *Water SA* 695.
19 Guelke and Shell 1992 *J. South. Afr. Stud.* 844; Van der Walt *The concept of “beneficial use” in South African water law reform* 38; Tewari 2009 *Water SA* 695; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 9; Young *Public Trusteeship and Water Management* 21.
20 Tewari 2009 *Water SA* 695; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 8.

4.2.3 Influences brought about by Dutch occupation

With the Dutch occupation of the Cape of Good Hope,[21] the Roman-Dutch law was transplanted to the southern areas of South Africa.[22] Roman-Dutch law was derived from two main sources, namely Roman law and Germanic customary law.[23] Hall[24] provides an important point of inquiry when examining the historical development of the legal status of water in the common law of South Africa when he writes:

> In order to ascertain the origin of any system of legal rules which has become a part of the common law of South Africa it is advisable to go back to the Roman Law, from which a great many of the basic principles of our law have been derived.

Against this backdrop, this section provides an introductory overview of some Roman water law principles that found application in South African water law. From the outset, it should be noted that Roman water law evolved in a country with a warm climate where water was relatively scarce.[25] Hall[26] elaborates on the scarcity of water when he states that rivers in Italy were mostly tumultuous in winter, but during the hottest part of the summer, mere "trickles" of water that flowed in thin, slow streams. Because water was scarce at times, the Romans developed a legal framework to regulate the fair allocation of water.[27]

Groundwater was generally regarded as *res in commercio* and governed in terms of the property law doctrine of *cuius est solum eius est usque ad coelum et ad inferos,* provided that it was not a source of flowing or running water.[28] Groundwater could therefore be the object of private ownership rights.

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21 Hahlo and Kahn *The South African Legal System and its Background* 566-575; Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 95; Van der Walt *Die Ontwikkeling van Houerskap* 436.

22 Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 97; Van der Walt *Die Ontwikkeling van Houerskap* 436.

23 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 6; Van der Walt 1988 *De Jure* (vervolg) 307.

24 Hall *The Origin and Development of Water Rights in South Africa* 1.

25 Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 17.

26 Hall *The Origin and Development of Water Rights in South Africa* 5.

27 Van der Walt *The Concept of "beneficial use" in South African water law reform* 15.

28 Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 19.

Surface water (*aqua profluens* or *flumina* or flowing and running water; meaning the body of water itself, and not the watercourse in which it flowed),[29] on the other hand, was in its natural state categorised as *res extra commercium.*[30] The classification of water as *res extra commercium* shows that surface water could further be sub-categorised under the categories of *res omnium communes* and *res publicae.* The former included things that could not be the object of ownership, not even by the state, but rather owned by all for common use,[31] while *res publicae* were public property, or things used by the public at large, and controlled by the state.[32] However, different assumptions existed regarding which of the two categories running or flowing water should fall into. The jurist Gaius for example argued that it should be regarded *res publicae,*[33] while Marcianus categorised running of flowing surface water as *res omnium communes.*[34]

Insofar as rivers were concerned, a distinction was made between public rivers (*flumina publicae*) and private rivers (*flumina privatae*).[35] Private rivers generally were very small streams or had an intermittent flow and were regarded as *res in commercio*.[36] The diversion of water in public rivers for irrigation and human consumption was permitted, provided that no other person who was entitled to use the water was injured through such diversion.[37] In line with the inconsistencies in the categorisation of surface waters mentioned above, Gaius argued that if a stream was perennial (*flumina perennia*), it should have been categorised as *res publicae* and subject therefore to state control.[38] Marcianus, in turn, argued that all waters in public

29 Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 17-18; Vos *Principles of South African Water Law* 1.
30 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 182.
31 Things that everyone can use, such as the air, seashore and flowing water. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122; Tewari 2009 *Water SA* 695.
32 Things under the legal category of *res publicae* was regarded state property, such as rivers or harbours and public ways. Kaser *Roman Private Law* 81; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122; Young *Public Trust and Res Publicae in South African Law* 8-9.
33 Gaius *Institutes* 1.8.1.
34 Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 17-18, 20.
35 Hall *The Origin and Development of Water Rights in South Africa* 5; Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 18.
36 Hall *The Origin and Development of Water Rights in South Africa* 5; Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 18.
37 Hall *The Origin and Development of Water Rights in South Africa* 5.
38 Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 17-18, 20.

and private rivers were *res omnium communes*[39] and therefore "belonged to all that were in need thereof".[40]

Notably, due to the importance of navigation and fishing in the Roman economy, certain water resources, especially streams, were subject to competitive uses. Consequently, it became necessary for the state to intervene and to regulate the common use of water resources. The state intervened and regulated various uses[41] of the nation's water through praetorian edicts[42] and other measures such as interdicts, servitudes and actions.[43] Hall[44] states:

> It does not appear from any passage in the *Institutiones,* the *Digest,* or the *Code* that the idea that the state was absolute owner of the rivers had ever existed. In the sense that the state controlled the rivers for the benefit of all the inhabitants, who had a common right to use them, the rivers were *res publicae,* but the functions of the Senate or the Emperor were purely legislative and went no further than control for the common weal. It is nowhere asserted that the state or the Emperor had rights of ownership in the rivers, their beds, or their banks. Common use for the general benefit of the people seems to have been the guiding principle of Roman law.

39 Due to the fact that a substantial part of the *Digesta* had been adopted from the work of Marcianus, he is regarded as the more authoritative author on the subject. Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 17-18, 20.

40 Viljoen *The Public Trust Doctrine in South African Water Law* 9.

41 The Romans obtained entitlements to different water uses, such as taking water, diverting it for irrigation or human consumption, or fishing in the stream. The real extent of the entitlements were not always clear, but owners on whose property water originated, had preferential rights to the use of water. Thompson *Water Law* 20; Hall *The Origin and Development of Water Rights in South Africa* 5.

42 The edicts relating to the regulation of water use are set out in *Digesta* 43.12-32. Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 22.

43 *Digesta* 39.3; Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 20, 22.

44 Hall *The Origin and Development of Water Rights in South Africa* 6.

4.2.3.1 The state as *dominus fluminis*

4.2.3.1.1 Roman-Dutch law

The Dutch adapted and applied the water law principles of the Roman law to Dutch circumstances.[45] The climatic and geographic conditions of the Netherlands differed significantly from that of Italy where Roman law originated. Whereas the climatic conditions of Italy were warm with scarce water resources during dry seasons, the Netherlands had abundant water resources.[46] Climatic and geographical conditions therefore necessitated different rules to govern water rights. Whereas the climatic conditions of Italy for example necessitated the introduction of water use entitlements for water irrigation,[47] the same rule was unnecessary for a water-abundant country such as the Netherlands.[48] Therefore, although the Roman-Dutch water law was rooted in the Roman law, and although the Dutch adapted and applied the water law principles of the Roman law, its application was not always identical in the Netherlands as it was in Italy. This section briefly refers to the Roman-Dutch water law as it was applied in the Netherlands during the seventeenth and eighteenth century, since the Cape of Good Hope became a Dutch colony and experienced Roman-Dutch law influences during this time.

From the middle of the seventeenth century, the doctrine of state ownership or state control (the *dominus fluminis*-principle) of all public rivers appears to have been accepted in the Netherlands.[49] In the second book of his *Inleidinge tot de Hollandsche Rechts-geleerdheid,* Hugo Grotius for example argued that public rivers belonged to the states of Holland and West Friesland. He stated:[50]

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45 Hall *The Origin and Development of Water Rights in South Africa* 1; *Transvaal Canoe Union v Garbett* 1993 4 SA 829 (SCA); Van der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* 9; Vos *Principles of South African Water Law* 1; Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 10.

46 Hall *The Origin and Development of Water Rights in South Africa* 5.

47 Hall *The Origin and Development of Water Rights in South Africa* 5.

48 Furthermore, due to the diverse climatic conditions of the two countries, Roman-Dutch law writers were for example almost silent on the subject of the diversion of water from public streams, but were rather concerned with the use of rivers as waterways or the ownership of river-beds. Hall *The Origin and Development of Water Rights in South Africa* 5.

49 Hall *The Origin and Development of Water Rights in South Africa* 10; Hall and Burger *Hall on Water Rights in South Africa* 1.

50 Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 43.

> The united states of Holland and West-Friesland are proprietors of the rivers, such as the Rhine, the Waal, the Maas, the Ijsel and the Lek, in so far they flow within the limits of Holland; also of the lakes and other navigable waters, and of the beds of all such streams and waters, together with the shores or banks of the same in so far as they are for the greater part of the time covered with water.

The works of Arnoldus Vinnius, Simon Groenewegen and Johannes Voet also provide insight into the question of how and to what extent the doctrine of state ownership or control of public rivers became universally accepted in the Netherlands. Vinnius was of opinion that the ownership of all navigable rivers vested in the Sovereign or the people of the country, while the use of rivers as waterways was public.[51] According to Vinnius, rights of fishing vested in the Sovereign and could only be exercised subject to a grant or entitlement acquired from the Sovereign.[52] Simon Groenewegen further articulated in his *De Legibus Abrogatis* that all public streams were the property of the state, and similar to Vinnius, Groenewegen stated that rights of fishing in rivers belonged to the Sovereign.[53] He also held that *flumina et portus* (rivers and ports), are classified as *Regalia* and therefore belong to the Princeps.[54] In his *Commentarius Ad Pandectas,* Voet held that only those streams that flowed perennially were regarded as public in nature.[55] The doctrine of state ownership or state control of public rivers appears to have been generally accepted in the Netherlands when considering the references to the works of the Roman-Dutch writers of the seventeenth and eighteenth centuries.[56] The *dominus fluminis*-principle, which refers to the notion of state ownership or state control of public rivers, seems to have developed in this period. The *dominus fluminis* principle also influenced the development of the legal status of water in South Africa.

51 Vinnius *Institutionum Imperialium Commentarius* 2.1.12.
52 Vinnius *Institutionum Imperialium Commentarius* 2.1.12.
53 Groenewegen *De Legibus Abrogatis* 2.1.23; Hall *The Origin and Development of Water Rights in South Africa* 9.
54 Groenewegen *De Legibus Abrogatis* 2.1.2; Vos *Principles of South African Water Law* 2.
55 Voet *Commentarius Ad Pandectas* 43.12; Hall *The Origin and Development of Water Rights in South Africa* 10; Vos *Principles of South African Water Law* 1. It will become evident in the discussions below that Voet's doctrine of perenniality was applied by the courts to the rivers in South Africa.
56 Hall *The Origin and Development of Water Rights in South Africa* 8.

4.2.3.1.2 South African law

Following the Dutch colonisation of the Cape of Good Hope, it soon became clear that South Africa is a water-scarce country, unlike the Netherlands. In light of this, the VOC (which occupied the position of the state at the Cape)[57] had to develop rules to control and regulate the uses of limited water resources.[58] The first exercise of state control over public streams in South Africa is found in the *Placaat of van Riebeeck* of 10 April 1655.[59] It seems as if people contracted diseases due to impurities in the drinking water obtained from the streams of Table Valley. The *Placaat of van Riebeeck* therefore prohibited persons from bathing and washing their clothes in the streams of Table Bay Valley[60] as it endangered the hygiene of other water users. This first *Placaat* clearly shows that the VOC took up the position that they had the right to control the use of the running streams of Table Valley.[61] The expansion of state control over water resources progressively manifested in *placaats* and included *inter alia* the General Proclamation or *Placaat* prohibiting upstream water pollution through bathing and washing, which was repeated in 1657;[62] the *Placaat* of 16 December 1661 that prohibited the use of water for irrigation so that the Company's corn-mill could function;[63] and the *Placaat* of 2nd January 1687 which held that no one is allowed to cross the watercourse that runs between the castle and Table Mountain with their wagons or animals.[64] From this series of *placaaten*, it is clear that the state, in person of the Company (VOC), took up the position of being *dominus fluminis*, not only in theory, but also in practice.[65]

57 Hall and Burger *Hall on Water Rights in South Africa* 11.
58 Tewari 2009 *Water SA* 695.
59 Hall and Burger *Hall on Water Rights in South Africa* 1.
60 This prohibition was later repeated in a General Placaat in 1657, which laid down penalties in the case where the proclamation was disobeyed. Hall *The Origin and Development of Water Rights in South Africa* 11; Hall and Burger *Hall on Water Rights in South Africa* 1.
61 Hall *The Origin and Development of Water Rights in South Africa* 13.
62 Tewari 2009 *Water SA* 695.
63 Hall and Burger *Hall on Water Rights in South Africa* 1; Tewari 2009 *Water SA* 696.
64 Except by means of for example bridges. This prohibition repeated in all the General Placaaten up to 1740. Further, a number of other *placaaten* saw the light, for example, the *placaat* of 16th December 1661 relates to the use of water for irrigation of gardens. Hall *The Origin and Development of Water Rights in South Africa* 12.
65 A clear example of the Company's right as *dominus fluminis* is shown by the fact that the individuals were granted permission to use running water, not as a right, but as a privilege. This privilege granted the Company the authority to withdraw any entitlement as they pleased. Hall *The Origin and Development of Water Rights in South Africa* 15, 16; Hall and Burger *Hall on Water Rights in South Africa* 2.

The fact that the VOC adopted the position of *dominus fluminis* was not only executed through the promulgation of *placaaten,* but the state also started to grant permission to riparian owners[66] to use running water through water entitlements. According to Hall,[67] it appears from the discussions of the Council of Policy that frictions arose between the riparian owners that were situated above the VOC's mill and the Company's miller. The VOC introduced a system of water entitlements to manage these conflicts.[68] The use or entitlements to use certain streams was regulated by granting turns of use, referred to as *besondere gunste*.[69] The precedents of *Ackerman v Company* 1763 and *Stellenbosch v Lower Owners* 1805 confirm this practice. Both these cases illustrate that riparian owners[70] did not have special water use rights due to their close proximity to the river, but had to receive privileges, authorisations or entitlements from the VOC to use water.[71] It should be reiterated that even where land was granted in full private ownership, the grant did not include a right to use water, for the state remained *dominus fluminis* and controlled the use of the water.[72] By allocating these entitlements, the VOC exercised its rights as *dominus fluminis.* In fact, the *dominus fluminis*-principle developed through the use of *placaaten* and its application broadened with the system of water entitlements that was used as a tool to regulate water use.[73]

66 Cognisance should in this instance be taken of the land tenure system that applied in this point of time. As indicated in chapter 3.2.3.2 above, the Dutch Administration provided grants of land in the forms of full ownership, *leeninggsplaatsen, leenings eigendom,* and *erfpacht* tenure.

67 Hall *The Origin and Development of Water Rights in South Africa* 12-13.

68 Tewari 2009 *Water SA* 695.

69 Tewari 2009 *Water SA* 696; Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 35.

70 Although the riparian landowners did not have special right to the river streams that either ran across or contiguous to their property, riparian owners had a greater advantage in terms of access to river water. Riparian owners were only entitled to use the water from 5 to 7 each morning and evening. Hall *The Origin and Development of Water Rights in South Africa* 13; Tewari 2009 *Water SA* 696.

71 See also Hall and Burger *Hall on Water Rights in South Africa* 2; Tewari 2009 *Water SA* 696.

72 Hall *The Origin and Development of Water Rights in South Africa* 27.

73 The Council of Policy was the actual repository of administrative and legislative authority ever since it has been set up by the VOC. As the limits of the Dutch colony expanded, it became necessary to establish other bodies in the country districts and to delegate its powers. For this purpose, Boards of *Landdroste* and *Heemraden* were appointed at Stellenbosch in 1685 and at Swellendam in 1745. The Boards apparently had a judicial function. Amongst the duties of these Boards was the settlement of disputes as to the use of water and to grant entitlements to the use of water in public streams. In light of the objective of this chapter that deals with the public nature of water, it would serve no purpose to deal with all the decisions of the *Landdroste* and *Heemraden.* Notably however, the case of *De Wet v Cloete* 1 Men 1830 should be mentioned as it provides insight into the continued relevance of the *dominus fluminis*-principle in water resources law after the English occupation in 1806. In *De Wet v Cloete* 1 Men 1830 page [403] Burton and Kekewich JJ affirmed that the Government was regarded *dominus fluminis* and had the power to regulate the use of the water of a stream between owners of riparian land. Hall *The*

4.2.4 Influences brought about by British occupation

4.2.4.1 Riparian ownership

Subsequent to the second British occupation in 1813, there was a new attempt to promote agricultural and farming systems in South Africa.[74] To realise this objective, the second English governor, Sir John Cradock, introduced a new land tenure system for the purpose of farming, namely that of perpetual quitrent.[75] Cradock's intent was to confer the entitlements usually associated with the Roman-Dutch law concept of *dominium plenum* ("full ownership") upon the grantee.[76] Full ownership "implied the grant of all the rights which accompanied the ownership of land."[77] These grants included riparian rights to water.[78] Hall argued that this development stands in stark contrast to the Roman-Dutch law principles that favoured a state-controlled system for water entitlements for riparian owners.[79] The English law therefore influenced the water law of South Africa in such a manner that it eventually minimised the power of the state to control water entitlements by providing unlimited use rights to riparian owners.[80]

Origin and Development of Water Rights in South Africa 21; Lewis *Water Law Its Development in the Union of South Africa* 18; Vos *Principles of South African Water Law* 2-3.

74 The British Government introduced a new set of water law principles after their occupation of the Cape of Good Hope in 1806. With the British occupation, many water law principles were derived from foreign law, especially from the English- and American law. The collective term for these English- and American laws, is the Anglo-American law. Hall and Burger *Hall on Water Rights in South Africa* 3; Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 30; Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 182. The reason for the relevance of American law lies in the fact that England colonised the eastern coastline of North America, and the English legal order was in that time equally accepted and applied in America. Dunning "Antiquity of the Public Right" 8.

75 Miller and Pope *Land Title in South Africa* 6; Milton "Ownership" 665.

76 Hall *The Origin and Development of Water Rights in South Africa* 28; Tewari 2009 *Water SA* 697.

77 Hall *The Origin and Development of Water Rights in South Africa* 29; Milton "Ownership" 665.

78 Hall and Burger *Hall on Water Rights in South Africa* 3.

79 Hall *The Origin and Development of Water Rights in South Africa* 29; See chapter 4.2.3.1 above.

80 Hall states that it is difficult to trace a clear connection between the establishment of a new land tenure system and the disappearance of the doctrine that the state is *dominus fluminis.* Although there is a clear connection between the introduction of the English Administration's full ownership of land which undoubtedly implied the rights which accompanied ownership, and included riparian rights; it is difficult to understand how riparianism came to supersede state control as the basis of the entitlement to use water. Hall *The Origin and Development of Water Rights in South Africa* 29.

The English law influence is evident in the judgment of Bell J in *Retief v Louw*,[81] wherein the court ignored the *dominus fluminis*-principle and applied the riparian principle. The court was called to decide on the rights of riparian owners to the water of a stream running through their land.[82] In his judgment, Bell J held that an upper riparian owner might, when using the water of a public stream, diminish its flow if he or she did not injure any other riparian owner of his or her reasonable use that is common to all riparian owners.[83] In effect, Bell J established a system of "proportional sharing"[84] by stating that "landowners have each a common right in the use of water which, at every stage of its exercise by any one of the proprietors, is limited by a consideration of rights of other proprietors."[85] According to Hall,[86] the *Retief v Louw*-precedent became the foundation upon which the whole edifice of South African water rights was based.[87] Bell J held:

> I have come to the conclusion that the proprietors of land through-out the course of a perennial running stream of water have each a common right in the use of water, which use, at every stage of its exercise by any one of the proprietors, is limited by a consideration of the rights of the other proprietors; and it seems to me that the uses to which the proprietor of land lying on the upper part of a stream may make of the water of the stream are, from the very nature of things, to be classed in the following order: 1st, the support of animal life; 2nd, the increase of vegetable life; and 3rd, the promotion of mechanical appliances; and the enjoyment of any one of these uses would seem, also from the very nature of things, to depend consecutively upon how far it deprived the owners of the lower land of their enjoyment of water for the same purposes. If the upper proprietor requires all the water for the support of life, for human beings and cattle upon his land, the lower proprietors must submit; it the water be more than sufficient for such animal demands, sufficient must be allowed to pass for the supply of animal demands of all proprietors lower down the stream before the upper proprietor can be allowed to use the water for the support of vegetable life, or to improve his lands by irrigation. Again the demands for the supply of animal life being answered, the proprietor of the upper ground is entitled to use the water for the purposes of vegetable life [...] But I apprehend that no proprietor on any part of the stream is entitled to use the water for all these three purposes, even consecutively in order in which I have mentioned them, of for any one of them, recklessly and without any regard to the wants of those below and above him.

81 *Retief v Louw* 1874 4 Buch page [165].

82 In the *Retief v Louw-case*, the downstream owner sued the upstream owner, who had diverted the whole of the stream's summer flow and thus deprived the downstream owner of water for drinking purposes and irrigation. *Retief v Louw* 1874 4 Buch page [165].

83 Hall and Burger *Hall on Water Rights in South Africa* 34-35.

84 Hall and Burger *Hall on Water Rights in South Africa* 4.

85 Similarly, in *Vermaak v Palmer,* Smith J held that the upper owner was not entitled to the unlimited enjoyment of the water rising on the land. *Vermaak v Palmer* 1876 6 Buch 25; Hall and Burger *Hall on Water Rights in South Africa* 47; Tewari 2009 *Water SA* 697-698.

86 Hall and Burger *Hall on Water Rights in South Africa* 32; Vos *Principles of South African Water Law* 3.

87 Hall *The Origin and Development of Water Rights in South Africa* 32; Van der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* 10.

It follows that the content and implications of the riparian principle were laid down in *Retief v Louw.* The riparian principle did not provide absolute and exclusionary private property rights to riparian owners to use the water from public streams running through their property. In the case of *Hough v Van der Merwe*,[88] De Villiers CJ delivered a judgment similar to that of the above quoted ruling of Bell J in *Retief v Louw.* De Villiers CJ determined:[89]

> [In] our law the owner of the land, by or through which a public stream flows, is entitled to divert a portion of the water for the purposes of irrigation, provided – firstly, that he does not deprive the lower proprietors of sufficient water for their cattle and for domestic purposes; secondly, that he uses no more than a just and reasonable proportion of the water consistently with similar rights of irrigation in the lower proprietors ; and thirdly, that he returns it to the public stream with no other loss than that which irrigation has caused.

It was therefore held that an upper riparian owner was entitled to use as much as was needed, even if it was all the water for primary purposes, but was not allowed to use it for secondary purposes if he or she deprived lower owners of primary use. The principles laid down in *Hough v Van der Merwe* were refined by the judgment of De Villiers CJ in *Van Heerden v Wiese*,[90] in which the court had to decide whether the Ongers River of the Karoo was a public or private stream. The headnote of *Van Heerden v Wiese* stipulates:

> Our law recognises two classes of natural streams or watercourses, viz., public and private. Under the designation of public streams are included all perennial rivers, navigable or not, and all streams which, although not large enough to be considered as rivers, are yet perennial, and are capable of being applied to the common use of the riparian proprietors. A river may sometimes become dry in the heat of summer without forfeiting its character of a perennial, and therefore public, river. The general rule that a person may deal as he chooses with water rising on his own land, is subject to the limitation that the water thus rising is not the source, or the main source, of public stream; and also that not rights have been acquired to the water by prescription.

88 *Hough v Van der Merwe* 1874 4 Buch 148 par [148].
89 Hall *The Origin and Development of Water Rights in South Africa* 44; *Hough v Van der Merwe* 1874 4 Buch 148 par [148].
90 *Van Heerden v Wiese* 1880 Buch AC 5.

The principle that recognises two classes of natural streams or watercourses became one of the cornerstones of the South African water law.[91] This is clear from the fact that even after the promulgation of the *Water Act* 54 of 1956 with its new definition for a public stream, the court adopted the same principle almost a hundred years after its first use in *Van Rensburg v Taute*.[92] Within the context of this chapter, the recognition and definition of public water is significant, for it affirms the public nature of certain water resources in South Africa under British rule.

4.2.4.2 Codification of the South African water law

The codification of the South African water law, albeit not the codifications that focused on irrigation practises,[93] commenced with the *Cape Act* 32 of 1906, followed by the *Transvaal Act* 27 of 1908 and later the *Irrigation and Conservation of Waters Act* 8 of 1912 (Union Act 8 of 1912) that was promulgated to consolidate and codify the water laws of the former colonies.[94] Notably, neither the Free State nor Natal colonies promulgated any water-related legislation and continued to apply the common law until the promulgation of the Union Act 8 of 1912. Hall[95] argues that the most important function of the new laws was to lay down rules that could be used *inter alia* to differentiate between private water and public water; to regulate the use of public water; and to provide for the acquisition of servitudes that are necessary for the economic use of public water.

91 Vos *Principles of South African Water Law* 4-5.
92 *Van Rensburg v Taute* 1975 1 SA 279 (SCA); Vos *Principles of South African Water Law* 5.
93 In the year 1854, a representative government came into existence in South Africa when the Cape Colony elected a Parliament consisting of two houses. In the year 1858, the first Select Committee on Irrigation sat to consider irrigation projects in the Cape. However, it was only after the sitting of the Select Committee in 1862, who considered the promotion of irrigation generally, that Bills dealing with irrigation came before Parliament. The legislature in the Cape Colony passed the *Right of Passage of Water Act* 24 of 1876, the *Right of Passage of Water Act* 26 of 1882, the *Irrigation Act* 8 of 1877 and the *Water Act* 40 of 1899. While the initiative regarding the promulgation of irrigation legislation came from the Cape Colony, other governments in South Africa followed the Cape's example (except for the Republic of the Orange Free State who produced no comprehensive water legislation and continued to apply the common law). Irrigation legislation was codified in the Natal Colony and included the *Irrigation Act* 26 of 1887 and the *Irrigation Act* 26 of 1891. The legislature of the Zuid-Afrikaanse Republic also promulgated their *Irrigation Act* 11 of 1894.
94 Hall and Burger *Hall on Water Rights in South Africa* 6.
95 Hall *The Origin and Development of Water Rights in South Africa* 73.

4.2.4.2.1 *Cape Act* 32 of 1906

The Cape Colony passed the Cape Act 32 of 1906 (the Cape Act) to consolidate the law relating to irrigation and the use of streams. The Act differentiated between private water and public water. Concerning private water, the Act stipulated that every landowner was entitled to the exclusive and unlimited use of all the water rising upon his or her land.[96] Hall[97] argues that the Cape Act effected significant changes to the existing common law relating to the use of public streams. In common law, public streams included all perennial rivers and all streams that, although not large enough to be considered rivers, were perennial and capable of being used by riparian owners.[98] The Cape Act broadened the scope of public streams by including into the definition intermittent streams that were non-perennial streams, but into which the natural surface-draining water flowed from the properties of riparian owners.[99] The Cape Act's definition of a public stream had the effect of impressing all the flood-water rivers of the inland plateau of the Cape Colony with the character of public streams.[100] Hall[101] stated that the Cape Act gave effect to the common law rule[102] that the use of water in a public stream for domestic purposes took precedence over the use of water for irrigation purposes.[103]

96 This exclusive right is however subject to the right of a riparian owner to receive a reasonable share of the water that rises on an upper riparian owner's land, and flows down in a defined channel for the greater part of the year. Furthermore, section 5 of the Cape Act prescribes that surface water is the sole property of a landowner on whose property the water falls or drains, until the water leaves his land or joins a public stream.

97 Hall *Origin and Development of Water Rights in South Africa* 71.

98 All the water courses that did not meet these requirements, were regarded as private streams, and were therefore subject to private ownership. Juta *Water Rights under Common Law and The Irrigation Act No 32 of 1906* 4.

99 Section 3(d) of Act 32 of 1906.

100 Hall *The Origin and Development of Water Rights in South Africa* 74.

101 Hall *The Origin and Development of Water Rights in South Africa* 75.

102 Prior to 1906, certain common law requirements applied to determine the use of public water by the riparian property owners. The requirements for domestic and watering cattle for example had to be satisfied before any land could be irrigated by the water of the public stream. The first effort to formulate and codify rules for riparian owners for the use of water from a public stream is to be found in the "reasonable use" regulations of section 4(7) of *Water Act* 40 of 1899. However, under section 84(g) of the Cape Act, an addition was made to the rules of common use in the sense that it added to the reasonable use regulation eight factors by which a Water Court was to be guided in defining a reasonable user. Hall *The Origin and Development of Water Rights in South Africa* 75; *Hough v Van der Merwe* 1874 4 Buch 148.

103 Section 6 of the Cape Act 32 of 1906.

4.2.4.2.2 *Transvaal Act* 27 of 1908

The Transvaal followed the lead of the Cape Colony and adopted the general framework of the Cape Act in the Transvaal Act 27 of 1908 (the Transvaal Act), with minor changes.[104] Changes included that the Transvaal adopted the term "public stream" from the Cape Act, but confined its application strictly to the earlier existing common law understanding of a perennial stream.[105] Furthermore, due to the continually expanding mining industry of the Transvaal, the legitimate claims of industrial undertakings of the water in public streams were included in the Transvaal Act. Remarkably, regarding the use of public water, the Transvaal Act provided that public water shall be subject to primary, secondary and tertiary purposes.[106] Primary uses included the use necessary for the support of human life and domestic purposes of riparian owners.[107] Secondary uses included the irrigation of cultivated land[108] and tertiary uses included claims to water for mechanical and industrial purposes.[109] The last additional characteristic of the Transvaal Act that is noted here is that it made provision for the central control of public water by an Irrigation Department.[110] Although in a totally different from, it seems as if the essence of the *dominus fluminis*-principle, namely public or state control, prevailed in the South African water law over centuries.

4.2.4.2.3 *Irrigation and Conservation of Water Act* 8 of 1912

Soon after the unification of South Africa, the Union Act brought about a compromise between the legislative provisions of the Transvaal and the Cape that was applied to all four provinces of South Africa.[111] The distinction between private and public water was laid down in section 2 of the *Irrigation and Conservation of Water Act*, where the term "public stream" was defined as:

104 Hall *The Origin and Development of Water Rights in South Africa* 71-91.
105 Section 2 of *Transvaal Act* 27 of 1908
106 Hall *The Origin and Development of Water Rights in South Africa* 76.
107 Hall *The Origin and Development of Water Rights in South Africa* 76.
108 Hall *The Origin and Development of Water Rights in South Africa* 76.
109 Hall *The Origin and Development of Water Rights in South Africa* 76.
110 Hall and Burger *Hall on Water Rights in South Africa* 6.
111 Hall and Burger *Hall on Water Rights in South Africa* 6.

> A natural stream of water, which when it flows, flows in a known and defined channel (whether or not the channel is dry during any period) if the water thereof is capable of being applied to the common use of the riparian owners for the purposes of irrigation. A stream which fulfils those conditions in part only of its course, shall be deemed to be a public stream as regards that part only.

The characteristics of a public stream therefore changed by replacing the characteristic of general common use, by common use for irrigation.[112] Although "private water" was not defined in the Act, it may be argued that the water that did not meet the requirements of public water, was private in nature.[113] Therefore, all streams which either did not have a defined channel, or were not capable of common use for the purpose of irrigation, were private streams and fell outside the scope of the Act.[114]

With regard to the use of public water, the *Irrigation and Conservation of Water Act* followed the example of the Transvaal Act by setting an order of preference.[115] The *Irrigation and Conservation of Water Act* established, with certain limitations, an absolute preference for primary use over the secondary uses of water and an absolute preference of secondary uses over tertiary uses of water. The Act consequently established that the claims of, for example, industry were in a sub-ordinate position to agriculture.[116]

In due course, the Union Act became inadequate to cope with the industrial progress of the Union.[117] Thompson points out that a commission of enquiry into water law under chairmanship of Judge Hall was appointed, whose investigation led to the promulgation of the *Water Act* 54 of 1956.[118]

112 The creation of a distinction between normal flow and surplus water was also a far-reaching innovation. Hall and Burger *Hall on Water Rights in South Africa* 6.
113 Pienaar and van der Schyff "The history, development and allocation of water rights in South Africa" 265.
114 Hall *The Origin and Development of Water Rights in South Africa* 73-74
115 Hall *The Origin and Development of Water Rights in South Africa* 77.
116 Hall *The Origin and Development of Water Rights in South Africa* 77.
117 Hall and Burger *Hall on Water Rights in South Africa* 7.
118 Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 61-62; Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 18.

4.2.4.3 The *Water Act* 54 of 1956 and the Apartheid regime

The long title of the *Water Act* 54 of 1956 (the Water Act) states its aim, namely to consolidate and amend the laws of South Africa that relates to the control, conservation and use of water for domestic, agricultural, urban and industrial purposes.[119] The legal status of water is laid down by section 1 of the 1956 Water Act by the definitions provided for "private water" and "public water".[120] Section 1 xiii defined "private water" as all water that rises or falls naturally on any land or naturally drains or is led onto a piece of land. Section 1 xv of the Act defined "public water" as any water flowing or found in or derived from the bed of a public stream. Water use entitlements in private and public water were derived from and linked to the ownership of land.[121] In the case of private water, section 5(2) of the Act stated that the exclusive use or rights of private water could be exercised by the landowner on whose land the water originated or over which it flowed.[122] In the case of public water, section 10(1) of the Act stipulated that every riparian owner was entitled to the use of surplus water of a public stream for domestic, watering, agricultural and urban purposes. Although the 1956 Water Act did not provide certainty regarding the ownership of water,[123] the use of water was derived from and linked to the ownership of land. In the case of public water, the right to use water was linked to riparian ownership. In the case of private water, the right to use water was derived from the ownership of land over which the water flowed or where the source of the water was situated.

Although the *Water Act* 54 of 1956 provided for essential change of "water supply for agriculture to the burgeoning mining and industry sector", two central provisions of the Act resulted in devastating consequences. The Act's entrenchment of the doctrine of riparian ownership and the distinction between public and private forms of water resulted in unequal access to water.[124] Riparian ownership and the distinction between

119 Kidd *Environmental Law* 65; The *Water Act* 54 of 1956 contained one separate schedule which listed all the laws that were repealed by the Act.

120 A "public stream" was defined by section 1 xiv as a natural stream of water that flows in a defined channel, whether or not such channel is dry during any period of the year, permitted that the water therein was capable of common use for irrigation on the properties of riparian owners. See also Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 16-19.

121 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 183.

122 Vos *Principles of South African Water Law* 8.

123 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 183.

124 Young *Public Trusteeship and Water Management* 40, 88.

public and private water may be deemed to have contributed to the sorry state of water access under Apartheid, because land ownership (which was linked to access to water) generally resided in the hands of the white minority. Consequently, the majority of black[125] South Africans were denied access to sufficient water.[126]

Significantly however, the 1956 Water Act vested in the appropriate Minister[127] a large measure of control of public water. In terms of this Act,[128] the Minister was authorised to *inter alia* develop hydro-electric power and to advise farmers, Irrigation Boards and local authorities as to the construction and maintenance of waterworks. The Minister could take any steps which he or she considered necessary for the development, control and utilisation of water. The Minister only had general powers. A number of specific powers for controlling the use of water were added in some sections and amendments of the Act.[129] Although some of the provisions were made for the convenience of administration, a considerable number of them controlled existing riparian rights to public water.[130] For example, the *Water Act* 54 of 1956 provided for the establishment of Government Control Areas in which, in certain circumstances, the Minister could override riparian allocations and provide access to water resources. This principle is significant within the broader context of the historical development of the South African water regulatory regime, as the role of the state as "public regulator" remained an important theme in the country's water law framework.

4.2.5 Concluding remarks: The legal status of water in pre-constitutional South Africa

The review of water rights regimes in South Africa started with African customary law approaches prior to colonisation. During this period, water rights were not privatised and water was regarded a community resource. After the arrival of the Dutch in the Cape in 1652, there was an evolution of the country's water rights regime. Under the

125 The terms "black South Africans", "black people" or "black majority" are used as defined by the *Broad-Based Black Economic Empowerment Act* 53 of 2003. The Act defines "black people" as a generic term which includes Africans, Coloureds and Indians.
126 The majority of the population was restricted from access to water. Kidd *Environmental Law* 65.
127 The Minister of Water Affairs.
128 Section 2(h) and (i) of the Water Act of 1956.
129 Hall and Burger *Hall on Water Rights in South Africa* 7-8. Statutes which have been passed for the purpose of amending the Water Act are Act 75 of 1957, Act 56 of 1961, Act 63 of 1963, Act 71 of 1965, Act 11 of 1966 Act 79 of 1967, Act 77 of 1969, Act 36 of 1971 and Act 45 of 1972.
130 Hall and Burger *Hall on Water Rights in South Africa* 8.

Dutch rule, the status of the VOC as *dominus fluminis* of the water resources was upheld. Although it was unclear whether the actual "ownership" of water belonged to the citizens in common or whether it was the property of the state,[131] research confirms that individuals held temporary and revocable rights to water under the Dutch rule.

In 1806, the British took over the Cape. In the period following the colonisation of the British, the Roman-Dutch law concept of *dominus fluminis* was gradually undermined and gave way to the principle of riparianism, in terms of which the individuals owning land adjacent to a river derived usufructuary rights (and not ownership rights) to use the water therein.[132] In due course, water sources were defined and categorised as private or public water. The categorisation of water resources enabled the British rulers to define different water use rights emanating from the categorisation. Riparian ownership became the dominant doctrine, ousting the Roman-Dutch law *dominus fluminis* principle, and formed the cornerstone of the Union Act 8 of 1912. However, as time passed, the Act became inadequate to cope with the social and industrial development of South Africa.

In 1956, the Union Act 8 of 1912 was repealed by the Water Act 54 of 1956. With the promulgation of the Water Act, South Africa had reached a stage of industrial development that rendered it essential that industry should no longer be required to take second place to agriculture in its claims to the use of public water.[133] In terms of this development, the 1956 Act provided that riparian owners had the right to use public water in public streams, but the use rights were controlled and regulated by the state.[134] The 1956 Act therefore vested in the appropriate Minister a large measure of control of public water.[135]

Under Apartheid rule however, the 1956-Act promoted the segregation of development of the different ethnic races. In fact, riparian ownership and the distinction between public and private water contributed to the sorry state of water access during Apartheid. Although the Act did not explicitly determine who the owner of private water

131 Movik and De Jong 2011 *Law Environment and Development Journal* 69.
132 Movik and De Jong 2011 *Law Environment and Development Journal* 69.
133 Hall and Burger *Hall on Water Rights in South Africa* 7.
134 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 183.
135 Hall and Burger *Hall on Water Rights in South Africa* 7.

was, it confirmed that the exclusive use rights of private water could be exercised by a landowner on whose property the water had its source, or over which it flowed. Land ownership (which was linked to access to water) generally resided in the hands of the white minority. Pienaar and Van der Schyff[136] summarise the unequal allocation of water rights in the Apartheid period:

> In terms of the 1956 Act riparian owners had the right to use public water in public streams […]. The right of private owners to use water in rural areas (farms) which had its source on the land or flowed over the land was a direct consequence of their landownership. Although there was no finality over the ownership of water, the use of water was derived from and linked to the ownership of land:
>
> (a) In the case of public water, riparian ownership;
> (b) In the case of private water, ownership of the land over which the water flowed or where the source of the water was situated;
> (c) In the case of water servitudes, only those granted by the owner of the servient tenement.

4.3 Contemporary perspectives on the legal status of water as informed by the Constitution

4.3.1 Introduction

Kotzé[137] points to the fact that South Africa is a water-stressed country[138] where scarce water resources remain unequally available to South Africans due to the country's political history. The Constitution is the result of extensive negotiations that were carried out with an acute awareness of the injustices of the country's non-democratic past.[139] Today, the Constitution provides for democratic values, social justice and fundamental human rights.[140] Chapter 2 of the Constitution contains the Bill of Rights.[141] Of specific relevance for this thesis, is the right to have access to sufficient water as enshrined in section 27(1)(b) in the Bill of Rights. The obligations of the state to realise the section 27(1)(b) water right against the backdrop of a history

136 Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 183.
137 Kotzé 2010 *Journal of Human Rights and the Environment* 135.
138 See the preamble of the *National Water Act* 36 of 1998.
139 See chapter 3.3.1 above; African National Congress Constitutional Committee's 1993 *A Bill of Rights for a New South Africa Preliminary Revised Text* http://www.anc.org.za/show.php?id=231
140 Preamble of the Constitution.
141 Section 7(1) of the Constitution.

of inequitable access to water[142] are concretised by sections 7(2) and 27(2). The latter section stipulates that "the state must take reasonable legislative and other measures to achieve the progressive realisation of the right to have access to sufficient water." In light of the constitutional mandate, the then Minister of Water Affairs and Forestry for example initiated a process to review all of South Africa's water-related legislation during May 1994.[143]

The first real outcome of this process was the adoption of the *Fundamental Principles and Objectives for the New Water Law in South Africa* of 1996. The principles and objectives speak to legal aspects of water (principles 1-4), the water cycle (principles 5-6), water resource management priorities (principles 7-11), water resource management approaches (principles 12-21), water institutions (principles 22-24), and water services (principles 25-28). For purposes of this chapter, the first four principles are relevant:

> Principle 1
>
> The water law shall be subject to and consistent with the Constitution in all matters including the determination of the public interest and the rights and obligations of all parties, public and private, with regard to water. While taking cognisance of existing uses, the water law will actively promote the values enshrined in the Bill of Rights.
>
> Principle 2
>
> All water, wherever it occurs in the water cycle, is a resource common to all, the use of which shall be subject to national control. All water shall have a consistent status in law, irrespective of where it occurs.
>
> Principle 3
>
> There shall be no ownership of water but only a right (for environmental and basic human needs) or an authorisation for its use. Any authorisation to use water in terms of the water law shall not be in perpetuity.
>
> Principle 4
>
> The location of the water resource in relation to land shall not in itself confer preferential rights to usage. The riparian principle shall not apply.

142 Du Plessis 2010 *Review of European Community & International Environmental Law* 19(3) 318; Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

143 Nealer and Van Eeden "Challenges regarding potable water supply management by South African municipalities" 58.

In the early stage of post-Apartheid policy and legal development, these fundamental principles and objectives provided the spirit of the later introduced concept of public trusteeship. These principles and objectives were, however, not legally binding,[144] but they nonetheless guided a process of consultation and research to develop the *White Paper on a National Water Policy for South Africa* of 1997 (NWP).[145] The NWP set out new integrated policy positions for the protection, use, development, conservation, management and control of South Africa's water resources.[146] The NWP *inter alia* stipulates that the "status of the nation's water resources as an indivisible national asset will be confirmed and formalised", that the "National Government will act as custodian of the nation's water resources and its powers in this regard will be exercised as a public trust", and that "all water in the water cycle will be treated as part of the common resource". Subsequent to the NWP, the *National Water Act* 36 of 1998 (NWA)[147] was drafted and enacted. The NWA is based on the principles and objectives of the NWP. The preamble to the NWA states that water is "a scare natural resource that belongs to all people." Section 3 of the NWA continues along similar lines and provides for the concept of public trusteeship by stating that,

> 3(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 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.

In the same period following the Constitution, the *Water Services Act* 108 of 1998 (WSA) and the *National Environmental Management Act* 107 of 1998 (NEMA) were drafted. Together with the *National Water Resources Strategy* of 2004[148] and the

144 They merely play the role of interpreting policy or the law. Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services* 162.
145 *White Paper on a National Water Policy for South Africa* of 1997.
146 Karodia and Weston 2001 http://publications.iwmi.org/pdf/H029111.pdf
147 The NWA addresses various themes, namely *inter alia* the introduction of the public trust concept, the realisation of equitable access to water, the Reserve, and the implementation of international agreements regarding the development and management of water resources that are shared by neighbouring countries.
148 The *National Water Resources Strategy* 1 of 2004 is the legal instrument for implementing the NWA. It is thus binding on all authorities and institutions who implement the NWA.

second *National Water Resources Strategy* published in 2013,[149] these legislative and other measures brought about a total reformation of the water regulatory framework of South Africa.[150]

The changes introduced and implemented by these reformative legislative and other measures marked a shift away from the water regulatory approach underpinned by the English- and Apartheid regimes. Whereas the English and Apartheid regimes acknowledged private or individual rights in water, the new paradigm guarantees access to water for all.[151] This is embodied in the purpose of the NWA,[152] which is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways that take into consideration such factors as *inter alia* meeting the basic human needs of present and future generations,[153] promoting equitable access to water,[154] redressing the results of past racial and gender discrimination,[155] and promoting the efficient, sustainable and beneficial use of water in the public interest.[156]

The legal status of water in South Africa is determined by the combination of the constitutional recognition of water and access thereto, and the body of water law that has developed from since 1996. The departure point for the present analysis is the constitutional right of access to water.

149 The second *National Water Resources Strategy* of 2013 outlines the key challenges, constraints and opportunities in water resource management and proposes new approaches that ensure that all people, authorities and institutions respond collectively and adequately for the benefit of all South Africans.

150 Van der Schyff and Viljoen states: "The victory of democracy and promulgation of the Constitution of the Republic of South Africa 1996 emphasised the need for land reform and equitable access to all South Africa's natural resources and demanded a revision of the national water use policy. The amendment of the South African water law dispensation was inevitable." Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* perspective" 340; Viljoen *The Public Trust Doctrine in South African Water Law* 26-27.

151 Young *Public Trusteeship and Water Management* 44.

152 Section 2 of the NWA.

153 Section 2(a) of the NWA.

154 Section 2(b) of the NWA.

155 Section 2(c) of the NWA.

156 Section 2(d) of the NWA.

4.3.2 The constitutional right to have access to sufficient water

4.3.2.1 Introduction

Section 27 of the Constitution contains the right of access to health care, food, water and social security. Of specific relevance for the legal status of water in post-constitutional South Africa, is the right to have access to sufficient water as enshrined in section 27(1)(b).[157] The content, meaning and duties that are ascribed to the state to realise the right of access to sufficient water form part of the determination of the current legal status of water.

4.3.2.2 The content and meaning of section 27(1)(b)

All of South Africa's waters are governed by the NWA and the WSA.[158] The constitutional right of access to sufficient water is given legislative effect by the WSA.[159] Section 3(1) of the WSA stipulates that everyone has the right to have access to a basic water supply.[160] The Constitution itself does not provide further meaning or content as to what exactly qualifies as sufficient quantity or quality of water.[161] In section 1(iii) thereof, the WSA defines "basic water supply" as:

> [T]he prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

This minimum standard of basic water supply was formulated in Regulation 3 of the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* (Water Regulations) as published in the *Government Gazette*[162] as being:

157 Young *Public Trusteeship and Water Management* 64-73.
158 The Acts are complementary. Young *Public Trusteeship and Water Management* 105-106.
159 Fuo 2013 *Murdoch University Law Review* 27; Mostert and Pope *The Principles of The Law of Property in South Africa* 287.
160 The WSA is therefore the principal legislative mechanism in terms of which the state must give effect to its duties as set out in section 27 of the Constitution. Kotzé 2010 *Journal of Human Rights and the Environment* 149.
161 Fuo 2013 *Murdoch University Law Review* 22.
162 GN R509 in GG 22355 of 8 June 2001; Thompson *Water Law A Practical Approach to Resource Management & the Provision of Services* 694.

> A minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household.

This minimum quantity of water should be provided free of charge in line with the Government's policy on free basic water supply.[163] Chapter 3 of the WSA establishes water services authorities. Section 11(1) of the WSA stipulates that each water services authority (including municipalities)[164] has the duty to progressively ensure efficient, affordable, economical and sustainable access to water services to the consumers in its area of jurisdiction.[165]

These duties ascribed to the state are further concretised by the Water Regulations. Regulation 4 of the Water Regulations stipulates the state's duty when dealing with interruptions in the provisions of water services. Regulation 4 requires (or obliges) a water services institution to provide to its consumers with access to alternative water services, comprising at least ten litres of potable water per person per day where water services are interrupted for a period longer than 24 hours.[166] Furthermore, in relation to the quality of potable water, Regulation 5 requires water services authorities to include a suitable programme for sampling the quality of the water in question.

4.3.2.3 The state's obligations to realise section 27(1)(b)

The obligations of the state in terms of the constitutional water right have been considered in a number of court decisions in recent years. In *Mazibuko v City of Johannesburg* (the *Mazibuko*-case),[167] the Constitutional Court had the opportunity to interpret section 27(1)(b). The *Mazibuko*-case followed upon two earlier decisions in the High Court[168] and the Supreme Court of Appeal.[169] In addition to the trilogy of

163 See the *Free Basic Water Programme* of 2001 and the *Free Basic Water Implementation Strategy* of 2007.
164 Kotzé 2010 *Journal of Human Rights and the Environment* 149.
165 In addition to these water services authorities, the WSA provides for the establishment of water services providers and intermediaries. These bodies have the authority and duty to provide water services. Kotzé 2010 *Journal of Human Rights and the Environment* 149; Young *Public Trusteeship and Water Management* 107; Sections 1(xxiii), 22- 27 of the WSA.
166 Fuo 2013 *Murdoch University Law Review* 28; See also section 4 of the WSA.
167 *Mazibuko v The City of Johannesburg and Others* 2010 3 BCLR 239 (CC).
168 *Mazibuko v The City of Johannesburg* Case No 13865/06.
169 *City of Johannesburg and Others v Lindiwe Mazibuko and Others* Case No 489/08 2009 ZA (SCA) par [20].

judgments, the cases of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (the *Bon Vista*-case)[170] and *Federation for Sustainable Environment and Others v Minister of Water Affairs* (the *Federation for Sustainable Environment*-case)[171] provide valuable insight into the scope of protection of the right of access to sufficient water.

In the *Bon Vista*-case, the right of access to water was interpreted in the context of an urgent application that was brought before the court because of an act by the local authority[172] of disconnecting the water supply to a block of flats after the applicants failed to pay for the water services. The applicants launched an urgent application to restore the residents' water supply after the respondents disconnected their supply. Although the facts in the *Bon Vista*-case did not lend itself to an in-depth analysis of the content and meaning of the constitutional right of access to water, the court elaborated on the duties of the state to realise the right, even in the event of consumers not being in a position to pay the state for its water services provision.[173]

Budlender AJ held that the *Bon Vista*-case did not involve the positive duty of the state to provide access to water services, but instead implicated the duty to respect the right of access to water as per section 7(2) of the Constitution. In other words, it highlighted the negative duty of Government in terms of the water right. Considering the comparable provisions in the ICESCR, Budlender AJ stated:[174]

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

The *Bon Vista*-judgment shows that section 7(2) of the Constitution adds an "additional layer" to and reinforces the obligation imposed on the state to realise the constitutional water right.[175] The latter section determines that the state must "respect, protect,

170 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W).
171 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC).
172 The Southern Metropolitan Local Council of Johannesburg, the Council, or the Municipality.
173 Du Plessis 2010 *Review of European Community & International Environmental Law* 321.
174 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W) par [20].
175 Pieterse 2003 *The South African Law Journal* 43.

promote and fulfil" the rights in the Bill of Rights. Liebenberg[176] indicates that each of these terms of the duty to respect, protect, promote and fulfil has its own particular meaning. Regarding the duty to "respect", the state is precluded from law or conduct that infringes upon the enjoyment of certain rights. Kotzé[177] argues that the duty to "protect" will for example oblige the state to take measures to protect vulnerable people from violations of their rights, while the duty to "promote and fulfil" will typically mean that the state must provide people with access to socio-economic entitlement where they currently lack such access.[178]

Seven years after the judgment of the *Bon Vista*-case, the Constitutional Court had to consider the meaning and content of section 27(1)(b) in greater depth. The *Mazibuko*-trilogy commenced in 2004 when the City of Johannesburg decided to install prepayment water meters in the township of Phiri. In terms of the City's Water Policy, residents were entitled to 6000 litres (6 kilolitres) of free water per household per month for domestic use. When this quantity was exceeded, the water supply would be disconnected automatically by the meter, but could be reactivated by purchasing further credit.[179] The installation of pre payment meters had a dual objective, namely to recover outstanding debts related to unpaid water services by the Phiri citizens and to save water by upgrading service provision infrastructure.[180] The applicants in the High Court case challenged the lawfulness of the installation of pre-payment water meters and further held that 25 litres of free water per person per day or 6 kilolitres per household per month is unconstitutional and invalid.[181] The applicants' case against the City of Johannesburg (the Municipality) succeeded in the South Gauteng High Court to the extent that the court ruled that the installation of pre payment water meters was unlawful.[182] It also held that the city's Water Policy was unreasonable and therefore unlawful. The court further ruled that the Municipality should provide 50 litres of free basic water daily to the residents of Phiri.[183] In the Supreme Court of Appeal

176 Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* 82-87.
177 Kotzé 2010 *Journal of Human Rights and the Environment* 147.
178 Kotzé 2010 *Journal of Human Rights and the Environment* 147.
179 *Mazibuko v The City of Johannesburg* Case No 13865/06 par [6].
180 Kotzé 2010 *Journal of Human Rights and the Environment* 150.
181 Barrett and Jaichand 2007 *SAJHR* 550-551; Jansen van Rensburg 2008 *Stellenbosch Law Review* 415-416; Stewart and Horsten 2009 *SAPL* 486-487.
182 *Mazibuko v The City of Johannesburg* Case No 13865/06 par [183].
183 For a summary of the finding of the High Court see *Mazibuko v City of Johannesburg* Case No 13865/06 para [25-27].

(SCA), this judgment was upheld, but the SCA slightly varied its order.[184] The SCA ruled that 42 litres of water per day would be "sufficient water" within the meaning of section 27(1)(b) of the Constitution.

One of the issues raised by the applicants in the Constitutional Court was that the court should determine the content and meaning of the constitutional right of access to water by quantifying the amount of water sufficient for a dignified life.[185] The applicants argued that the Constitutional Court should hold the initial High Court's amount of 50 litres of water per person per day as the content of section 27(1)(b) and as the quantity of water required per person to live a dignified life. The Constitutional Court *in casu* first focused on the nature and extent of the state's obligation to provide access to sufficient water as per section 27(1)(b) of the Constitution and held:[186]

> […I]t is clear that the [section 27(1)(b)] right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.

The Constitutional Court refrained from quantifying the right of access to water and rejected the idea that socio-economic rights in the South African Constitution contain a "minimum core".[187] The court adopted a flexible approach with respect to the quantification of adequate water in terms of the constitutional right of access to water.[188] The court stated that "…what the [constitutional right of access to water] requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of the context".[189] The Constitutional Court therefore held that it is inappropriate for the court to give a quantified content to what constitutes "sufficient water".[190] Kotzé[191] argues in this regard:

184 See Stewart and Horsten 2009 *SAPL* 486-505.
185 Stewart and Horsten 2009 *SAPL* 488.
186 *Mazibuko v The City of Johannesburg and Others* 2010 3 BCLR 239 (CC) par [50].
187 Kotzé 2010 *Journal of Human Rights and the Environment* 154.
188 Kotzé 2010 *Journal of Human Rights and the Environment* 154.
189 *Mazibuko v The City of Johannesburg and Others* 2010 3 BCLR 239 (CC) para [60-68].
190 Kotzé 2010 *Journal of Human Rights and the Environment* 154.
191 Kotzé 2010 *Journal of Human Rights and the Environment* 154.

> If the court had in fact acknowledged the existence of a minimum core in terms of section 27, this would have meant, *inter alia,* that the state would have been under the obligation to provide a minimum quantity of water, regardless of the qualifications and restraints imposed by the availability of resources, to provide access and to provide within a specific period of time[…]

Accordingly, the section 27(1)(b)-right is a qualified right in the sense that it does not impose the obligation on the state to literally provide people with unlimited amounts or access to water. Rather, the state is merely obliged to progressively provide access to water through legislative and other measures within its available resources. It is agreed with Du Plessis[192] who states that the *Mazibuko*-case emphasised the idea of "progressive realisation" of the right of access to water when the court held that the constitutional right of access to water does not bestow the Government with limitless duties in relation to the provision of access to water resources.

Reference is in the last instance made to the judgment in the *Federation for Sustainable Environment*-case.[193] Silobela is a residential area that constitutes part of the Carolina mining and farming community in the Mpumalanga Province of South Africa.[194] The Carolina community suffers from acid mine drainage that contaminates the water.[195] After Carolina's water was contaminated, the municipality provided access to clean drinking water through temporary tanks, which the residents argued was inadequate.[196] Some of the tanks were never refilled and some consumers had to walk long distances to the tanks.[197] In this case, the applicants (residents of Carolina, represented by the Federation for Sustainable Development and the Silobela Concerned Community) approached the High Court to compel the respondents (*inter alia* the Minister of Water Affairs, the Sibanda District Municipality and the Luthuli Local Municipality) to provide regular supply of safe drinking water in terms of Regulation 3

192 Du Plessis 2010 *Review of European Community & International Environmental Law* 321.
193 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC).
194 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC) par [3].
195 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC) par [4].
196 Fuo 2013 *Murdoch University Law Review* 29.
197 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC) para [4, 5]; Fuo 2013 *Murdoch University Law Review* 29.

of the Water Regulations.[198] The applicants further argued that the lack of daily access by residents to an effective and reliable supply of potable water constituted a violation of their constitutional right of access to sufficient water.[199]

The court acknowledged the duty of the respondents to provide water to the residents of Carolina based on the former's constitutional and other legislative duties.[200] The court held that the respondents were enjoined by the Constitution to take reasonable steps towards the progressive realisation of the residents' right of access to water. The court held that:[201]

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

Section 27(1)(b) of the Constitution affords people the right of access to water even if they are not in the position to pay the state (or municipality) for water provision services. In short, the state's obligation to fulfil section 27(1)(b) has been phrased in a positive fashion. It obliges the entire state (in all three spheres of Government) to "respect, protect, promote and fulfil" the full enjoyment of the section 27(1)(b)-right.[202] Section 27(1)(b) does not impose the obligation on the state to literally provide people with unlimited amounts or access to water.[203] Rather, as Pieterse[204] points out, the state's obligations for the realisation of the section 27 right are qualified by the sub-section of the constitutional provision. In terms of the qualifying sub-section, the state is merely obliged to progressively provide access to water through legislative and other measures within its available resources.

198 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC) [para 6].
199 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC)[para 6].
200 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC) [para 10].
201 *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC) [para 24].
202 Kotzé 2010 *Journal of Human Rights and the Environment* 147
203 Du Plessis 2010 *Review of European Community & International Environmental Law* 321
204 Pieterse 2003 *The South African Law Journal* 42.

4.3.2.4 Concluding remarks

The content and meaning of the section 27(1)(b)-right, as well as the obligations of the state in terms of the constitutional water right, have been considered. It follows that the entire state must "respect, protect, promote and fulfil" efficient, affordable, economical and sustainable access to water.

It is possible to derive an important principle relating to the legal status of water in a post-constitutional South Africa from the preceding examination of the content and meaning of the constitutional right to sufficient water, as well as the state's obligations to realise the constitutional water right. Water, as a natural resource, is so important to human survival and well-being that it cannot be regulated in only a private property regime in terms of which, amongst other things, a private law owner can exclude others from having access to the resource.

Up to date, the courts have not explicitly interpreted the constitutional water right as being part of a public property regime. Given the South African context as described, the constitutional water right should, however, be understood, interpreted and enforced in a public property regime. In a public property regime, the extent of use and access rights to water resources are structured, allocated, protected and governed by a public authority to meet the needs and purposes of society as a whole, and not only the needs of (some) individuals.[205]

4.3.3 Public trusteeship

4.3.3.1 Introduction

The notion of public trusteeship captured in the NWA must be understood to fully comprehend the legal nature of water in the current water regulatory regime. This requires understanding of the origin of the concept of public trusteeship and the way in which the concept has to date been interpreted in South Africa.

205 See chapter 2.4.4.1 above.

4.3.3.2 The origin of the concept of public trusteeship

4.3.3.2.1 The Anglo-American public trust doctrine

Some scholars argue that the public trust concept originated from the jurisprudence of the United States of America (USA).[206] The principles underpinning the Anglo-American public trust doctrine are believed to have also been statutorily enshrined in the NWA in South Africa. An in-depth exposition of the development and complexities of the Anglo-American public trust doctrine falls beyond the scope of this thesis. Some of the underlying principles are briefly discussed to provide an understanding of the general gist of the Anglo-American public trust doctrine.

At the most elementary level, the Anglo-American public trust doctrine recognises the principle that some natural resources, and the role they play in sustaining life and the economy are deemed so important that it should be protected for the benefit of the public.[207] In order to do so, a distinction is made between private property rights on the one hand, and public rights on the other. In terms of the doctrine, the state as sovereign acts as trustee of the public rights in certain natural resources, and entrenches the public's right of access to specified uses such as fishing, navigation and commerce.[208] This distinction originated from the decision in the *Illinois Central Railroad Co v Illinois*-case (Illinois-case).[209]

Traditionally, the application of the Anglo-American public trust doctrine was limited to certain natural resources. At the time that the Illinois-case was decided, the doctrine for example applied only to tidal and navigable water, as well as the soil covered by

206 Blumm and Guthrie 2012 *University of California Davis Law Review* 791; Glazewski *Environmental Law in South Africa* 17. See also Pienaar and Van der Schyff *Law Environment and Development Journal* 183-184; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 79-152; Van der Schyff 2010 *PER/PELJ* 123; Viljoen *The Public Trust Doctrine in South African Water Law 35;* Young *Public Trust and Res Publicae in South African Law* 12-14.

207 Van der Schyff 2013 *The South African Law Journal* 375; Zellmer and Harder 2007 *Nebraska Lawyer* 7.

208 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 114; Young *Public Trust and Res Publicae in South African Law* 158.

209 *Illinois Central Railroad Co v Illinois* 1892 146 US 387.

these waters.[210] In this case, the court explained that a distinction exists between property that is owned by the state that could freely be disposed of, and property "owned" and managed by the state on behalf of all the citizens and in the interest of the entire nation.[211] Although the state remained owner of both the categories of property, the "modus" of ownership of these distinct forms of property differed. With regard to the first category, the state was a party in private law, and held the title of the property in question as private owner. In contrast, it was decided that property "owned" and managed by the state on behalf of all the citizens were subject to a form of public ownership. In the *Shively v Bowlby* (the Shively-case),[212] the court elaborated on the nature and meaning of "public ownership". The court explained that the title in, or dominium of the tidal and navigable water, and the soil thereunder, belonged to the sovereign or state as the representative of the nation for the public benefit.[213] The natural resources in question were incapable of private occupation; and their natural and primary uses, including navigation, fishing or commerce were public in nature.[214] In the Shively-case, Justice Gray effectively argued that the state's control and ownership to property subject to the public trust doctrine are supreme, "subject only to the paramount right of navigation and commerce".[215] Public trust resources belonged to the state, but the state did not become the owner in the ordinary private law sense. The title in public trust property vested in the state as public trustee, with the nation as beneficiary.[216]

The court in the Illinois-case expanded the reach of the doctrine to non-tidal navigable waters, and to other resources of "special character" or "public concern" that had to be protected for intergenerational use.[217] Joseph Sax[218] further encouraged the development and expansion of the doctrine to ensure environmental protection. The legislatures and judiciaries of different states in the USA considered arguments made

210 Dunning 1988-1989 *Environmental Law* 516-517; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 114.
211 Van der Schyff 2013 *The South African Law Journal* 376-377.
212 *Shively v Bowlby* 1894 152 US 1.
213 *Shively v Bowlby* 1894 152 US 1, 11, 12.
214 Van der Schyff 2013 *The South African Law Journal* 375.
215 *Shively v Bowlby* 1894 152 US 1, 56.
216 Van der Schyff 2013 *The South African Law Journal* 378.
217 Van der Schyff 2013 *The South African Law Journal* 377.
218 Sax 1970 *Michigan Law Review Association* 471-566. Olsen referred to Sax's work seminal work as the "leading treatment" on the public trust doctrine. Olson 1975 *Detroit College of Law Review* 162.

by Sax. In some states, only subtle expansion could be observed, while the development of the doctrine in other states was "bold and daring", resulting in the increase of public trust uses[219] and the expansion of the reach of the doctrine to resources not previously affected by it.[220] The expansion of the public trust doctrine emphasised the state Government's inherent duty to protect certain natural resources for the benefit of current and future citizens.[221] The expansion of the traditional public trust doctrine highlighted more than the fiduciary obligations of the different states to protect public access and use of certain natural resources. The public trust doctrine accordingly developed beyond its initial "public ownership and access" model to a duty to protect certain natural resources for the sole benefit of current and future generations.[222]

4.3.3.2.2 Statutory birth of the concept of public trusteeship

The assumption that the South African concept of public trusteeship was borrowed or transplanted from the Anglo-American public trust doctrine may not be entirely correct.[223] As discussed earlier,[224] South African law originated from the Roman-Dutch law and was further influenced by English law. Reference to the Anglo-American regime as a place of origin of legal principles for South African law is therefore strange from the outset.[225] Further, as indicated,[226] the Anglo-American public trust doctrine expanded and developed to different degrees in different American states and uncertainty exists as to how the public trust doctrine is applied from one state to the next.[227] For example, a distinction made between high-tide states (where the public trust resources may not be owned privately) and the low-tide states (where private

219 The expansion is for example also depicted in the uses of the public that kept pace with the changing needs of society.
220 Van der Schyff 2013 *The South African Law Journal* 377.
221 Van der Schyff 2013 *The South African Law Journal* 378.
222 Van der Schyff 2013 *The South African Law Journal* 378.
223 Feris 2012 *Law Environment and Development Journal* 6; Pienaar and Van der Schyff 2007 *Law Environment and Development Journal* 184; Young *Public Trust and Res Publicae in South African Law* 15, 146.
224 See chapters 4.2.3 and 4.2.4 above.
225 The departure from the common law approach is found in the NWA. Mostert and Pope *The Principles of The Law of Property in South Africa* 287; Van der Schyff "South African Natural Resources, Property Rights, and Public Trusteeship" 330.
226 See chapter 4.3.3.2.1 above.
227 Young *Public Trust and Res Publicae in South African Law* 14, Young *Public Trusteeship and Water Management* 254-255, 158, 160.

ownership of trust property is possible).[228] This raises the question about which variant of the Anglo-American public trust doctrine finds application in South African law.[229] Although valuable lessons may be learned from Anglo-American law in the process of demystifying the concept of public trusteeship, it seems unlikely that what we find in South Africa's NWA is a virtual "copy" or replica of the Anglo-American public trust doctrine. In fact, in light of the historical development of South Africa's water regulatory regime, one can not agree to the wholesale or blanket importation of the foreign public trust doctrine into South African law. The South African concept of public trusteeship is rather a domestic product of statutory origin, resultant from South Africa's own legal development.[230] In fact, the NWP[231] makes it clear that the Government intended to create a doctrine of public trust that is designed to fit the specific circumstances of South Africa:

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

Subsequent to the NWP, the NWA was drafted and enacted. The preamble of the NWA states that water is a natural resource that belongs to all people. Section 3 of the NWA provides that the National Government is appointed as public trustee of the nation's water resources. The concept of public trusteeship was also statutorily introduced by other environmental and natural resource legislation. In terms of section 2 of the NEMA, for example, the "environment is held in trust for the people" and the state is appointed as its custodian. In 2004, the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) declared in section 3 that mineral and petroleum resources are the common heritage of all the people of South Africa, while the state is appointed as custodian thereof for the benefit of all South Africans. The *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (NEM:ICMA) states that the ownership of coastal public property vests in the citizens of the Republic, and that the state is the public trustee thereof. All of these statutes in recent years incorporated the concept of public trusteeship. It should, however, be

228 Young *Public Trust and Res Publicae in South African Law* 14.
229 Young *Public Trust and Res Publicae in South African Law* 14.
230 Van der Schyff "South African Natural Resources, Property Rights, and Public Trusteeship" 330.
231 *White Paper on a National Water Policy for South Africa* Para 5.1.2.

noted that, except for the NEMA which is regarded as framework-environmental legislation,[232] the other sector-specific Acts find very specific application in South African environmental law.[233] Each of the statutorily introduced concepts should therefore be interpreted on the basis of their specific focus and scope of application.

4.3.3.3 Preliminary remarks on the concept of public trusteeship in South Africa's water regulatory framework

4.3.3.3.1 A legal analysis

To the extent that the statutorily introduced concept of public trusteeship in the South African water law forms the crux of this thesis, it is proper to analyse the concept of public trusteeship as entrenched in the NWA. Van der Schyff[234] contends that the concept is to be understood with reference to the legal principle of "stewardship". She argues that public trusteeship is often seen as a specific manifestation of stewardship.[235]

It seems as if section 24 of the Constitution is the conduit through which the principle of stewardship found its way into South African law.[236] The Gauteng High Court judgment of *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 5 SA 512 (T) states as follows:

> [Section 24] confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment [therefore including water as a natural resource] for future generations. From this follows 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.[237]

232 See the Preamble of NEMA.
233 Van der Schyff 2013 *The South African Law Journal* 380-381.
234 Van der Schyff 2013 *The South African Law Journal* 370-371.
235 Van der Schyff 2013 *The South African Law Journal* 371.
236 Van der Schyff 2013 *The South African Law Journal* 372.
237 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2006] ZAGPHC 132 par 19.

Although the court did not define stewardship *per se*, Van der Schyff[238] refers to the notion's ordinary dictionary meaning and states that stewardship can *inter alia* be understood as the careful and responsible management of something that has been entrusted in one's care.[239] If this understanding is accepted, it may be stated that the holder, owner, manager or regulator of the thing in question (in the context of this study, a natural resource) is entrenched with a fiduciary responsibility of careful management. The views of two other scholars are consulted to provide further insight into the notion of stewardship. Bratspies[240] describes the notion of stewardship as "an approach towards problem solving that includes a long-term perspective, a focus on sustainability, and a deliberate attempt to understand and respect the delicate balance of the earth's ecosystem". Barnes[241] highlights that through the notion of stewardship, a stake in a natural resource vests in the immediate holder (owner, manager or regulator) as well as the wider community. In light of these perspectives on the notion of stewardship, it may be deduced that section 24 of the Constitution creates a fiduciary relationship between the natural resource in question and current and future generations. Within this context, Van der Schyff[242] holds that the notion of stewardship represents a duty towards the environment, the duty to conserve resources, the duty to protect and preserve resources, and the duty towards current and future generations in respect of the resource.

One of the outcomes of stewardship is then that property owners whose property meet the qualification of being of intergenerational importance, and which are therefore affected by the notion of stewardship, are not allowed to use their property in ways that may be detrimental to the environment or other people's interests regarding the natural resource. Property owners are obliged to respect the fiduciary relationship that exists between natural resources and current and future generations.[243] This view regarding the rights of private property owners corresponds with the argument in the preceding chapter that private ownership rights are not absolute, but can be limited if

238 Van der Schyff 2013 *The South African Law Journal* 371.
239 Merriam-Webster, Incorporated 2015 www.merriam-webster.com/dictionary/stewardship; Van der Schyff 2013 *The South African Law Journal* 371-372.
240 Bratspies 2001 *Harvard Environmental Law Review* 213 at 214; See also Van der Schyff 2013 *The South African Law Journal* 372.
241 Barnes *Property Rights and Natural Resources* 247-248.
242 Van der Schyff 2013 *The South African Law Journal* 371-372.
243 Van der Schyff 2013 *The South African Law Journal* 371-372.

so required by the public interest.[244] Stewardship and the limitation of private property rights seem to display a parallel development in the South African property law.[245] It can therefore not be ignored that the newly introduced notion of stewardship encapsulated in section 24 inevitably impacts on the law of property as far as natural resources are concerned.[246]

As indicated above, scholars such as Sand[247] and Van der Schyff[248] argue that the notion of stewardship underlies the concept of public trusteeship. Public trusteeship, as infused by stewardship therefore places natural resources under the custodial or fiduciary control of a state authority.[249]

4.3.3.3.2 The fiduciary responsibility

The NWP[250] explains the idea of the public trust fiduciary responsibility in South Africa's water regulatory framework when it stipulates:

> [T]hat the National Government has a duty to regulate water use for the benefit of all South Africans, in a way which takes into account the public nature of water resources and the need to make sure that there is fair access to these resources. The central part of this is to make sure that these scarce resources are beneficially used in the public interest.

In line with the White Paper, the *National Resource Strategy* of 2004[251] stipulates that the public trustee, in executing its fiduciary responsibility, should ensure that decisions are taken in the beneficial interest of all persons; and that the public trustee's decisions must be constitutionally compliant. In addition, the public trustee must ensure that the goals in relation to sustainability, equity and efficiency are met.[252] This principle is echoed in the second *National Resource Strategy* that was published in 2013.[253] The fiduciary responsibility of the public trustee therefore includes the duty to manage and

244 See chapter 3.2.4.2.2.2 above.
245 Van der Schyff 2013 *The South African Law Journal* 372.
246 Van der Schyff 2013 *The South African Law Journal* 372.
247 Sand 2004 *Global Environmental Politics* 48.
248 Van der Schyff 2013 *The South African Law Journal* 387.
249 Van der Schyff 2013 *The South African Law Journal* 374.
250 Par 5.1.2 of the NWP.
251 *National Resource Strategy* of 2004, A 1, Principle 13.
252 *National Resource Strategy* of 2004, A 1, Principle 13.
253 Chapter 8.5.1 of the *National Resource Strategy* of 2013.

protect access to certain natural resources for the intergenerational benefit of its citizens, as is emphasised by the stewardship principle above.[254]

The policy principles contained in the NWP were given force by the NWA. Through section 3(1) of the NWA, the legislature intended that the public trustee is ultimately responsible for the protection, use, conservation, management and control of South Africa's water resources in a sustainable an equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.[255] In addition, section 3(2) obliges the public trustee to ensure that water or water use rights are acquired and allocated equitably. In terms of the concept of public trusteeship in the South African water regulatory regime, the public trustee is cloaked with a fiduciary responsibility of careful management in the sense that the public trustee must ensure that the nation's water is protected, used, developed, conserved, managed and controlled in a sustainable manner to the benefit of the citizenry.

4.3.3.3.3 The custodial authority

In terms of section 3 of the NWA, the National Government is appointed as the trustee of the nation's water resources. Notably, all the other environmental or natural resource legislation that provide for the concept of public trusteeship, do not refer to the "National Government" as public trustee, but rather to the "state" that holds the natural resources in trust. Section 2 of the NEMA for example contains environmental management principles that apply to all actions of the state. In terms of section 2(4)(o) of the same Act, the state is conferred the duty of public trustee and guardian of the nation's interests relating to the environment. Section 3 of the MPRDA appoints the state as the custodian of the nation's mineral resources, and in terms of section 2(c) and 11 of the NEM:ICMA, the state is appointed as public trustee of coastal property. Van der Schyff[256] indicates that two arguments can be held for these discrepancies. On the one hand, some may argue that "poor and haphazard draftsmanship" of the legislature caused the discrepancy in the custodial authority in the NWA as the "National Government", while the other statutes refer to the "state". On the other hand,

254 Van der Schyff 2013 *The South African Law Journal* 372.
255 Van der Schyff 2013 *The South African Law Journal* 386.
256 Van der Schyff 2013 *The South African Law Journal* 381.

however, she convincingly argues that water as a natural resource is inherently so important to the existence and well-being of the people of the country, and that so many decisions in other governmental spheres impact on water use, that the legislature intentionally bound the National Government in its entirety with a fiduciary responsibility as far as water as a natural resource in South Africa is concerned.

Despite the discrepancies, the underlying idea in all of these environmental and natural resource legislation is that these statutes cloak the country's highest governing authority with the responsibility to govern the natural resources in question.[257] Although the appropriate minister is appointed to act on behalf of the National Government or state, and although specific functions can be delegated by them to subordinate structures, the Government or the state as public trustee is ultimately accountable to carry out its fiduciary responsibility.[258]

4.3.3.3.4 The nation as beneficiary

The Preamble of the NWA states that "water is a natural resource that belongs to all people". Although the "nation" has no legal personality,[259] Van der Schyff[260] argues that the term is used as a collective noun to denote a community of people associated with a specific territory. In the water law realm, this community of people has shared interests in the nation's water resources. It is therefore submitted that the NWA does not promote individual interests.[261] It is rather the joint interest of the public, the South African nation as a whole that is advanced by the concept of public trusteeship.

257 Van der Schyff 2013 *The South African Law Journal* 381.
258 Young *Public Trusteeship and Water Management* 85-86.
259 In *Webb & Co Ltd v Northern Rifles* 1908 TS para [464-465] it was decided that a juridical person is an legal entity with legal personality. A legal entity exists distinct from the individuals forming it and the rights and obligations that are acquired, are intended for the body as a whole and not for the individual members. Technically therefore, the nation as "all the people", cannot acquire ownership of water as natural resource, for the nation does not qualify as a juridical person (*legal personae*) that is distinct from its individuals.
260 Van der Schyff 2013 *The South African Law Journal* 383.
261 Van der Schyff 2013 *The South African Law Journal* 383-384.

4.3.3.3.5 The public interest

The notion of public trusteeship as captured in the NWA does not aim to protect individual interests.[262] It follows that a private individual or legal entity will not be able to claim benefits flowing from the NWA if the claim is not shaped by the public interest.[263] The public interest is, however, an abstract concept that is difficult to define.[264] Scholars argue that the public interest varies across different countries and communities because different needs culminate in different public interests.[265]

The concept of the public interest is in the South African water regulatory regime delimited primarily by the values and fundamental rights of the Constitution, together with the objectives of the NWA. In light of the constitutional values and fundamental rights, the public interest then combines the constitutional vision of section 24, which stipulates that everyone has the right to an environment that is not harmful to health or well-being, with the nation's commitment to bringing about equitable access to water in terms of section 27. In addition hereto, the NWA contains distinctive objectives and purposes to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways that take into account *inter alia* meeting the basic human needs of present and future generations,[266] redressing the results of past racial and gender discrimination[267] and facilitating social and economic development.[268]

The concept of the public interest is instrumental in understanding the post-constitutional, public trusteeship water rights paradigm discussed below.[269] The public interest must be advanced and supported via every action in terms of the NWA. It for example determines any personal-use right or water use entitlement that can be acquired by an individual or legal entity in terms of the NWA.[270]

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262 See chapter 4.3.3.3.4 above.
263 Van der Schyff 2013 *The South African Law Journal* 383-384.
264 Van der Schyff 2013 *The South African Law Journal* 383.
265 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 22; Van der Walt *Constitutional Property Law* 242-245; Van der Schyff 2013 *The South African Law Journal* 383.
266 Section 2(a) of the NWA.
267 Section 2(c) of the NWA.
268 Section 2(e) of the NWA.
269 See section 4.3.4 below.
270 Van der Schyff 2013 *The South African Law Journal* 384.

4.3.4 The post-constitutional water rights regime

4.3.4.1 The introduction of administrative use rights

The introduction of the concept of public trusteeship is most significant. Its addition to the water regulatory framework should be seen against the post-constitutional policy discourse that aims to redress past inequalities while simultaneously achieving efficient and sustainable water use.[271] On the basis of the concept of public trusteeship, the authority over water resources in South Africa primarily vests with the national sphere of Government. In terms of schedules 4B and 5B of the Constitution, the National Government may delegate certain functions pertaining to water resources to other spheres of Government.

The NWA provides for the fact that the National Government, as public trustee, publicly allocates and regulates the use of South Africa's water resources in the public interest by means of a licensing or permitting system. Therefore, in permitting (or licensing) any use of water, the concept of public trusteeship obliges the National Government and all its repositories with decision-making power to take into account and to give effect to the state's constitutional mandate, the fundamental principles and objectives of the NWA.[272]

4.3.4.2 The nature of the licensing or permitting system

Water use entitlements or access rights are divided into three categories in terms of section 4 of the NWA. The first category contains entitlements to use water without any permission or license; the second category includes the instances where an individual is allowed to continue with an existing lawful water use; and water uses of the third category require a general authorisation, permit or license from the relevant authority.

271 See chapter 4.3.1 above.
272 Stein 2005 *Texas Law Review* 2175.

Giving effect to the constitutional right of access to water for basic needs,[273] individuals are allowed to use water in or from a water resource without permission if the water use is listed in Schedule 1 of the NWA. Schedule 1 stipulates that everyone is entitled to water for reasonable domestic purposes, including but not limited to domestic gardening, animal watering, fire-fighting and recreational use. Section 4(2) of the NWA articulates the second category of water use entitlements in the sense that any person may continue the lawful use of water in terms of the previous *Water Act* 56 of 1956, subject to any conditions regarding the substitution of the right of use by the new licensing procedure in terms of the NWA. In terms of section 4(3) of the NWA, the third category of entitlements to use water is subject to a general authorisation or license in terms of the NWA.[274]

In light of the three-part division of water use entitlements or access rights, the NWA itself sheds some light on the legal nature of water in the current post-constitutional, public trusteeship water regulatory regime. In terms of section 28 of the NWA, all water licenses are subject to conditions and are issued for a fixed period that may not exceed forty years.[275] As section 28 of the NWA does not acknowledge private, individual or exclusionary rights in water, and as the holder of the water right cannot freely decide on the unlimited use or exploitation of the resource, it seems on face value alone that water cannot be subject to private, exclusionary water rights. Similarly, sections 53-55 of the NWA disregard the possibility of private ownership in water resources. Sections 53-55 deal with the consequences of contraventions of license conditions and provide for the possibility of *inter alia* the retraction of entitlements to use water. The consequences of contraventions range from the responsible authority requiring the licensee to take remedial action,[276] failing which it may take the necessary action and recover reasonable costs from that person[277] or the suspension or withdrawal of a license by the public authority.[278] These forms of regulatory control are conducive to what was envisioned with the adoption of the notion of public trusteeship over water

273 Stein 2005 *Texas Law Review* 2179.
274 See the explanatory note of chapter 4 of the NWA. As a general rule, a water use must be licensed unless it is listed in Schedule 1, is an existing lawful water use, is permissible under a general authorisation, or if the responsible authority waives the need for a license.
275 Section 28(1)(d)-(e) of the NWA.
276 Section 53(1)(c) of the NWA.
277 Section 53(2)(a) of the NWA.
278 Section 54 of the NWA.

resources, vesting the authority over water resources with the national sphere of Government.

4.3.5 Concluding remarks: The legal status of water in the post-constitutional, public trusteeship regime

Following the advent of the Constitution, a novel legal framework for water resources regulation was developed in South Africa.[279] The Constitution provides for a fundamental human right to have access to sufficient water. The right is enshrined in section 27(1)(b) of the Bill of Rights. The obligations of the state to realise the section 27(1)(b) water right against the backdrop of a history of inequitable access to water[280] is concretised by section 27(2). The latter section stipulates that "the state must take reasonable legislative measures to achieve the progressive realisation of the right to have access to sufficient water." Following an in-depth discussion of the case law above,[281] it becomes clear the state has numerous positive as well as negative duties to progressively realise the section 27-right for everyone. It is obvious that the constitutional right to have access to water, and the state's concomitant duties to progressively realise the right cannot be regulated in a private property regime in which an individual owner normally holds a right of use to the exclusion of others. It therefore seems as if the legislature intended a more "public" regime for the regulation of water resources. This propensity towards a "public regime" is also to be depicted in the NWA.

The aim of the NWA was to bring about fundamental reform of the law relating to water resources.[282] Following the NWA, the water regulatory framework of South Africa changed from one that linked access to water to land ownership[283] and differentiated

279 Du Plessis 2010 *Review of European Community & International Environmental Law* 19(3) 317; Gabru 2005 *PER* 1; Soltau 1999 *Acta Juridica* 231; Stein 2005 *Texas Law Review* 2167.

280 Du Plessis 2010 *Review of European Community & International Environmental Law* 19(3) 318; Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

281 See chapter 4.3.2.3 above.

282 Long title of the NWA. Section 2 of the NWA states that it is the purpose of the Act to "ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled" taking into account factors *inter alia* the basic human needs of present and future generations, equitable access to water and the public interest.

283 See the introduction of the *White Paper on a National Water Policy for South Africa*; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 393-340.

between private and public water,[284] to a framework that applies to "all water" in South Africa. The NWA further provides that all water use rights are placed under the centralised control of the public trustee, acting through the Minister, to hold the nation's water resources in trust for the people. In terms of the concept of public trusteeship incorporated through the NWA, the public trustee acting through the National Government, publicly allocates and regulates the use of South Africa's water resources by means of a licensing- or permitting system. Although an individual can apply for, and hold a general authorisation or license to use water in a private or official capacity, the holder thereof cannot deal with the authorisation of license as a private property owner. In fact, in terms of section 28 of the NWA, all water licenses are subject to conditions and are issued for a fixed period that may not exceed forty years.[285] It is therefore safe to submit that the nation's water resources are publicly regulated by the National Government or public trustee and are not privately owned.

Although the environmental and human-rights lawyer may hail the post-constitutional, public trusteeship development in the regulatory framework of South Africa's water resources, the introduction of the concept of public trusteeship raises a plethora of questions for the property lawyer. Van der Schyff[286] for example identifies numerous questions which include, but are not limited to, the question of whether the NWA, through the concept of public trusteeship merely re-affirmes the public nature of water and legal principles that applied to the nation's water resources under the African customary and Dutch rule; whether the public trust fiduciary responsibility altered the nature of ownership; whether the concept introduced an institutional regime change; or whether the notion of *res publicae* have been statutorily introduced through the concept of public trusteeship? In light of these questions, the implications that the statutorily introduced concept of public trusteeship might have on water as property and the property regime within which water is regulated in South Africa seem infinite and still have to be determined. The concept of property as understood from the research done thus far may assist in guiding the inquiry.

284 Para 5.1.1 of the NWP.
285 Section 28(1)(d)-(e) of the NWA.
286 Van der Schyff 2013 *The South African Law Journal* 373, 387-389.

4.4 Property, property regimes and the regulation of water in post-constitutional South Africa

4.4.1 Private property

From the discussion in chapter 2.4 above, it is evident that three major property regimes can be differentiated. They are private property,[287] common property[288] and public property.[289] The identifying characteristics of private property are the exclusive right of the individual owner to decide on the use of the resource in question; the exclusive right to the services of the resource; and the right to exchange the resource at mutually agreeable terms.[290] On face value alone, it is clear that the post-constitutional, public trusteeship model does not leave room for the country's water resources to be regulated in a private property regime. That leaves the common and public property regimes.

4.4.2 Common property

As far as common property is concerned, the research indicated that the main characteristic of common property is that common "things" are generally so important to mankind that they are incapable of being subject to ownership.[291] The Supreme Court of Appeal, in the case of *Mostert Snr and Another v S,*[292] recently engaged with the classification of water as property in the post-constitutional, public trusteeship paradigm and decided it to be common property. A farmer and his son grew sugarcane on a farm riparian to the Lomati River. They had intentionally omitted to register a second pump to monitor water usage as required by the Lomati Irrigation Board. In addition, they had tampered with the existing pump station meter to reflect a lower than actual water usage. These actions resulted in charges of theft, fraud and further criminal charges for the contravention of section 151 (1)(e) and (5) of the NWA for wrongfully, unlawfully, intentionally or negligently tampering or interfering with the

287 See chapter 2.4.2 above.
288 See chapter 2.4.3 above.
289 See chapter 2.4.4 above.
290 See chapter 2.4.2.1 above.
291 See chapter 2.4.3 above.
292 *Mostert Snr and Another v S* 2010 2 All SA 482 (SCA).

required pump and unlawfully, intentionally or negligently committing an act detrimentally affecting a water resource by illegally abstracting water from the Lomati River. The court *a quo* held that common law charges could not be brought by the state, as the statutory penalties excluded common law remedies. However, on appeal, the Supreme Court of Appeal found that the NWA had not specifically excluded common law offences. Consequently, in order to establish whether the water was capable of being stolen in terms of the common law, the court had to establish whether the water contained in the Lomati River was of private or public in nature. In light of the historical foundations and distinctions drawn between *res publicae* and *res omnium communes* above,[293] it seems surprising that the court concluded that public water, whether running in a river or stream, is classified as *res omnium communes.* The court held:

> Roman law recognised certain things as being *res extra patrimonium* which were incapable of being owned, including those things classified as *res communes* being 'things of common enjoyment, available to all living persons by virtue of their existence'. Public water, running in a river or a stream, was recognised as being *res communes* and therefore incapable of being owned. These Roman law principles were adopted by Roman-Dutch law and subsequently recognised in South Africa.

The Supreme Court of Appeal therefore concluded that the water contained in rivers is *res omnium communes,* or common property and therefore incapable of ownership. If it is not owned, it cannot be stolen.

This judgment can, however, be criticised. Young[294] for example argues that the Supreme Court of Appeal failed to properly analyse the distinctions made between the Roman and Roman-Dutch law concepts of *res publicae* and *res omnium communes* as discussed above.[295] The discussions on Roman- and Roman-Dutch law principles indicate that running water should be classified as *res omnium communes,* while water in perennial rivers should be regarded as *res publicae. Res publicae* entails public property that is susceptible to use by all. As a result, it largely affords access to the resource. The National Government regulates the use of the resource as *res publicae*, especially in the context of navigable waters, where extraction of water is subject to

293 See chapters 2.4.3.1 and 2.4.4.1 above.
294 Young *Public Trusteeship and Water Management* 138.
295 See chapters 2.4.3.1 and 2.4.4.1 above.

limitations. On face value, especially in the context of perennial waters, these common law requirements of *res publicae* seem to be consistent with the concept of public trusteeship, as the National Government is required to facilitate access to water resources. In order to determine whether the court was right in classifying "public water, running in a river or a stream" as *res omnium communes* and not as *res publicae*,[296] it is necessary to evaluate whether water can be regarded as *res publicae* (public property).

4.4.3 Public property

4.4.3.1 Introduction

Chapter 2.4.4.1 offers two main attributes for the public property regime. Firstly, that public property separates ownership from the actual use of a resource. Whereas the "ownership" of public property vests in the state, the statutorily governed access and use rights reside with a subset of the citizenry (the public). Secondly, that the forms of property or resources in a public property regime aim to satisfy the needs and purposes of the public or society as a whole, whatever the needs or purposes are and however they are determined.[297] There are similarties between the public property regime and the public trusteeship regime to the extent that they seem alike. Similarities between the two regimes include that both of them separate ownership from the actual use of a resource; both regimes vest "ownership" of the property in question in the state (or Government); and in both the stated regimes the access and use rights to the property reside with the public. If it is found that the public property regime and the public trusteeship regime are identical, it would be possible to glean from the former regime possible answers to at least some of the property law questions posed above.[298] Therefore, to establish whether the public trusteeship paradigm can be equated with the public property regime, and further, to confirm whether the legal

296 If the court correctly found that this type of water was *res publicae* it would have been required to engage with the nature of ownership of water and whether it is owned by the public or the state. Further, regardless of by whom it is owned, the fact that it is owned at all would have resulted in a finding that this water had in fact been stolen. The decision may therefore in future be set aside.

297 Waldron 1985 *Oxford Journal of Legal Studies* 328-329.

298 See chapter 4.3.5 above.

nature of water is that of public property, it is necessary to revisit the characteristics of "things", "objects" or resources that are susceptible to a public property regime.

It has been indicated thus far that six characteristics determine whether property can be classified as public property to be regulated in a public property regime.[299] They are 1) the "public function" of property; 2) the fact that public property cannot be owned by private individuals, but that the legal title vests in the state; 3) the idea that the state cannot deprive the public of its common-law entitlements to the use and enjoyment of public property; 4) that it falls within the competence of the state to regulate access to and use of public property; 5) that legislation, regulations or policies "declare" property as being public; and 6) that the state, as "public owner", has the competence to grant rights in respect to public property to private individuals. A brief overview of historical and post-constitutional, public trusteeship water law principles serves as a benchmark against which to measure and determine whether water can be regarded as public property in South Africa today.

4.4.3.2 The public function of water

The first characteristic of public property entails the "public function" or "public purpose" it fulfils. It is important to state from the outset that water is inherently important for the existence and well-being of the people of the country. One of the functions of water is therefore that it fulfils certain needs of society, or that it promotes the public interest.[300] The discussions of pre-constitutional and contemporary perspectives on water in South Africa indicate that the vital functions of water as natural resource have been acknowledged throughout history. These functions include that it is a source of life, livelihood and prosperity, and also an input into all production in agriculture and industry.[301] In the post-constitutional water regulatory framework,

299 See chapter 3.2.4.3 above.

300 See chapter 3.2.4.3.4 above; Habdas 2011 *TSAR* 637-639, 343.

301 In section 4.2.3 above, it was for example acknowledged that water is vital for food- and industrial production when the *Placaat* of 16 December 1661 was issued to prohibit the use of water for irrigation so that the Company's corn-mill could function. On its turn, the discussion on the influences brought about by the British occupation brought to the fore the riparian-principle. The principle was interpreted by the courts to allow a riparian owner to use running water for domestic purposes, animal watering, and even industrial activities. These principles arguably emphasised the vital function of water in the pre-constitutional era. The same can however not be said for the regulatory practices that prevailed under the Apartheid regime. The majority of people (the black population) were deprived of access to water resources due to racial segregation and

the vital "function" or "purpose" of water to promote the public interest is acknowledged in the principles, objectives and purpose of the NWA. Sections 1-4 of the NWA for example provide for guiding principles that *inter alia* recognise the basic human needs of present and future generations, and the need to promote social and economic development. It may therefore be asserted that water as a natural resource meets the first characteristic of public property by fulfilling a vital and public function or purpose.

4.4.3.3 Water cannot be owned by private individuals

The second characteristic of public property concerns its legal title. The discussion dealing with the attributes of public property in chapter 2.4.4.1 above, indicates that two interpretations exist to provide guidance to answer the question of which "recognisable entity" the "ownership" of public property vests in. The first interpretation is that the "ownership" of public property usually vests in a Government agency, public authority or the state, and is therefore commonly referred to as "state or public ownership".[302] It should again be emphasised that this public property conception of "ownership" is detached from the self-serving and exclusionary interests normally associated with private ownership.[303] Another argument for the "ownership" of public property is that, in many cases, property rights in public property are not controlled by the state or Government, but rather by the society at large. In this argument, Rose calls the "owner" of the public property the "unorganised public".[304] This dual understanding of "public ownership" is significant for understanding how the concept is separated from the actual use and access rights of the public in a public property regime. Whereas the "ownership" of public property vests in the state or even the citizenry at large, the control and management usually resides with a group of elected

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discrimination that were implemented and enforced. Although it was only for the benefit of the white minority, it seems from the legislation of that period that the state continued to acknowledge the function of water by availing water to riparian owners for *inter alia* domestic purposes. Hall and Burger *Hall on Water Rights in South Africa* 1; Tewari 2009 *Water SA* 696.

302 The terms "public property", "state property" or "collective property" are often used to refer to the property regime describing the states', or some public agency's responsibility to control the resource in question. Barnes *Property Rights and Natural Resources* 154; Page "Reconceptualising property: Towards a sustainable paradigm" 94; Rose 1986 *The University of Chicago Law Review* 716; Waldron *The Right to Private Property* 41; Ziff *Principles of Property Law* 9.

303 Rose 2003 *Law and Contemporary Problems* 99; Van der Schyff "South African Natural Resources, Property Rights, and Public Trusteeship" 329; Barnes *Property Rights and Natural Resources* 154.

304 Rose 1986 *The University of Chicago Law Review* 721.

individuals who are representatives of the state, while the access and use rights reside with a subset of the citizenry.[305]

These interpretations of the legal title of public property are familiar to the pre-constitutional water regulatory regime. The pre-constitutional South African common law was silent on where the "ownership" of water vested. Some argued that it belonged to the citizens in common, while others interpreted the application of the Roman-Dutch law *dominus fluminis*-principle as water being the property of the state. In the contemporary water regulatory framework, the National Government is not only appointed as the public trustee, but has an overall authority over the nation's water resources on behalf, and for the benefit of the citizens. It may therefore be submitted that the legal title of water resources in both the pre-constitutional, as well as the post-constitutional water regulatory frameworks correspond with that of public property.

4.4.3.4 Common-law entitlements to the use and enjoyment of water

The third characteristic of public property, is that the state cannot deprive the public of its common-law entitlements to the use and enjoyment thereof.[306] In other words, if one wants to determine whether water can be regarded as public property, it must be affirmed that the state is not in the position to deprive the public of certain entitlements to the use and enjoyment of water.

Pre-constitutional examples of common-law entitlements to the seashore as public property included the public's rights in respect of the beach for purposes of *inter alia* bathing and swimming. In the context of the public trusteeship paradigm wherein water is currently regulated, the NWA provides for certain entitlements or water uses, *inter alia* for reasonable domestic use, domestic gardening and fire-fighting[307] that cannot be withdrawn or suspended. Consequently, as the public has certain access and use rights to use water that cannot be deprived from them, water can be regarded as public property.

305 Bromley "The commons, property, and common property regimes" 15.
306 See chapter 3.2.4.3.2 above.
307 See Schedule 1 of the NWA.

4.4.3.5 The competence of the state to regulate access and use rights to water

The fourth characteristic of public property is that the state is authorised to regulate access to- and the use of *res publicae.* In pre-constitutional South Africa, the state often made use of its authority to publicly regulate access and use rights to water resources. With the *Placaat of van Riebeeck,* the VOC, acting as the state, for example prohibited persons to bath and wash their clothes in the streams of Table Bay Valley[308] as it endangered the health of other water users. The state exercised this authority right throughout the British era where the state for example restricted the access of the public to the seashore to protect sea birds during their breeding season.[309] Similarly, in the post-constitutional era, the state is charged with the competence to regulate access and use rights to water. In fact, section 7(2) read with section 27(1)(b) of the Constitution determines that the state must "protect, promote and fulfil" the right to have access to sufficient water. The duty to "protect" for example obliges the state to take measures to protect vulnerable people from violations to their right to water, while the duty to "promote and fulfil" will typically mean that the state must provide people access to water where they currently lack such access.[310] In light of the examples pointing to the competence of the state to regulate access and use rights to water, it may be asserted that water can be regarded as public property.

4.4.3.6 Legislation, policies or regulations

The fifth characteristic of public property is that legislation, policy or regulations normally indicate, describe or declare property as being public. It was for example indicated that in the pre-constitutional dispensation, the *Seashore Act* 21 of 1935 "declared" the sea and seashore as being owned by the President.[311] Influences brought about by the British occupation further led to the promulgation of legislation

308 This prohibition was later repeated in a General Placaat in 1657, which laid down penalties in the case where the proclamation was disobeyed. Hall *The Origin and Development of Water Rights in South Africa* 11; Hall and Burger *Hall on Water Rights in South Africa* 1.
309 See chapter 3.2.4.3.2 above.
310 Kotzé 2010 *Journal of Human Rights and the Environment* 147.
311 Van der Walt 2008 *Stell LR* 325.

that explicitly provided for "public water" when they differentiated between and respectively defined public and private water.[312]

Numerous legislative measures,[313] policies and regulations of the post-constitutional era also recognise public property in natural resources.[314] With regard to water specifically, the NWP acknowledges the "public nature of water resources".[315] The preamble of the WSA confirms the National Government's role as custodian of the nation's water resources, while the NWA characterises water as being a public resource by stating that water "belongs to all people" and acknowledges the National Government's overall responsibility for and authority over the nation's water resources.[316] Once again, the characteristic of public property that legislation, policy or regulations indicate, describe or declare property as being public, is met in the water regulatory framework.

4.4.3.7 The authority and responsibility of the state (or National Government) to grant rights to individuals

In the last instance, public property is characterised by the fact that the state, as "public owner", has the competence to grant rights in respect to public property to private individuals. Under Dutch rule, the VOC (acting as the state) granted water entitlements to regulate the use of the scarce resource in terms of the *dominus fluminis* principle. In terms of sections 3(2), 4 and 21 of the currently prevailing NWA, the National Government or public trustee is responsible for ensuring that water is allocated equitably and used beneficially in the public interest.[317] Chapter 4.3.4 above indicates that the National Government publicly allocates and regulates the use of South Africa's water resources by means of a licensing or permitting system. In permitting (or licensing) any use of water, the concept of public trusteeship obliges the National Government and all its repositories with decision-making power, to take into account

312 See the *Cape Act* 32 of 1906, the *Transvaal Act* 27 of 1908, the *Irrigation and Conservation of Water Act* 8 of 1912, and the *Water Act* 54 of 1956.
313 The NEM:ICMA describes the phrase "coastal public property" in section 7 thereof. The MPRDA likewise provides that mineral and petroleum resources are the common heritage of all the people of South Africa.
314 See for example chapter 2 of the NEM:ICMA and the preamble of the WSA.
315 *White Paper on a National Water Policy for South Africa,* par 5.1.2.
316 Preamble of the NWA.
317 Young *Public Trusteeship and Water Management* 82.

and give effect to its constitutional mandate, the fundamental principles and objectives of the NWA.[318]

4.4.3.8 Concluding remarks

In light of the above six characteristics of property under a public property regime, water as a natural resource fits the concept of public property. It is not only true in the post-constitutional water law policy and legislation, but water was historically also regarded as public property regulated by the *dominus fluminis*principle. The concept of public property is therefore not foreign to South African water law. Some may argue that the concept of public trusteeship merely (re-) introduced the *res publicae* concept into the South African realm. The researcher is cautious of the argument that the concept of public trusteeship merely (re-) introduced the *res publicae* concept into the South African water realm, the reason being that the concept of *res publicae* is a concept of common law. Indeed, it is not the common law, but the statutory law or NWA that regulates the post-constitutional water regulatory framework in South Africa. Therefore, although the research indicates that there are many similarities between the common law concept of *res publicae* and the concept of public trusteeship, an examination of the concept of public trusteeship indicates that public trusteeship means much more than originally articulated by the common law concept of *res publicae* or public property. The concept of public trusteeship for example includes a fiduciary responsibility that is not explicitly recognised by the common law concept of *res publicae.* The introduction of the concept of public trusteeship can not be seen as a mere continuation of the *res publicae* concept, but brings about a major transformation in which existing property rights are re-defined in South Africa's water law dispensation.

318 Stein 2005 *Texas Law Review* 2175; Young *Public Trusteeship and Water Management* 81-82.

4.5 Conclusion

The historical overview of the legal status of water in South Africa indicated that the legal status of water was never fixed. Whereas the African custromary law regarded water a common resource, water was after the arrival of the Dutch in the Cape of Good Hope subject to the Roman-Dutch doctrine of *dominus fluminis*. Although, with the advent of the British regime, the Roman-Dutch doctrine was gradually undermined with the principle of riparianism, the NWA and its introduction of the notion of public trusteeship brought to culmination the trend of state control of South Africa's water resources. These historical developments affected the legal status of water to the point that water can today be regarded as public property.

The NWA, through the concept of public trusteeship, does not merely re-affirm the public nature of water and legal principles that applied to the nation's water resources under the African customary and Dutch rule. Neither does it introduce the common law notion of *res publicae*. The concept of public trusteeship imposes a public trust fiduciary responsibility on the South African Government that is unknown to the common law notion of *res publicae.* This novel, statutory introduced concept of public trusteeship *inter alia* alters the nature of ownership and introduces an institutional regime change that has important legal implications for existing property rights and the regulation of water resources in South Africa.

Sand[319] indicates that the concept of *öffentliche Sache* in German law has striking similarities to the concept of public trusteeship in the South African water regulatory framework. Further evaluation of the structural parallels between the concepts might not only improve the understanding of the concept of public trusteeship, but may also reveal new insight into the implications that the statutorily introduced concept of public trusteeship might have on water as property and the property regime within which water is regulated in South Africa.

319 Turnipseed *et al* 2010 *Environment* 12.

Chapter 5

Property in the context of German law

5.1 Introduction

Foreign law that provides for concepts and legal constructs resembling the features of public trusteeship may assist with the interpretation of the concept in the South African context.[1] As indicated earlier, the Anglo-American public trust doctrine is the foreign framework most often analysed by South African scholars who take interest in the meaning and application of public trusteeship with respect to natural resources.[2] Young,[3] however, argues that there are "inherent shortcomings" in the Anglo-American public trust doctrine as a potential model for trusteeship in the South African water regulatory framework. Sand[4] reasons on the other hand, that "functional equivalents" of the Anglo-American public trust doctrine also exist in *other* legal jurisdictions. According to Sand, one of these "functional equivalents" exists in German property law.[5]

It follows that the German property law and specifically the concept of property could inform the development and interpretation of the concept of public trusteeship in South Africa's water law. Of particular relevance is the German concept of *öffentliche Sache* that embodies the principle that the state becomes public manager of resources that are vital to the public.[6] The concept of *öffentliche Sache* mirrors in part the core of the Anglo-American public trust doctrine, namely the concept of "public ownership" that

1 Section 39(1) of the Constitution.
2 The Anglo-American public trust doctrine speaks to *inter alia* the concept of public ownership and the state's fiduciary responsibilities in relation to natural resources. Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 106-148; Young *Public Trusteeship and Water Management* 147-171.
3 The Anglo American public trust doctrine is traditionally concerned with the right of access to resources for the purposes of fishing and navigation. In some American states, the doctrine has been developed to encompass also modern concerns such as recreation or aesthetic uses. Young argues that "[t]he inconsistencies in the application of the public trust doctrine result in uncertainty, not only in the application of the doctrine, but also the nature of the rights created, the types of property protected and the classification of the doctrine within the legal sphere." Young *Public Trusteeship and Water Management* 168-171.
4 Turnipseed *et al* 2010 *Environment* 12.
5 Turnipseed *et al* 2010 *Environment* 12.
6 Kube 1997 *Natural Resources Journal* 857, 862, 877-879.

vests a fiduciary obligation in the state to protect the public interest in natural resources and to regulate public rights therein.[7]

The German concept of *őffentliche Sache* is analysed and discussed in two chapters of this study.[8] The focus of the present chapter is to determine the content, meaning and forms of the concept of property in German law. The next chapter deals with the relevance and application of the concept of *őffentliche Sache* in the German water regulatory framework. Raff[9] argues that the German legal system provides for different property concepts in the civil or private law and public law respectively. In line with Raff's division, the present chapter is organised into two parts. The first part briefly focuses on the development, content and meaning of the private law concept of property in Germany. The second part examines the public law property concepts in German law and elucidates how and to what extent the concept of *őffentliche Sache* is regulated in the public law sphere. The chapter concludes with reflections on the relevance of the content, meaning, and public law regulation of the German property law concept of *őffentliche Sache*.

7 Blumm 2010 *Pace Environmental Law Review* 658.

8 The present chapter, chapter 5, examines the different forms of the property concept in the German legal context. The chapter interprets the concept of *őffentliche Sache* in the context of, and in relation to other property law concepts. To a certain extent, the discussions of chapter 5 provide the background for the second part of the discussion of *őffentliche Sache* in the following chapter. Chapter 6 below will analyse the concept of *őffentliche Sache* as it functions in the German water law.

9 Raff *Private Property and Environmental Responsibility* 160.

5.2 The private law concept of property in Germany

5.2.1 Introduction

The most important source of the private law in Germany is *Das Bürgerliche Gesetzbuch* (the German Civil Code, or the BGB), which was passed on 1 July 1896 and came into effect on 1 January 1900.[10] The BGB is divided into five books,[11] of which the third (*Dritter Abschnitt*) contains the private property law.[12] The concept of property encapsulated in the BGB is the German concept of *Eigentum.* Van der Walt[13] states that in its traditional, Roman-Germanic private law sense, this term is generally translated as "ownership" rather than "property". To inform the interpretation of the German private law concept of *Eigentum* in the BGB, it is first necessary to commence with a brief historical overview of the German legal system indicating the development towards and comprehensive adoption of the Roman law.

5.2.2 Historical perspectives on the reception of Roman law private property concepts

The history of German law spans the transition from unwritten and localised[14] dispute settlement[15] to a formal, largely codified system aimed at the administration of justice over numerous centuries.[16] A comprehensive historical study of German law is rather

10 The BGB extensively unified and codified the civil law, which consequently provided the legal basis for legal relationships between private individuals or legal subjects. Cohn *Manual of German Law* 7; Foster and Sule *German Legal System and Laws* 407.

11 The first book (§1-240) deals with *Allgemeiner Teil* (general concepts of law), which apply to all other books of the *Bürgerliche Gesetzbuch*. The second book (§241-853) deals with *Schuldrecht* (the law of obligations) and is followed by the third book (§854-1295), which contains the *Sachenrecht* (property law). As will become clear below, the third book is of particular interest for the current research, and contains rules regarding ownership. It further regulates the acquisition and loss of ownership as well as the establishment and protection of other property rights. It also distinguishes between movable and immovable objects. The fourth book (§1297-921) deals with the *Familienrecht* (family law) and is followed by the fifth and last book (§1922-2385), which deals with the *Erbrecht* (the law of succession).

12 It regulates the allocation of property (*Sachen*) to legal subjects that may either have ownership or possession of the property. The BGB also regulates other property rights, such as rights of use and security rights. Baur *Lehrbuch des Sachenrechts* 5; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 211.

13 Van der Walt *The Constitutional Property Clause* 42.

14 Cohn *Manual of German Law* 20-21; Hübner *A History of Germanic Private Law* 2.

15 Foster and Sule *German Legal System and Laws* 10.

16 Freckmann and Wegerich *The German Legal System* 1; Mousourakis *The Historical and Institutional Context of Roman Law* 445.

extensive and surpasses the focus and purpose of this chapter. It should, however, be noted that German law has historically been subjected to numerous influences.[17] Arguably, the most important of these influences was Roman law, as Roman law not only sculpted the development of German property law, but was comprehensively adopted into the German private law regime.[18]

In the earliest times, during the Germanic period (100 BC- AD 500), society was composed of independent tribes or communities.[19] The law employed by the independent tribes was a form of customary law[20] that was communally established by a *Volksversammlung* (an open-air assembly, tribal meeting, or *thing*).[21] Notably however, from the Germanic period onwards, Roman law traditions progressively influenced the development of the German legal system. The first signs of Roman law influences are found in the migration period between the second and the fifth centuries AD, known as the period of Barbarian Invasions.[22] The Barbarian Invasions had put Germanic peoples in control of areas that were largely inhabited by Roman citizens who applied Roman law.[23] As the migrating tribes were mostly settlers rather than destroyers, they usually allowed Roman law to be retained for the Roman citizens,[24]

17 Until Medieval times the Early Germanic Law, as derived from the Salic Law of the Salian Franks, was common. In the Renaissance period, Roman law again began to play a strong role. Cohn *Manual of German Law* 21; *Nestorovska* 2005 *Hanse Law Review* 79.

18 Laufs *Rechtsentwicklungen in Deutschland* 41-69; Maine *Ancient Law* 175.

19 Nomadic at first, the Germanic tribes gradually settled by the third century and became dependent on agricultural activities. Land belonged to the tribe as a whole, while the head of the family divided portions of the land amongst the members of the tribe. It was not possible for the members to obtain private ownership of resources, such as land. Bray "Feudal Law: The Case for Reform" 100; Cohn *Manual of German Law* 4; Fay 1911 *The American Historical Review* 234*;* Foster and Sule *German Legal System and Laws* 10; Freckmann and Wegerich *The German Legal System* 1-2; Hübner *A History of Germanic Private Law* 2, 5; Humby, Kotzé and Du Plessis (eds) *Introduction to Law and Legal Skills in South Africa* 69; Juergensmeyer and Wadley *Natural Resources Journal* 363-364.

20 Dahm *Deutsches Recht* 68; Freckmann and Wegenrich *The German Legal System* 2; Hübner *A History of Germanic Private Law* 5.

21 The *Volksversammlung*, consisting of the freemen of a tribe, periodically assembled to approve customary rules. Legal proceedings took place in the same assembly, described either as a Thing- (*Ding)*- or a *Gau,* depending on the matter at trial. Cohn *Manual of German Law* 4; Dahm *Deutsches Recht* 69; Foster and Sule *German Legal System and Laws* 9; Freckmann and Wegerich *The German Legal System* 1.

22 One of the first recorded migrations of a Germanic tribe occurred when the Goths left the lower Vistula for the shores of the Black Sea at the end of the 2nd century. Between the 2nd and 4th centuries, the Goths slowly migrated deeper into the south- and east. The most notable date in this migration is the fall of the Western Roman Empire to the Germanic tribes in AD 476. Foster and Sule *German Legal System and Laws* 11; Hübner *A History of Germanic Private Law* 5; Watkins http://www.sjsu.edu/faculty/watkins/barbarians.htm

23 Foster and Sule *German Legal System and Laws* 10-11.

24 Foster and Sule *German Legal System and Laws* 11; Hübner *A History of Germanic Private Law* 5; Stein *Roman Law in European History* 30.

while the settlers continued to apply Germanic customary law.[25] In other instances, however, the Germanic settlers applied a mixture of their customary law and Roman law, and sometimes even applied the Roman law directly, particularly some of the Roman procedural rules and criminal law.[26]

As the Germanic settlers established their own polities in the bigger area of the Western Roman Empire, the Roman Empire lost effective control over the scattered Western domains.[27] This development ultimately resulted in the fall of the western provinces of the Roman Empire to the Germanic tribes in AD 476.[28] It was only after the Salik-Frank period (*Fränkische Zeit*), covering the period of AD 500 to AD 888, that the re-establishment of the Holy Roman Empire was achieved.[29]

The period that followed, the Middle Ages (888-1200), saw the rapid development towards, and comprehensive adoption of the Roman law in Germany.[30] In the year 962, Otto I was crowned as Roman Emperor. From this period onwards German kingship and Roman Empire was linked.[31] Although a German king was the Roman Emperor, the Imperial law was Roman law.[32] This ideological connection assisted with the gradual reception of the Roman law in Germany.[33] The reception of Roman law into Germany was further stimulated through *inter alia* the influence of the church,[34]

25 Foster and Sule *German Legal System and Laws* 11.
26 Foster and Sule *German Legal System and Laws* 11.
27 Foster and Sule *German Legal System and Laws* 11.
28 Foster and Sule *German Legal System and Laws* 11; Mousourakis *The Historical and Institutional Context of Roman Law* 410; Stein *Roman Law in European History* 32.
29 The re-establishment happened with the papal coronation of Charlemagne (Charles the Great) as Emperor of the Romans in AD 800. Charlemagne extended Frankish power by conquest over virtually all of Gaul and into Germany and Italy. He formed an alliance with the papacy and in 774 created a papal state in central Italy. On Christmas Day of 800, in the presence of Pope Leo III, he was crowned emperor of the restored Roman Empire. Dahm *Deutsches Recht* 84; *Encyclopaedia Britannica Online Academic Edition* 2016 http://www.britannica.com/EBchecked/topic/96523/Carolingian-dynasty; Foster and Sule *German Legal System and Laws* 12; Mousourakis *The Historical and Institutional Context of Roman Law* 413; Stein *Roman Law in European History* 41.
30 Cohn *Manual of German Law* 21; *Nestorovska* 2005 *Hanse Law Review* 79.
31 Laufs *Rechtsentwicklungen in Deutschland* 131; Mousourakis *The Historical and Institutional Context of Roman Law* 415; Zekoll and Reimann *Introduction to German Law* 1-2.
32 Hübner *A History of Germanic Private Law* 16; Zekoll and Reimann *Introduction to German Law* 2.
33 Cohn *Manual of German Law* 21; Foster and Sule *German Legal System and Laws* 20.
34 As the Frankish nation came into being, many citizens converted to Christianity, and the laws of the church were incorporated within their customary law. Furthermore, the canon law used by the centrally organised church of Germany was influenced to a great extent by Roman law. The church (ecclesiastical) courts subsequently applied written Roman procedural and substantive law. The ecclesiastical courts provided clear and reasonably certain dispute resolution and had

the absence of a central legal system[35] and legal scholarship. Legal scholarship in the eleventh and twelfth centuries at the first European universities played a significant role in the reception of Roman law into Germany.[36] In particular, the *Glossatoren* (the Glossators)[37] at the university of Bologna developed and debated interpretations of the classical Roman law texts (especially the *Corpus Iuris Civilis* of Justinian), which led to the production of glossaries at Bologna.[38] The study of Roman law formed the basis of academic training.[39]

German scholars initially studied at Italian universities and were therefore taught in Roman law.[40] As a result, German lawyers that were educated in Roman law,[41] referred to Roman law concepts when customary law was lacking.[42] The tradition of Italian universities was later inherited by German universities and resulted in Roman law being taught in Germany.[43] Consequently, in due course, all students in Germany were qualified in Roman law and not Germanic customary law.[44] Roman law

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a much wider jurisdiction than purely church or religious matters. Therefore, due to the popularity of the ecclesiastical courts with litigants, Roman law was further received into the legal system of the time. Dahm *Deutsches Recht* 59; Foster and Sule *German Legal System and Laws* 11, 18-19; Hübner *A History of Germanic Private Law* 7, 9; Laufs *Rechtsentwicklungen in Deutschland* 34; Lobingier *Michigan Law Review* 563; Mousourakis *The Historical and Institutional Context of Roman Law* 411, 415, 430-431; See also Stein *Roman Law in European History* 42.

35 The absence of a central legal system also played an important role in the reception of Roman law. In contrast to England, where a strong national common law could resist or in fact did not require Roman law, there was less resistance in Germany to the inclusion of new laws. Germany's low level of resistance against Roman law was therefore due to the absence of a central legal system. Foster and Sule *German Legal System and Laws* 20, 21; Mousourakis *The Historical and Institutional Context of Roman Law* 434, 437.

36 Radding and Ciaralli *The Corpus Iuris Civils in the Middle Ages Manuscripts* 1; Stein *Roman Law in European History 53.*

37 Freckmann and Wegenrich *The German Legal System* 11; Laufs *Rechtsentwicklungen in Deutschland* 53; Mousourakis *The Historical and Institutional Context of Roman Law* 424; *Nestorovska* 2005 *Hanse Law Review* 80.

38 Freckmann and Wegenrich *The German Legal System* 11; Laufs *Rechtsentwicklungen in Deutschland* 53*;* Mousourakis *The Historical and Institutional Context of Roman Law* 425; *Nestorovska* 2005 *Hanse Law Review* 80; Radding and Ciaralli *The Corpus Iuris Civils in the Middle Ages Manuscripts* 1; Stein *Roman Law in European History* 45.

39 Foster and Sule *German Legal System and Laws* 20; Lobingier *Michigan Law Review* 564; Stein *Roman Law in European History* 49.

40 Foster and Sule *German Legal System and Laws* 20.

41 Kaser *Römische Rechtsgeschichte* 13; Laufs *Rechtsentwicklungen in Deutschland* 57.

42 Foster and Sule *German Legal System and Laws* 17.

43 Baade "The Education and Qualification of Civil Lawyers in Historical Perspective: From Jurists and Orators to Advocates, Procurators and Notaries" 228; Foster and Sule *German Legal System and Laws* 20; Mousourakis *The Historical and Institutional Context of Roman Law* 437; Stein *Roman Law in European History* 54-55.

44 Foster and Sule *German Legal System and Laws* 20.

subsequently formed a major component of what came to be known as the Roman-Canon *ius commune*.[45]

With the rise of rationalism[46] the *ius commune* started to disintegrate.[47] During this period, rulers of influential states within the Roman Empire commenced legal codification. The codes that materialised were the *Prussian Allgemeines Landrecht* of 1794[48] and the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1794.[49] In the year 1804 the codification movement received a further stimulus with the enactment of the *Code Napoléon* (*code civil*).[50] During the course of the 19th century, several German states also attempted to codify their own private law.[51] Consequently, due to the numerous codifications, the legal landscape of Germany became inconsistent and fragmented; the *Allgemeines Bürgerliches Gesetzbuch* was applied in Austria, the *Prussian Allgemeines Landrecht* was applied in Prussian territories (Westphalia, Bayreuth and Ansbach), and the *code civil* was applied in the Rhine Province, in Alsace and Lorraine.[52] Of course, this was not a convenient state of affairs. In due course, a quest for German legal unity emerged. Notably, through the work of Friedrich Carl von Savigny (1779-1861), Roman law formed the basis of developments towards unification.

45 Mousourakis *The Historical and Institutional Context of Roman Law* 433; Zekoll and Reimann *Introduction to German Law* 2.

46 Dahm *Deutsches Recht* 110; The belief that all behaviour, opinions etc. should be based on reason rather than on emotions or religious beliefs. Turnbull (ed) *Oxford Advanced Learner's Dictionary International Student's Edition* 1216.

47 The disintegration became visible in the emergence of a new type of literature. Mousourakis *The Historical and Institutional Context of Roman Law* 433; Zekoll and Reimann *Introduction to German Law* 3, 8.

48 Laufs *Rechtsentwicklungen in Deutschland* 140-152; Hübner *A History of Germanic Private Law* 25.

49 Both of these codes were inspired by a desire to emphasise the responsibility of a territorial ruler for the administration of justice. Cohn *Manual of German Law* 24; Zekoll and Reimann *Introduction to German Law* 3.

50 Fay 1911 *The American Historical Review* 252; Cohn *Manual of German Law* 24; Rheinstein 1958-1959 *Indiana Law Journal* 550.

51 See for example the civil code of the kingdom of Saxony. Zekoll and Reimann *Introduction to German Law* 3.

52 See also *inter alia* the *Badisches Landrecht* of the Grand Duchy of Baden and the Austrian law which prevailed in Bavaria. Baade "The Education and Qualification of Civil Lawyers in Historical Perspective: From Jurists and Orators to Advocates, Procurators and Notaries" 228; Lobingier *Michigan Law Review* 566; Zekoll and Reimann *Introduction to German Law* 3-4.

One of the most celebrated jurists of the Historical School of Germany,[53] Von Savigny, succeeded in unifying the legislative "patch-work"[54] of Germany.[55] Although he did not support the introduction of a single piece of legislation in the form a general German civil code, he advocated the recognition of a *Rechtswissenschaft* (legal science) common to the nation.[56] The legal science was known as "Pandectist" as it used the most important body of Roman legal sources, the Digest (*Pandectae*), to build an internally consistent system of legal concepts, rules and principles.[57] German legal unification therefore ultimately emerged on a scholarly level,[58] based upon Roman law, through the work of the Pandectists.[59]

The Pandectists revived the formalities of Roman law as set by Justinian in the *Corpus Iuris Civilis*.[60] Consequently, the abstract Roman law ideas of "dominium" and "proprietas" were introduced into the Germanic legal system, which designated the conception of absolute ownership.[61] It may from the discussion thus far be asserted that Roman law progressively influenced German law to the point when the greater part of codification took place.[62]

53 Dahm *Deutsches Recht* 117-124; Eisenhardt *Deutche Rechtsgeschichte* 304-307.

54 The fragmentation is to be noted in the number of codifications applied in German territory. Baade "The Education and Qualification of Civil Lawyers in Historical Perspective: From Jurists and Orators to Advocates, Procurators and Notaries" 228; Fay 1911 *The American Historical Review* 252; Hübner *A History of Germanic Private Law* 26.

55 Larenz *Methodenlehre der Rechtswissenschaft* 11-18; Lehmann *Sacherrschaft und Sozialbindung?* 223; Whitman *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* 161; Zekoll and Reimann *Introduction to German Law* 5.

56 Dahm *Deutsches Recht* 122; Eisenhardt *Deutche Rechtsgeschichte* 303; Foster and Sule *German Legal System and Laws* 27-29; Kaser *Römische Rechtsgeschichte* 14-15; Zekoll and Reimann *Introduction to German Law* 5.

57 Eisenhardt *Deutche Rechtsgeschichte* 308-309; Foster and Sule *German Legal System and Laws* 28; Kaser *Römische Rechtsgeschichte* 15; Rheinstein 1958-1958 *Indiana Law Journal* 549.

58 Zekoll and Reimann *Introduction to German Law* 5.

59 Foster and Sule *German Legal System and Laws* 28.

60 Zekoll and Reimann *Introduction to German Law* 5.

61 Kube *Natural Resources Journal* 859; Tully *A Discourse on Property: John Locke and His Adversaries* 69.

62 With the enactment of the various codifications, the history of the *ius commune,* and therefore a study of Roman sources in Germany, has come to its end. Lobingier *Michigan Law Review* 565-566; Zekoll and Reimann *Introduction to German Law* 8.

5.2.3 Circumstances that prompted the drafting process of the BGB

Due to a gradual expansion of the economy, which was operating increasingly on a supra-regional level, legal unification was primarily required in the trade law.[63] After the creation of the *Deutsches Reich,* the need to establish an organisational framework for the uniform administration of justice, enlarged.[64] The requirement for unification therefore developed progressively. In light hereof, scholars have argued that the scene was set for the inception of a code[65] as the "crowning symbol of German legal unity".[66] Despite the opposition of the Historical School and Von Savigny, who advocated a uniform *Rechtswissenschaft* in preference to a single piece of legislation, scholars have argued that the scene was set for the inception of a code[67] to systematise and unify the various heterogeneous laws that were in effect in Germany. Consequently, in 1875 a commission started with a process of drafting a code for Germany. After a lengthy drafting process, the BGB came into effect on 1 January 1900.[68]

63 In 1848 the law of negotiable instruments was unified by means of the *Allgemeine Deutsche Wechselordnung* and it is argued that nearly all states of the *Deutcher Bund* adopted the draft of the *Allgemeines Deutches Handelsgesetzbuch* of 1861. After the creation of the *Deutsches Reich* a streamlined procedural and organisational framework for the uniform and efficient administration of justice was established. Hübner *A History of Germanic Private Law* 26; Zekoll and Reimann *Introduction to German Law* 6.

64 Zekoll and Reimann *Introduction to German Law* 6.

65 Cohn *Manual of German Law* 25; Foster and Sule *German Legal System and Laws* 29; Zekoll and Reimann *Introduction to German Law* 7.

66 Zekoll and Reimann *Introduction to German Law* 7.

67 Cohn *Manual of German Law* 25; Foster and Sule *German Legal System and Laws* 29; Zekoll and Reimann *Introduction to German Law* 7.

68 The *Bürgerliche Gesetzbuch* of 1900 extensively unified and codified the civil law, which consequently provides the legal basis for legal relationships between private individuals or legal subjects. Bähr and Hoffmann *Grundzüge des Bürgerlichen Rechts* 10; Cohn *Manual of German Law* 7; Foster and Sule *German Legal System and Laws* 407; Laufs *Rechtsentwicklungen in Deutschland* 254.

5.2.4 Private property in the BGB

The German private law of property is primarily incorporated in the third book of the BGB.[69] Given the reception of Roman law into Germany as discussed above, it is not surprising to find that scholars[70] argue that most of the material law on property in the BGB is based on Roman law.[71] Scholars[72] indicate that the BGB contains no abstract definition of the concept of private property. Given its Roman law background, an analysis of the concept of *Eigentum* (as described in paragraph 903 of the BGB) may provide guidance in understanding the property concept.

5.2.4.1 The concept of *Eigentum*

According to scholars such as Mostert[73] and Van Wyk[74] the concept of *Eigentum* (ownership) is described in paragraph 903 of the BGB as the right to dispose of a *res* (a thing) at will and to exclude others from interference with the *res* to the extent that the law and the rights of third parties permit. Paragraph 903 of the BGB stipulates:

> [Befugnisse des Eigentümers] Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen.[75]

Technically, this provision does not contain a theoretical definition of ownership. The mere reference to an owner's entitlements and their limitation by either the law or by

69 The third book is further divided into nine parts. It contains provisions of Possession (§§854-872); General Provisions Regarding Rights over Land (§§873-902); Ownership (§§903-1011); Hereditary Building Rights (§§1012-1017); Servitudes (§§1018-1093); Right of Preemption (§§1094-1104); Realty Charges (§§1105-1112); Mortgage, Land Charge, Annuity Charge (§§1113-1203); and the Rights of Pledge on moveable things and on rights §§1204-1296. Füller *Eigenständiges Sachenrecht?* 2; Lehmann *Sacherrschaft und Sozialbindung?* 24.

70 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 2; Foster *German Legal System and Laws* 278; Lehmann *Sacherrschaft und Sozialbindung?* 127; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 211.

71 It regulates the allocation of property (*Sachen*) to legal subjects that may either have ownership or possession of the property. Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 211.

72 Lehmann *Sacherrschaft und Sozialbindung?* 31; Raff *Private Property and Environmental Responsibility* 154.

73 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 214.

74 Van Wyk 1996 *TSAR* 296.

75 "[Entitlements of the owner] The owner of a thing (*res*) can, as far as the law or the rights of third parties do not prohibit, act with that thing (*res*) at will and can exclude others from interfering with it."

the rights of third parties[76] describes the boundaries of a proprietor's entitlements to his property. It does not constitute a comprehensive definition of property. Raff[77] argues that the drafters of the BGB intentionally formulated the concept of ownership in this way because they required flexibility in the private property concept. Flexibility of this nature was required because of the variety and forms of things or *res* that could be the object to the concept of ownership. In fact, by laying down the entitlements that an owner held in relation to the object of ownership (a thing), whether movable or immovable,[78] flexibility had been encapsulated through the limitations of ownership expressed.[79] Therefore, instead of providing a technical definition of ownership, the drafters of the BGB placed the focus on the object of ownership, the entitlements of the owner and the limitations on ownership.[80]

5.2.4.2 The object of ownership

Paragraph 90 of the BGB stipulates that only corporeal objects can qualify as things or *res* within the meaning of the German law.[81] Mostert[82] indicates that paragraph 90 includes both movable and immovable objects. It is therefore submitted that both movable and immovable corporeal things may be objects of ownership. The fact that the right to ownership can only vest in corporeal objects, stands in stark contrast to the real rights of *Nießbrauch* (usufruct) or *Pfandrecht* (pledge) that can also have a right as object.[83]

76 For example *Erbbaurecht* (heritable building right), *Dienstbarkeiten* (servitudes) and *Pfandrechted* (pledge).

77 Raff *Private Property and Environmental Responsibility: A Comparative Study of German Real Property* 154.

78 In terms of paragraph 90 of the BGB, only corporeal things may be the object of ownership. According to paragraph 903 read together with paragraph 90 of the BGB, the rights in property pertain to both corporeal movables and immovables. Wieling *Sachenrecht* 4, 21; Wilhelm *Sachenrecht* 262.

79 Raff *Private Property and Environmental Responsibility: A Comparative Study of German Real Property* 154.

80 Lehmann *Sacherrschaft und Sozialbindung?* 47; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 215.

81 Baur *Lehrbuch de Sachenrechts* 11; Baur and Stürner *Sachenrecht* 11.

82 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 215.

83 Baur *Lehrbuch de Sachenrechts* 317-346, 641-643; Baur and Stürner *Sachenrecht* 23-24; Capelle *Bürgerliches Recht Sachenrecht* 82-85, 117-125; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 215; Wilhelm *Sachenrecht* 624-668.

Although both the BGB and the *Grundgesetz* refer to the concept *Eigentum,* the German Federal Constitutional Court decided that it is unacceptable to restrict the objects of constitutional property to corporeals.[84] It may therefore at this stage be noted that a wider constitutional property concept exists alongside, but distinct from the narrow, private law concept.[85] The constitutional property concept is further examined below.[86]

5.2.4.3 The entitlements of an owner

Scholars in general interpret ownership as having a position superior to that of other real rights.[87] It is an all-embracing right in property that constitutes the most comprehensive right of control permitted by law with regard to a thing (*res*).[88] In terms of paragraph 903 of the BGB, an owner may act with his or her *res* at his or her own discretion and may exclude other from infringing upon the *res.*[89] Scholars[90] furthermore argue that paragraph 903 ascribes both a positive and a negative component to the entitlements of the owner. The ability of the owner to act with the *res* at his or her own discretion clearly constitutes the "positive power" of ownership. The owner may, for example, act at his or her own discretion *inter alia* through use and abuse, alteration, consumption, destruction or abandonment of the *res*.[91] On the other hand, the characteristic of exclusivity, as part of the ownership concept as per paragraph 903 of the BGB, constitutes a negative component of ownership.[92] Therefore, as part of the ownership concept, the owner may exclude any arbitrary infringements (*inter alia* change of possession or damage) on the *res* by third parties, for which various remedies exist. It should, however, be reiterated that even the most

84 See chapter 5.3.2.2 below.
85 Baur and Stürner *Sachenrecht* 11; Van der Walt *The Constitutional Property Clause* 33.
86 See chapter 5.3.2 below.
87 Raff states that one of the main intentions of including paragraph 903 into the BGB, was to encapsulate the essence of ownership as "something greater than the sum of its elements, in contrast to the limited propriety interests such as mortgages, which were sharply defined". Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 216; Raff *Private Property and Environmental Responsibility* 155.
88 Baur and Stürner *Sachenrecht* 29.
89 Baur *Lehrbuch de Sachenrechts* 27; Lehmann *Sacherrschaft und Sozialbindung?* 24.
90 Dreier (ed) *Grundgesetz Kommentar* 1231; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 215-217.
91 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 216.
92 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 216.

comprehensive control over *res* cannot be without limits. This is particularly clear from paragraphs 903-924 of the BGB, which determine limitations on ownership-related entitlements.

5.2.4.4 Limitations on the right of ownership

As indicated above, paragraph 903 of the BGB stipulates that the owner of a *res* may, as far as the law and the right of other do not oppose it, manage the *res* as he or she likes and may exclude others from interfering with it. This provision therefore sets limits on an owner's entitlements to the extent that certain laws and rights of third parties may inhibit the inherent positive or negative entitlements of a property owner.[93]

Two kinds of limitations on the right of ownership can be distinguished from paragraph 903, namely limitations by normative law and limitations by the interests of third parties.[94] Mostert[95] shows that normative law in this context stems from the public law and includes constitutional- and statutory law. Consequently, limitations that stem from normative law are found in legislation of both the German Federation and the different *Länder*.[96] For example, in the field of *Bauordnungsrecht* (construction law), several building regulations exist that limit the rights of the owner.[97] In the *Forstrecht* (forestry laws), owners of forest land are for example limited in their use of their property by

93 See chapter 3.2.4.2.2.2 above for the manifestation of the limitation of ownership in the South African legal system.

94 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 217.

95 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 217.

96 The Federal Republic of Germany is a federal state made up of 16 constituent *Länder* or states. The federal laws apply for the whole territory of the Federation, and the laws of the different *Länder* only have validity in the *Länder* in question. Duetscher Bundestag *Competencies of the German Federation and the Länder* https://www.bundestag.de/htdocs_e/bundestag/function/legislation/competencies/245700; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 217.

97 The legislative competence for public construction law in Germany is divided between federal and *Länder* governments. *Bauplanungsrecht* (zoning law) is regulated by federal law. The *Länder* are responsible for *Bauordnungsrecht* (building regulations law), which determines how buildings may be designed and constructed in order to meet planning law requirements. However, most of the states have adopted a specimen building regulation issued by the state ministries that also makes provision for standardisation within this field. Federal Ministry for Economic Affairs and Energy 2013 http://www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/The-legal-framework/planning-and-building.html; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 218.

timber felling quotas.[98] It is therefore clear that the public law can restrict the entitlements of private property owners. On the other hand, limitations to an owner's entitlements may stem from the private law, or from the rights of third parties. In fact, the BGB itself contains such limitations on the use of property. For example, paragraphs 905-924 deal specifically with neighbour law, and elaborate *inter alia* on the limitations of emissions and the encroachment of buildings. Paragraph 904 deals with the infringement of property by third parties through *Notstand* (in cases of urgent necessity), which also justifies the infringement upon the property rights of another. Perhaps the most important general limitation on the use of property is set forth in paragraph 903. The latter paragraph refers to the rights of third parties that may limit the right of ownership. Third-party or external limitations to ownership may include *inter alia Dienstbarkeiten* (servitudes) and *Pfandrechte* (pledges). These limitations are classified as external limitations, as they enable the holder of the right to exercise certain entitlements to limit the power of disposal of the owner.[99]

5.2.5 Concluding remarks: The private law concept of property

Due to the gradual reception of Roman law, most of the material law on property in the private law codification (the BGB) is based on Roman law. The concept of property encapsulated in the BGB is the German concept of *Eigentum.* Van der Walt[100] argues that in its traditional, Roman-Germanic private law sense, this term is generally translated as "ownership". Paragraph 90 of the BGB stipulates that only corporeal objects can qualify as things or *res* within the meaning of the German law. In the discussion dealing with the concept of property in constitutional law below,[101] it becomes evident that the private law interpretation of the property concept is severely restricted in comparison to its constitutional law counterpart.

Although ownership is not the only private law property right, the German concept of ownership (similar to the Roman law concept of ownership) epitomises the most

98 The *Federal Forest Act* of 1975 is a framework law that applies to the *Länder*. Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 218.

99 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 219.

100 Van der Walt *The Constitutional Property Clause* 42.

101 See chapter 5.3.2 below.

comprehensive real right in property and provides to its holder entitlements that *inter alia* includes the owner's exclusive right to determine access to and control over things. This interpretation clearly reflects the "absolute and complete" rights that characterises the Roman law concept of dominium. However, the formulation of paragraph 903 of the BGB indicates that entitlements in the German private law concept of property are subject to limitations. Limitations are not only derived from statutory provisions, but also from certain rights of third parties. The concept of ownership in the German law can therefore not be viewed blindly as an unlimited or absolute right of dominion.[102]

5.3 The public law concept of property in Germany

5.3.1 Introduction

The German public law also provides for the concept of property. In public law, the concept of property is found in constitutional law, criminal law and administrative law.[103] As the concept of property in constitutional law is closely connected to the protection of private property in a civil or private rights context,[104] the discussion on public law property commences with the constitutional concept of property. In order to understand the constitutional concept of property in the sphere of German law, it is necessary to provide a brief overview of the drafting history of the German constitution and its property clause, whereafter the constitutional property concept is interpreted.

102 Only in comparison to other rights of property (for example limited propriety interests such as mortgages, as defined in §1113) can ownership be described as unlimited or absolute. Raff argues that the limitation of the right of ownership should not be seen as an exception to a total or absolute right of dominion, but instead as an inherent limitation of the content of the private property right itself. Raff *Private Property and Environmental Responsibility* 157.

103 Raff *Private Property and Environmental Responsibility* 160.

104 Hösch *Eigentum und Freiheit* 15; Raff *Private Property and Environmental Responsibility* 160.

5.3.2 The concept of property in constitutional law

5.3.2.1 Historical perspectives on constitutional property protection in Germany

In the period 1818 to 1848, various states of the German Confederation adopted constitutions.[105] The different constitutions guaranteed certain rights, but the rights were regarded as the rights of the subject and were not described as universally accepted fundamental human rights.[106] Furthermore, the rights were confined to the citizens of a specific state in question.[107] Notably, the middle-class revolution, which began in 1848, was *inter alia* aimed at compelling the Government to acknowledge fundamental human rights.[108] The *Paulskirchenverfassung* or *Frankfurter Reichsverfassung* of 1849 was drawn up and although it never came into force,[109] it played a significant role in the later developments of fundamental rights in Germany.[110] Individual property rights were recognised in the *Paulskirchenverfassung*, paragraph 164, which contained a property guarantee:[111]

> *Das Eigentum ist unverletzlich. Eine Enteignung kann nur aus Rücksichten des gemeinen Besten, nur auf Grund eines Gesetzes und gegen gerechte Entschädigung vorgenommen warden.*

105 It should therefore be noted that constitutional development took place predominantly at state level. Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 47.

106 The rights were regarded as the rights of the subject and not as human rights. Freckmann and Wegerich *The German Legal System* 20-22; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 47.

107 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 47.

108 Eisenhardt *Deutche Rechtsgeschichte* 270; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 47.

109 Dreier (ed) *Grundgesetz Kommentar* 1232; Eisenhardt *Deutche Rechtsgeschichte* 289-291; Freckmann and Wegerich *The German Legal System* 19.

110 Eisenhardt *Deutche Rechtsgeschichte* 292-296; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 47.

111 Paragraph 164 of the *Paulskirchenverfassung* is translated by Mostert *The Relevance of Constitutional Protection and Regulation of Property for the Private Law of Ownership in South Africa and Germany* 48: "Property is inviolable. Expropriation can take place only against a consideration of the public weal, and only in accordance with law and against just compensation." This dichotomy between private property and the public interest has become common to all subsequent constitutional property guarantees in Germany.

The fundamental idea of constitutional protection of the *Paulskirchenverfassung* materialised years later in article 153 of the *Weimarer Reichsverfassung* of 1919:[112]

> *Das Eigentum wird von der Verfassung gewährkeistet. Sein Inhalt und seine Schranken ergeben sich aus Gesetzen. Eine Enteignung kann nur zum Whole der Allgemeinheit und auf gesetzlicher Grundlage vorgenommen warden. Sie erfolgt gegen angemessene Entschädigung, soweit nicht ein Rechsgesetz etwas anderes bestimmt. … Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste*.[113]

The rights entrenched in the *Weimarer Reichsverfassung* were not fundamental rights and could be altered by a majority vote.[114] It is trite that the National-Socialists exploited this weakness after they seized power in 1930.[115] In an attempt to prevent this from happening again, the *Deutsche Demokratische Republik* (West German Federal Republic of Germany) enacted the *Grundgesetz der Bundesrepublik Deutchland* (hereinafter the *Grundgesetz*)[116] in 1949. It should be noted, however, that after 1949 the *Deutsche Demokratische Republik* existed as a separate state[117] unconnected to the *Bundesrepublik Deutschland*, with its own constitution (of 7 November 1949).[118]

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112 The first constitution to contain *Grundrechte* (constitutional civil rights). Cohn *Manual of German Law* 10; Dahm *Deutsches Recht* 453; Dreier (ed) *Grundgesetz Kommentar* 1233; Freckmann and Wegerich *The German Legal System* 24.

113 This article is translated by Mostert *The Relevance of Constitutional Protection and Regulation of Property for the Private Law of Ownership in South Africa and Germany* 36 as follows:
> "Property is guaranteed by the constitution. Its substance and limits are revealed by law. Expropriation can take place only in the public weal and upon legislative basis. Expropriation is successful against appropriate compensation, unless imperial legislation determines otherwise. […] Property entails obligations. Its use should serve the public interest."

114 Cohn *Manual of German Law* 10-11.

115 Cohn *Manual of German Law* 29; Eisenhardt *Deutche Rechtsgeschichte* 350-354; Freckmann and Wegerich *The German Legal System* 26; Leisner *Sozialbindung des Eigentums* 34.

116 The *Grundgesetz der Bundesrepublik Deutchland* came into force on 23 March 1949. It contained similarities to the *Paulskirchenverfassung* of 1848 and the *Weimarer Reichsverfassung* of 1918 and introduced a canon of basic rights, constitutional principles and constitutional legal system. From 1949 the *Bundesrepublik Deutchland* and the *Deutche Demokratishe Republik* existed as two different states. The constitution of the *Deutche Demokratishe Republik* of 7 November 1949 was based on principles different from those of the *Grundgesetz* of the *Bundesrepublik Deutchland*. Cohn *Manual of German Law* 8, 31; Freckmann and Wegerich *The German Legal System* 27; Lubens 2007 *Arizona Journal of International & Comparative Law* 401, 404.

117 For instance, the *Sozialistische Einheitspartei Deutschlands* governed the country, and not the people of the *Deutche Demokratishe Republik*. For four decades, the *Deutche Demokratishe Republik* existed as a socialist state that was strongly influenced by the former Soviet Union. In 1989 there was pressure to reform the *Deutche Demokratishe Republik*. Freckmann and Wegerich *The German Legal System* 27. See *BVerfGE* 1, 14 for an exposition of the problems of federalism of the newly established Federal Republic of Germany.

118 For example, in the *Deutsche Demokratische Republik,* property was nationalised. Cohn *Manual of German Law* 16; Freckmann and Wegenrich *The German Legal System* 27.

The drafters regarded the *Grundgesetz* as a temporary measure for the provisional West German state until the enactment of a permanent constitution for an ultimately reunified Germany.[119] The *Grundgesetz* contained provisions similar to those in the *Paulskirchenverfassung* of 1848 and the *Weimarer Reichsverfassung* of 1918, and introduced basic human rights and constitutional principles.[120] On 18 May 1990 the two German states agreed to a *Staatsvertrag* and on 3 November 1990 both states signed the *Einigungsvertrag* in terms of which the *Deutsche Demokratische Republik* joined the *Bundesrepublik Deutchland*.[121] The *Grundgesetz* lost its temporary nature and was accepted by the people of the Federal Republic as the basic law.[122] The *Grundgesetz* of the Federal Republic of Germany consists of eleven chapters[123] and is the supreme[124] source of German law. It outlines principles of state policy,[125] the state's organisation, and individuals' basic human rights.[126] Of particular importance for this study is article 14 of the *Grundgesetz*, which contains the constitutional property clause. Article 14 of the *Grundgesetz* forms part of the *Grundrechtskatalog*,[127] and consists of three clauses, each containing more than one provision,[128] and reads as follows:[129]

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119 Under the provision of article 146 of the *Grundgesetz.*

120 Cohn *Manual of German Law* 14.

121 After the levelling of the Berlin Wall in 1989 a few amendments to the constitution of the former *Deutche Demokratishe Republik* were carried out. Cohn *Manual of German Law* 16.

122 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany A Comparative Analysis* 55.

123 Chapter 1 of the *Grundgesetz* (articles 1-19) sets out the *Grundrechte* (basic rights) of individuals. The second chapter (articles 20-37) outlines the fundamental structural principles of the German federation. Chapters 3 to 6 (articles 38-69) contain provisions relating to the main organs of state, which are the *Bundestag* (Federal Parliament), the *Bundesrat* (Federal Council), the *Bundespräsident* (Federal President), the *Bundesregierung* (Federal Government) and the *Bundeskanzler* (Federal Chancellor). Chapter 7 of the *Grundgesetz* (articles 70-82) deals with federal legislation, while chapter 8 (articles 83-91) contains principles on the implementation of federal laws and with federal administration. Chapter 9 (articles 92-104) regulates the administration of the Federal judiciary of Germany. The tenth chapter (articles 104a-115) deals with finance, while chapter 10a (articles 115a-1151) sets out the principles relating to defense. Chapter 11 (articles 116-146) contains transitional and concluding provisions.

124 The supreme position of the *Grundgesetz* is emphasised by article 1(3) thereof, which declares all state authorities bound by the basic rights, and article 20(3), which subjects even the legislature to the constitutional order.

125 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 177.

126 Lubens 2007 *Arizona Journal of International & Comparative Law* 404.

127 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 122.

128 Baur *Lehrbuch de Sachenrechts* 120; Mostert *The Relevance of Constitutional Protection and Regulation of Property in South Africa and Germany* 77.

129 The English translation of the German constitutional property clause, reads as follows:
(1)Property and the right of inheritance are guaranteed. Their content and limits are determined by statute.

(1) *Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.*
(2) *Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.*
(3) *Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeingheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.*

Generally speaking, the first part of article 14(1) contains the guarantee clause; the second half of article 14(1), read with article 14(2), the regulation clause; and article 14(3) the expropriation clause. The guarantee clause, specifically, might provide insight into the content and meaning of the constitutional property concept.

Article 14(1) of the *Grundgesetz* contains a positive guarantee in that it provides that "[p]roperty and the right of inheritance are guaranteed".[130] The positive guarantee is remarkable for property clauses.[131] Normally, a constitutional property guarantee is negatively formulated.[132] The constitutional property clause of South Africa, for example, negatively stipulates that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".[133] Due to the unusual positive formulation of the German property guarantee, Van der Walt[134] indicates that a quite extensive theory has been developed in German law to interpret and explain the meaning of the phrase. As part of this theoretical framework, the "fundamental purpose" of the property guarantee was identified by the jurisprudence of the courts.[135] The "fundamental purpose" can only

(2)Property imposes duties. Its use should also serve the public weal.
(3)Expropriation is only permissible for the public good. It may be imposed only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation has to be determined by establishing an equitable balance between the public interest and the interests of those affected. Regarding disputes about the amount of compensation recourse to the courts of ordinary jurisdiction available.

130 Dahm *Deutsches Recht* 453; Du Plessis *Compensation for Expropriation under the Constitution* 149; Lubens 2007 *Arizona Journal of International & Comparative Law* 389; Raiser "Eigentum als Recht des Menschen" 121.
131 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 124.
132 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 124.
133 Article 25(1) of the Constitution.
134 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 124.
135 Alexander 2003 *Cornell Law Review* 747; Mostert *The Relevance of Constitutional Protection and Regulation of Property in South Africa and Germany* 237.

be achieved by following a purposive or functional approach. This approach provides the basis for the interpretation for the whole constitutional property clause. In terms thereof, the fundamental purpose of the property guarantee can be explained as follows:[136]

> The property guarantee (a) is a fundamental (human) right, (b) which is meant to secure, for the holder of property, (c) an area of personal liberty (d) in the patrimonial sphere, (e) to enable her to take responsibility for the free development and organisation of her own life (f) within the larger social and legal context.

This explanation of the fundamental purpose of the property guarantee must be seen in light of the fact that *Menschenwürde* (human dignity)[137] is the most fundamental value of the *Grundgesetz* and therefore influences the interpretation of the entire constitutional property clause. As a result, the protection of property rights in article 14 of the *Grundgesetz* has to be seen against the background of the protection of human dignity. If one duly considers the protection of human dignity, the property guarantee cannot be interpreted as absolute.[138] Rather, it must be interpreted with due reference to the social considerations implied by the "fundamental purpose" of the property guarantee.[139] In this way, the property clause is placed in a value-determined context, where each aspect of the constitutional property clause (therefore also the constitutional property concept itself) is interpreted.[140]

5.3.2.2 The meaning and scope of property within the protective ambit of the constitutional property guarantee

The *Grundgesetz* does not contain a definition for the concept of property.[141] The constitutional property guarantee, as stipulated in article 14(1) of the *Grundgesetz*, guarantees property and the right of inheritance.[142] The constitutional property guarantee comprises of two separate, but related guarantees, namely a

136 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 124.
137 Dahm *Deutsches Recht* 452; Dreier (ed) *Grundgesetz Kommentar* 139, 232.
138 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 125.
139 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 125.
140 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 125. See also Mostert *The Relevance of Constitutional Protection and Regulation of Property in South Africa and Germany* 226.
141 Mostert *The Relevance of Constitutional Protection and Regulation of Property in South Africa and Germany* 224.
142 Alexander 2003 *Cornell Law Review* 737.

Bestandsgarantie, also the *Individualgarantie* (individual guarantee) and an *Institutionsgarantie,* also the *Einrichtungsgarantie* (institutional guarantee).[143] Van der Walt extensively examined these two guarantees.[144] For purposes of explaining the constitutional property guarantee and the constitutional property concept, some of the principles dealt with by Van der Walt are discussed below.

5.3.2.2.1 Individual guarantee

The individual guarantee protects the individual property holder and his or her property holdings against state interferences, such as regulation or expropriation.[145] It should, however, be noted from the outset that the individual guarantee does not mean that the state cannot amend or affect individual property rights at all; it merely lays down the boundaries of and requirements for valid state interferences.[146] The individual guarantee therefore provides that the state may only interfere with individual property rights through regulation or expropriation if it is done in accordance with legal requirements and for a public purpose that justifiably overrides the individual property guarantee.[147]

Van der Walt[148] argues that the purposive or functional approach to the fundamental meaning of the property guarantee, as set out above, explains (and in a sense facilitates) the question of whether certain interests should be included or excluded for purposes of the constitutional property guarantee. In fact, a number of court cases[149] have included or excluded specific property interests from the property guarantee on the basis of the question of whether or not their protection in terms of article 14 can serve the "fundamental purpose" of the property guarantee. This has resulted in a separate, constitutional concept of property that is wider than its private or civil law counterpart.[150] It is indicated below that the use of the term *Eigentum* (property) in the

143 Baur *Lehrbuch des Sachenrechts* 120; Hösch *Eigentum und Freiheit* 57-59; Lehmann *Sacherrschaft und Sozialbindung?* 33; Van der Walt *Constitutional Property Clauses A Comparative Analysis* 128.
144 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 128-132.
145 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 128.
146 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 128.
147 *BVerfGE* 74, 264; Van der Walt *Constitutional Property Clauses A Comparative Analysis* 128.
148 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 126.
149 See chapters 5.3.2.2.1.1 and 5.3.2.2.1.2 below.
150 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 127.

Grundgesetz can refer to either the object of property rights, or to the right of ownership as it is known in the German private law.[151] It includes not only ownership, but also several other patrimonial and incorporeal rights.[152]

5.3.2.2.1.1 Property as objects of property rights

Although the private law interpretation of the concept of property (which is restricted to corporeal things) is used as the starting point, the Federal Constitutional Court in the *Naßauskiesung*-case[153] held that the meaning and content of the constitutional concept of property should be determined with reference to the *Grundgesetz* itself, and not on the basis of private law.[154] This means that not only corporeal things, but a wide range of corporeal and incorporeal things, rights and interests can be regarded and protected as property under article 14 of the *Grundgesetz.* This development is illustrated by a number of judgments by the Federal Constitutional Court in terms of which incorporeal property rights such as copyrights,[155] trademarks,[156] workers' rights,[157] contractual claims,[158] as well as certain participatory "new property" of public-law rights[159] are protected by the constitutional property guarantee. It should be reiterated that each of the above "extensions" of the property concept was considered in terms of the general *Leitmotiv,* namely whether the inclusion of a specific form of

151 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 17.
152 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 17.
153 See *BVerfGE* 58, 300.
154 Mostert *The Relevance of Constitutional Protection and Regulation of Property in South Africa and Germany* 225.
155 *BVerfGE* 31, 229.
156 *BVerfGE* 51, 193.
157 *BVerfGE* 50, 290.
158 *BVerfGE* 42, 263; *BVerfGE* 83, 201.
159 In the case of *BVerfGE* 69, 272, (the *Personal Contribution* case), the court had to decide if an amendment to a federal statute that provided health insurance benefits for the elderly violated the constitutional property right of article 14. The claimants asserted that by reducing their health-care benefits the legislature violated the property guarantee of article 14(1) that was essential to personal liberty. The court first had to decide if the said welfare benefits qualified as property under article 14 of the *Grundgesetz*. The court set three requirements that had to be met for such rights to qualify as constitutional property. In the first instance, the right had to take the form of a private property exclusionary right that the holder had been awarded by the state. Secondly, the right had to be based on substantial contributions or efforts by the holder of the right. In the third instance, the right had to serve to ensure the holder's existence. As all three these requirements were met, the Federal Constitutional court extended the constitutional guarantee to include *subjective öffentliche Rechte* (public law rights) in the form of welfare benefits. See Maunz and Dürig *Grundgesetz Kommentar* 78-81.

property under the protection of article 14 would serve the purposive or functional approach to create and protect a sphere of personal freedom where the individual can realise and promote the development of his or her own life.[160]

5.3.2.2.1.2 Property as rights

A similar development of the "expansion" of the meaning of property is depicted with regard to the meaning of the term "property as a right" as can be seen with "property as an object". In the private law sphere, the concept of property is often translated into the concept of ownership. The view of property as ownership is, however, a restricted view that is unacceptable for purposes of the constitutional protection of property, because the Federal Constitutional Court[161] confirmed that the possessory right of a lessee of immovable property could also be protected by the constitutional property clause. It is therefore submitted that not only ownership, but also other property rights[162] are included in the Federal Constitutional Court's understanding of the term *Eigentum* (property).[163]

In determining whether non-proprietary rights can also qualify for constitutional protection, the German courts rely on the purposive or functional approach to the property guarantee, as indicated earlier. A right will be included or excluded from the property guarantee subject to the requirement that it will serve a sphere of personal freedom that will allow the individual person to take responsibility for the development of his or her own person within the social context. In following this approach, certain non-proprietary rights, *inter alia* participatory rights of employees in a large firm,[164] land-use rights of residential lessees[165] as well as lessees of garden allotments,[166] have been included under the constitutional property guarantee.[167]

160 *BVerfGE* 89, 1; Van der Walt *Constitutional Property Law* 39.
161 *BVerfGE* 89, 1.
162 As opposed to property objects.
163 Van der Walt *The Constitutional Property Clause* 42.
164 *BVerfGE* 50, 290.
165 *BVerfGE* 37, 132; *BVerfGE* 38, 248.
166 *BVerfGE* 52, 1; *BVerfGE* 87, 114.
167 Alexander 2003 *Cornell Law Review* 765-769; Van der Walt *The Constitutional Property Clause* 43.

5.3.2.2.2 Institutional guarantee

On the other hand, the institutional guarantee concerns the whole system or institution of private property as such and not merely the individuals or their individual property interests.[168] Van der Walt explains that the institutional guarantee secures a core of legal norms that describes the essence of property and ensures that this core is not abolished by legislation.[169] The institutional guarantee therefore ensures that traditional property institutions are not abridged or removed from the private market or transformed into public property without sufficient justification,[170]

> It prevents the state from eliminating or removing whole categories of property such as land, or water, or minerals in general, from the sphere of private property; as opposed to the individual guarantee, which protects an individual property holder against the expropriation of a specific piece of land, or a specific water right, or a specific mineral right.

Notably, however, the institutional property guarantee does not mean that the legislature is completely barred from interfering with the system of private property.[171] Rather, in answering the question whether a certain category of property can be removed from the sphere of private property altogether, or whether a certain category of property rights can be transformed into public-law entitlements for the sake of more effective state control, one must have due regard for the "fundamental purpose" of the constitutional guarantee as set out above.[172] Therefore, if the nature and social function of certain categories of property is such that exclusive individual rights in that property cannot be reconciled with the importance and potential dangers that private rights therein may have for the society as a whole, the social value and function of the property justifies the complete removal of that property from the sphere of private rights altogether, or the transformation of a category of rights into public-law rights.[173] These actions are then not in conflict with the institutional guarantee, because they

168 Baur *Lehrbuch des Sachenrechts* 120; Van der Walt *Constitutional Property Clauses A Comparative Analysis* 129.
169 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 129.
170 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 129.
171 Maunz and Dürig *Grundgesetz Kommentar* 56; Van der Walt *Constitutional Property Clauses A Comparative Analysis* 129-130.
172 See chapter 5.3.2 above; Van der Walt *Constitutional Property Clauses* 129.
173 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 130.

are justified by the public interest. At least two examples of this nature can be drawn from case law.

In the *Deichordnung Case* (the Hamburg Flood Control Case),[174] the court had to decide if a certain category of property could be removed from the sphere of private property rights without infringing upon the constitutional property guarantee. Immense damages had been caused by a flood in Hamburg in 1962. The city-state of Hamburg passed the *Dikes and Embankments Act* in 1964 which provided for a "conversion" of all grassland that was classified as "dikeland" to "public property". This Act therefore terminated all private (ownership) rights over the grasslands and provided compensation to its owners. Aggrieved landowners approached the Federal Constitutional Court, alleging a violation of their fundamental right to property, as guaranteed under article 14(1) of the *Grundgesetz*.

The court interpreted the constitutional property guarantee in the context of its fundamental purpose, namely the protection of personal liberty.[175] The court asserted that the right to hold property has to secure its holder a sphere of liberty and thereby enable the holder to lead a self-governing life. If the court disregarded fundamental purpose of the property guarantee, the *Dikes and Embankments Act* in 1964 would have been unconstitutional, as it changed the content of ownership in a way that would constrict the core of personal freedom.[176] However, the Federal Constitutional Court decided that the Act in question did indeed remove dike land from the private property sphere, but that the Act did not contravene the constitutional institutional guarantee. The taking of the private lands near the dikeland properties did therefore not infringe upon the right to property as set forth in article 14 of the *Grundgesetz,* as the property (subject to private rights) was inherently not suited to serve the fundamental purpose of the property, namely to secure an individual sphere of personal freedom. Rather, the property was set to be used for a public purpose.[177] The public purpose standard was satisfied as the upgrading of the dikes would avert the recurrence of a similar

174 *BVerfGE* 24, 367.
175 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 124.
176 It could also be argued that the protection of property as an institution secures this basic right and cannot be secured effectively if the legislature may at any time replace private property with any rights less than ownership. Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 253.
177 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 251.

disaster in Hamburg. Therefore, despite the existence of the individual guarantee protecting the private property right, the court allowed that the state could transfer dikeland properties from the sphere of private property, to public property. The court therefore weighed the interests of private landowners against the public's interest, and decided the latter to be more important.

The property guarantee was also interpreted in the series of *Naßauskiesung*- or the so-called *Groundwater* cases, which were first brought to the Federal Supreme Court[178] in 1978 and ended in the Federal Constitutional Court.[179] The series of cases concerned the constitutional validity of the amendments to article 1a(3) of the *Wasserhaushaltgesetz.*[180] In the *Naßauskiesung*-case the plaintiff owned and operated a gravel pit near Münster.[181] For years the plaintiff had unrestricted access to the groundwater below his property, which he used for extracting gravel.[182] The quarry where the gravel pit was operated was located near the city of Rheine's water wells. With the creation of a new water conservation district in 1968, the city denied the gravel pit operator a permit to use the underground water for his operations.[183] As the unlimited use of groundwater by the plaintiff had been restricted, he successfully sued North Rhine-Westphalia for damages, as the denial of a permit to extract groundwater violated his right to property.[184] The Federal Supreme Civil Court[185] held that the denial of the permit indeed violated the plaintiff's constitutional property right and that the amendments of the *Wasserhaushaltgesetz* in 1976 were contradictory to the property guarantee in article 14(1) of the *Grundgesetz.*[186]

178 *NJW* 1978, 2290.
179 *BVerfGE* 58, 300; These cases are among the most widely discussed constitutional property cases in Germany and the Constitutional Court's judgment of them is worth reflecting upon as it provides clear indicators of the German attitude towards the regulation of property, which is characterised by the desire to strike an equitable balance between the property interests of the individual property holder and the public interest.
180 As indicated in the quotation above, the amendments required anyone (including the owner of the surface) wishing to make use of surface or groundwater to obtain a permit.
181 *BVerfGE* 58, 300.
182 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 257.
183 Alexander 2003 *Cornell Law Review* 123; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 257.
184 S905 of the BGB states: "The right of the owner to a piece of land extends to the space above the surface and to the terrestrial body under the surface."
185 *NJW* 1978, 2290.
186 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 258.

However, under German law, only the Federal Constitutional Court has the authority to declare legislation unconstitutional.[187] The case therefore had to be submitted to the Constitutional Court to decide if the denial of the permit was an uncompensated expropriation of property, which is unconstitutional under article 14 of the *Grundgesetz.* The Constitutional Court acknowledged that the constitutional guarantee prohibits the legislature from undermining the basic right embedded in the private law of property in a way that substantially impairs the guaranteed freedom provided under article 14 of the *Grundgesetz.*[188] The court held that the guarantee of the institution of property is not encroached on when the security of resources that is vital to the public at large is placed under the authority of the public legal order rather than the private order.[189]

The preceding paragraphs show that the property guarantee is not absolute. In fact, article 14(1)(2) of the *Grundgesetz* underpins the legitimacy of the statutory regulation of property through which property rights can and must be limited[190] or infringed upon.[191] In terms of article 14(1)(2), the regulation of property consists of statutory provisions that determine the substance or content and the limits of property rights within the framework laid down by article 14 as a whole.[192] Van der Walt[193] argues that when the legislature determines the content of property, it concerns itself with the preservation of existing[194] property institutions and the establishment of new property institutions, while being restricted by the institutional guarantee of property.[195] On the other hand, in the determination of the limits of property, the legislature has to consider

187 Foster and Sule *German Legal System and Laws* 90-91; Freckmann and Wegerich *The German Legal System* 38.
188 Alexander 2003 *Cornell Law Review* 124.
189 Alexander *Cornell Law Review* 124; *BVerfGE* 58, 300; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 259.
190 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 132.
191 Du Plessis *Compensation for Expropriation under the Constitution* 149.
192 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 132.
193 Du Plessis *Compensation for Expropriation under the Constitution* 153; Van der Walt *Constitutional Property Clauses A Comparative Analysis* 132-133.
194 Or traditional property institutions.
195 It was argued in chapter 5.3.2.2.2 above that the institutional guarantee secures a core of legal norms that describe the essence of property. The Institutional guarantee must be determined through the establishment of new property institutions as and when necessary, while preserving existing property institutions. Hösch *Eigentum und Freiheit* 57-59; Van der Walt *Constitutional Property Clauses A Comparative Analysis* 133.

the exercise of individual property rights and the limits thereof. In this regulatory process the legislature is restricted by the guarantee of individual property.[196]

5.3.3 The concept of property in criminal law

Chapter 5.3.1 above indicated that property functions in the public law sphere. The property concept for purposes of criminal law is one example of this. However, the criminal law concept of property does not form part of the focus of this study. The concept of property is acknowledged and applied in the German criminal law, and more specifically in relation to theft as a crime.[197] Theft occurs where a person takes a movable thing out of another person (the owner's) custody and appropriates it. The thief's act of appropriation is therefore an act of taking possession with the intention of becoming the owner, to the exclusion of the person entitled to the thing.[198] For a criminal charge of theft in German public law to be substantiated, the object of theft (a movable thing) cannot belong to the thief, nor can it be ownerless, but it should be dealt with in terms of the public law.[199]

5.3.4 The concept of property in administrative law

5.3.4.1 Introduction

In Germany, property law textbooks rarely attend to the concept of public property.[200] The limited scope of scholarly consideration and analysis of public property (from a private property law perspective) may be attributed to the fact that the BGB is silent on principles regulating public things or objects.[201] However, public law commentators recognise the status and administration of public property as an established field of the administrative law.[202]

196 Van der Walt *Constitutional Property Clauses A Comparative Analysis* 133.
197 See Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 8; Raff *Private Property and Environmental Responsibility* 160.
198 Raff *Private Property and Environmental Responsibility* 160-161.
199 Raff *Private Property and Environmental Responsibility* 160.
200 Van der Veen *Openbare Zaken* 36.
201 Van der Veen *Openbare Zaken* 36.
202 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 16; Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 3; Raff *Private Property and Environmental Responsibility* 161.

It should from the outset be emphasised that, although they may overlap, the private law concept of a "thing" or "object" differs from its public law counterpart. Public things or objects can for example not be regarded as being susceptible to private ownership; neither can they be regarded as objects of private transactions.[203] Things or objects that constitute private property may, however, be classified as public property.[204] According to Papier,[205] public property may include things, objects and resources such as:

> Straten, wegen en pleinen, natuurlijke en kunstmatige wateren, spoor, tram- en metrobanen, vliegvelden, havens, dijken, groenvoorzieningen, kinderspeelvelden, sportvelden en zwembadden, kindertehuizen, bejaardentehuizen en ziekenhuizen, scholen, bibliotheken, onderzoeksinstituten, kazernes en legeroefenterreinen, parkeerplaatsen en –garages, inrichtingen van de posterijn, de telefonie en de omroep, inrichtingen voor de levering van water, gas en elekra, zuiveringsinstallaties, vuilnisbelten en vuilverbrandingen, gemeentehuizen en andere bestuurs-, regerings- en gerechtsgebouwen, kerken, parpchiehuizen, kerkelijke begraafplaatsen en de voor het kerkelijk gebruik bestemde voorwerpen.

Scholars[206] argue that the special status of public property is dependent on the public beneficial function (*die Gemeinwohlfunktion*) of the thing, object or resource in question.[207]

203 In *NJW* 1974, 2182 (the Passport Case), it was confirmed that a German passport is public property of the German state, and that the plaintiff is not at liberty to hand over her passport as security for the unpaid balance of her vehicle.

204 Wantuch-Thole *Cultural Property in Cross-Border Litigation: Turning Rights into Claims* 104.

205 Papier *Recht der öffentlichen Sachen* 1; see also Schulte *Eigentum und öffentliches Interesse* 160; Van der Veen *Openbare Zaken* 37.

206 Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 96; Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 40-42; Raff *Private Property and Environmental Responsibility* 161; Van der Veen *Openbare Zaken* 37.

207 See chapter 6.3.3.2.1 below.

5.3.4.2 Forms of public property

Various forms of public property have been acknowledged and systematically classified in the German Administrative law.[208] Raff[209] for example differentiate between three forms, namely "public property proper" (*öffentliche Sache*), "factually public things" and "public property held in a private capacity by a public authority to execute its public functions". The latter category represents things or objects that never truly leave the private law, such as an office building that is leased to a private tenant to generate public income.[210] The category of "factually public things", also technically remains in the private law realm, because they are not administrated by a public authority, but managed by a private owner to serve a public purpose.[211] An example of a "factually public thing" is that of a privately owned art gallery. The remaining category, that of "public property proper", is most important for present purposes. "Public property proper" includes those things or objects that, through their use, directly and permanently serve particular needs of the public administration, the public interest or the common good.[212] It is important to note that the criterion is also set for serving a "public interest", and should not be restricted to serve only "a public purpose" or to be available for "public access".[213]

Scholars[214] distinguish between three categories of "public property proper". The categorisation follows the particular designation and public interest that the property in question serves. The three categories are that of *res sacrae* (religious use of things),[215] *Sachen im Verwaltungsgebrauch* (things in administrative use)[216] and

208 Gröpl and Rupp 2011 http://www.ius-publicum.com/repository/uploads/10_03_2011_16_33_Groepl.pdf 3; Havlan and Janeček https://is.muni.cz/do/law/shop/publikace/8474430/210-4842-Ukazka.pdf 12; Raff *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* 161-162.

209 Raff *Private Property and Environmental Responsibility* 161-162.

210 Raff *Private Property and Environmental Responsibility* 161-162.

211 Raff *Private Property and Environmental Responsibility* 162.

212 Raff *Private Property and Environmental Responsibility* 162.

213 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 7; Van der Veen *Openbare Zaken* 37.

214 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 48; Raff *Private Property and Environmental Responsibility* 162; Van der Veen *Openbare Zaken* 38.

215 See chapter 5.3.4.2.1 below.

216 See chapter 5.3.4.2.2 below.

Sachen im Zivilgebrauch (things available for the use of citizens, including common use, special use and institutional use).[217]

5.3.4.2.1 Res sacrae

Scholars[218] argue that, because religious groups, religious communities and churches are in public law recognised as being juristic or legal persons, their property is regarded as public property in the form of *res sacrae.* The category of *res sacrae* resembles the well-known Roman law concept of things used to publicly practice religion and normally includes churches, church cemeteries, or other objects that may be used to serve the public interest, in a religious or church service, for example.[219]

The question arises whether the buildings of religious groups are regarded as public property even if access to them is restricted at certain times, for various reasons, and to various persons.[220] The answer to this question can be found in the concept of a *Widmung*,[221] referring in this instance to an administrative act subjecting property to restrictions in the interest of religious groups, religious communities or churches. The German law provides for the fact that a religious *Widmung* can ascribe the status of public property to the buildings of religious groups (*res sacrae)* without the requirement of granting "free access" or use to the public.[222] It is therefore submitted that things can be regarded as public property*,* even if access and use rights therein are limited.

5.3.4.2.2 *Sachen im Verwaltungsgebrauch* (things in administrative use)

As with *res sacrae,* the status of public property categorised as *Sachen im Verwaltungsgebrauch* does not mean that the public now requires unrestricted access or use rights to the property in question.[223] *Sachen im Verwaltungsgebrauch* are things

217 See chapter 5.3.4.2.3 below.
218 Kaser *Roman Private law* 80-81; Van der Veen *Openbare Zaken* 39; Wieling *Sachenrecht* 24.
219 Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56; Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 18; Dreier (ed) *Grundgesetz Kommentar* 1277; Kaser *Roman Private law* 80-81.
220 Van der Veen *Openbare Zaken* 39.
221 Bassenge *et al Palandt Bürgerliches Gesetzbuch* 56; Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 17; Kube 1997 *Natural Resources Journal* 861; Singh *German Administrative Law In Common Law Perspective* 32-34.
222 Raff *Private Property And Environmental Responsibility* 163; Van der Veen *Openbare Zaken* 39.
223 Van der Veen *Openbare Zaken* 39.

dedicated to administrative use.[224] Public administrators in the fulfilment of their tasks directly employ these things internally.[225] Therefore, the second category of "public property proper" comprises things used by the public administration to perform its duties (*Verwaltungsgebrauch*) and which indirectly serves the public.[226] In this context, public administration includes all three branches of Government, namely the legislative, executive and judicial branches.[227] Things that resort in this category may include *inter alia* public buildings such as fire stations, parking areas for public officials, police weapons and other equipment.[228] These things are available in "service of the public" rather than for "public use", and their "connection to a public beneficial function" is clearly visible.[229]

The public has access and use rights in *Sachen im Verwaltungsgebrauch*, such as governmental buildings, but they are not in the same legal position as they would have been as in the event of *Sachen im Zivilgebrauch,* as will be discussed below.

5.3.4.2.3 Sachen im Zivilgebrauch (things in civil use)

The third categorisation of public property proper is the concept of *Sachen im Zivilgebrauch*. This category is of particular significance for this research since, unlike the categories of *res sacrae* and *Sachen im Verwaltungsgebrauch*, *Sachen im Zivilgebrauch* comprise property that are available for the external use by citizens. In fact, *Sachen im Zivilgebrauch* are specifically dedicated to access and use rights by the public.[230] Scholars[231] indicate that *Sachen im Zivilgebrauch* can further be sub-categorised between things for the use of which no prior permission is required (*Sachen im Gemeingebrauch*), and things for the use of which a particular permission, which could be express or tacit, is required from the public authority in which the public dominion is vested.[232] The latter group can be sub-divided between *Sachen im*

224 Raff *Private Property and Environmental Responsibility* 163; Wieling *Sachenrecht* 26.
225 Raff *Private Property and Environmental Responsibility* 163; Van der Veen *Openbare Zaken* 39.
226 Van der Veen *Openbare Zaken* 39.
227 Raff *Private Property and Environmental Responsibility* 163.
228 Van der Veen *Openbare Zaken* 39.
229 Van der Veen *Openbare Zaken* 39.
230 Van der Veen *Openbare Zaken* 40.
231 Raff *Private Property and Environmental Responsibility* 162-163; Van der Veen *Openbare Zaken* 40; Wieling *Sachenrecht* 26.
232 Raff *Private Property and Environmental Responsibility* 163.

Sondergebrauch (special use) and *Sachen im Anstaltsgebrauch* (institutional or organisational use).[233]

5.3.4.2.3.1 *Sachen im Gemeingebrauch* (things in common use)

Sachen im Gemeingebrauch comprise the air, beaches, public roads and public waters.[234] It is generally accepted that *Sachen im Gemeingebrauch* are characterised as being available to the public for use and enjoyment without any prior authorisation or permission.[235] Consequently, every individual has a guaranteed *subjective-őffentliche Recht* to use *Sachen im Gemeingebrauch.*[236] The term *subjective-őffentliche Recht* in this context refers to the duty of the owner of the property to allow unrestricted access to the property in question.[237] On the other hand, the remaining categories of *Sachen im Sondergebrauch* and *Sachen im Anstaltsgebrauch* can only be accessed or used on the basis of the state's explicit or tacit permission.

233 Raff *Private Property and Environmental Responsibility* 163.

234 Bassenge *et al Palandt Bürgerliches Gesetzbuch* 1083; Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 96; Dahm *Deutsches Recht* 452; Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 9; Van der Veen *Openbare Zaken* 40; Wieling *Sachenrecht* 26.

235 Within *Gemeingebrauch,* a further distinction is made between *Sondernutzung* and *Anliegergebrauch*. An *Anlieger* is the owner or possessor of immovable property adjacent to a public road. The *Anliegerrecht* does not only ensure that the *Anlieger* has free access to and from the public road, but provides for numerous activities that are undertaken from or on a property next to a public road. These include *inter alia* the temporary parking of building machinery or depositing building material. No permission is required to undertake the named activities. On the other hand, *Sondernutzung* represents a form of use of *őffentliche Sache*, which is subject to permission. Consequently, in contrast to *Sachen im Gemeingebrauch, Sondernutzung* can only be used if permission or authorisation thereto has been granted. *Sondernutzung* should not be confused with *Sachen im Sondergebrauch.* Bassenge *et al Palandt Bürgerliches Gesetzbuch* 1083; Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 96; Maunz and Dürig *Grundgesetz Kommentar* 74-78; Schulte *Eigentum und öffentliches Interesse* 166; Van der Veen *Openbare Zaken* 40.

236 Van der Veen *Openbare Zaken* 40.

237 See Baur and Stürner *Sachenrecht* 318; Van der Veen *Openbare Zaken* 40.

5.3.4.2.3.2 Sachen im Sondergebrauch (things in special use)

Contrary to the unrestricted use of *Sachen im Gemeingebrauch, Sachen im Sondergebrauch* can be used only once permission[238] has been granted to the prospective user.[239] Van der Veen[240] indicates that the use of water is included into the category of *Sachen im Sondergebrauch.*

The next chapter[241] indicates that in terms of the *Wasserhaushaltsgesetz*,[242] the use of surface water and groundwater by landowners are prohibited unless it is explicitly and individually allowed or permitted through an *Erlaubnis* or *Bewilligung* by the administration.[243] Significantly, such an *Erlaubnis* or *Bewilligung* restricts the private property rights of water held by the owner. Consequently, the owner is obliged to tolerate the use of water to the extent provided for by the *Erlaubnis* or *Bewilligung.*[244] Although the question of whether and to what extent water as natural resource resorts under *Sachen im Sondergebrauch* is discussed in greater detail later on,[245] it may be stated at this stage that, in principle, the *Wasserhaushaltsgesetz* provides for *Sachen im Sondergebrauch* in the German water law.[246]

5.3.4.2.3.3 Sachen im Anstaltsgebrauch (things in institutional or organisational use)

Sachen im Anstaltsgebrauch are institutional or organisational facilities that are established to realise certain public functions in the interest of the general public. Things that resort under *Sachen im Anstaltsgebrauch* include *inter alia* schools,

238 Van der Veen *Openbare Zaken* 41.
239 Van der Veen *Openbare Zaken* 41.
240 Van der Veen *Openbare Zaken* 41.
241 See chapter 6.3.3.2 below.
242 The *Wasserhaushaltsgesetz* of 2009 (The Water Management Act or WHG of 2009).
243 See Baur and Stürner *Sachenrecht* 317-318; Consequently, should an *Erlaubnis* or *Bewilligung* be awarded to a person, the owner of the water has a duty to allow the use of the water on which an *Erlaubnis* or *Bewilligung* has been given.
244 The owner's obligation to tolerate the use of water does however not include that he should tolerate activities on the water bed. Such activities still require permission from the owner. Van der Veen *Openbare Zaken* 42.
245 See chapter 6.3.3.2 below.
246 Although this statement allows for the notion that water as a natural resource is seen as different *sachen*, as it is categorised into two categories, namely *Sachen im Gemeingebrauch* and *Sachen im Sondergebrauch*, it should rather be seen as the same thing used in two different ways.

hospitals, swimming pools and theatres.[247] Van der Veen[248] argues that *Sachen im Anstaltsgebrauch* are not easily categorised as public property. The term "*Anstalt"* (institution or organisation)[249] is in a certain sense too broad, as not all public law organisations are dedicated to the public interest, while on the other hand the term is too narrow, as it excludes various private institutions with public functions.[250]

Sachen im Anstaltsgebrauch should be connected with the concept of *öffentliche Einrichtung.*[251] *Einrichtung* refers to the fact that an individual's right to access or use has to be obtained individually. Consequently, an individual needs specific permission from the authority in which the public dominion is vested to access or use such facilities.[252] Access and use rights in *Sachen im Anstaltsgebrauch* are therefore dependent on some sort of admission or permission.

5.3.4.3 The concept of truly public ownership

Within the above-described category of "public property proper", the concept of "truly public ownership" evolved. Otto Mayer,[253] with his perception of the Roman law concept of *res publicae* (and as inspired by French sources)[254] was one of the major protagonists of the concept of truly public ownership and articulated that goods that are vital to the public cannot be subject to the private law, but should be regarded as a form of public or state property, totally detached from the private law.[255] Mayer therefore removed certain things, objects or resources from the sphere of the private property regime, and placed it in the sphere of public or state property.[256] A few examples exist in which Mayer's concept of "public state ownership" or *Őffentliches Eigentum* became law in Germany. As indicated in chapter 5.3.2.2.2 above, the waters

247 Van der Veen *Openbare Zaken* 43.
248 Van der Veen *Openbare Zaken* 43.
249 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 48.
250 Van der Veen *Openbare Zaken* 42-43.
251 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 48; Van der Veen *Openbare Zaken* 43.
252 Van der Veen *Openbare Zaken* 43.
253 Havlan and Janeček https://is.muni.cz/do/law/shop/publikace/8474430/210-4842-Ukazka.pdf 11; Van der Veen *Openbare Zaken* 44.
254 Kube 1997 *Natural Resources Journal* 860.
255 Kube 1997 *Natural Resources Journal* 860; Van der Veen *Openbare Zaken* 44; Wieling *Sachenrecht* 26.
256 Unsatisfactory, however, Mayer held that *Öffentliche Sache* is "privately" held and owned by the state; which use is only restricted by the *Gemeingebrauch*.

in Baden-Wűrttemberg and the dikes of Hamburg, for example, became subject to public state ownership to serve a particular public interest.[257] In chapter 6 below, the importance of public ownership is discussed in more detail.[258]

5.3.4.4 The concept of *őffentliche Sache*

Kube[259] holds that the concept of *őffentliche Sache* evolved when the idea of restricting private property in natural resources for public benefit gained momentum. He argues that the German legal system has established the framework of *őffentliche Sache* "in order to conceptually describe the interplay between private ownership rights in natural resources and restrictions on their exclusive use for the benefit of the public."[260] In essence, the concept *őffentliche Sache* denotes an approach that regulates the *use* of resources that serve a beneficial public function (*Gemeinwohl*).[261] Existing private property rights in resources that serve a public function (if there are any) are in terms of this approach restricted, so that the use of the property serves the public interest. In terms of this hypothesis, private property is affected by an *öffentliche Dienstbarkeit* (public servitude).[262] The concept of *őffentliche Sache* therefore regulates the *use* of a resource, and does necessarily affect the private nature of the ownership thereof. Consequently, the concept of *őffentliche Sache* covers things, objects and resources in private, individual ownership, state ownership,[263] and even things with no owner at all.[264]

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257 Van der Veen *Openbare Zaken* 45. Article 15 of the *Grundgesetz* arguably incorporated this or at least a similar principle into the German legal order. Article 15 provides that, for the purpose of socialisation, land, natural resources and means of production can be transferred into public ownership or other forms of Government property. Van Banning *The Human Right to Property* 193.

258 See chapter 6.3.3.2.2 below.

259 Kube 1997 *Natural Resources Journal* 861.

260 Kube 1997 *Natural Resources Journal* 857.

261 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 17; Kube 1997 *Natural Resources Journal* 861. Things such as streets, natural and other water bodies, rail systems, airports, ports, dikes, parks, sport stadia, public swimming pools, schools, libraries, parking lots, water, gas and electrical services institutions, government buildings and churches are regarded as public in nature.

262 Capelle *Bürgerliches Recht Sachenrecht* 80-82; Kube 1997 *Natural Resources Journal* 862; Maunz and Dürig *Grundgesetz Kommentar* 56.

263 Some may argue that in order to qualify as *őffentliche Sache* legal objects must be owned by a public entity. (This argument was articulated by the theory of Mayer). However, in terms of this argument, private museums, for example, would be disqualified from the concept of *őffentliche Sache*. "Public ownership" is therefore not a prerequisite for a legal object's public status. Kube 1997 *Natural Resources Journal* 861-862.

264 Kube 1997 *Natural Resources Journal* 861; Wieling *Sachenrecht* 26.

Similar to Raff,[265] Kube argues that the key to understanding the concept of *őffentliche Sache* is the concept of a *Widmung* or dedication to the public.[266] A *Widmung* denotes the formal legal mechanism by which a resource is dedicated to the public.[267] The *Widmung* is made pursuant to legislation, an administrative act, or from custom, as in the case of beaches.[268] The *Widmung* then determines both the content and the extent of the resource's public beneficial function. It is therefore safe to state that a *Widmung* "founds the future legal status" of the resource.[269] Naturally, once the public status of a resource has been acknowledged, the resource in question is restricted by the public beneficial function it is dedicated to fulfil.[270] The restriction following the *Widmung* or *öffentlichrechtliche Dienstbarkeit*[271] attaches to the resource itself and is independent of the property holder.[272] Consequently, a dedication runs with the property or resource, and restricts subsequent buyers for reasons of the public interest.[273]

Effectively, the concept of *őffentliche Sache* therefore supplants the private law powers of an owner of a resource with state management.[274] What is in chapter 5.3.4.3 above described as the transfer to "truly public ownership" may within this context be understood as an extreme example of the application of the concept of *őffentliche Sache.* In those extreme instances, the *Widmung* usurped all private powers to the extent that the state became the "public owner" of the resource.[275] The state should, however, not be seen as the proprietor of the resource in question. The state rather manages the resources on behalf of the nation as *de őffentliche Sachherr*.[276] The *őffentliche Sachherr* has the necessary authority to dedicate the property in question

265 Raff *Private Property and Environmental Responsibility* 161.
266 Kube 1997 *Natural Resources Journal* 861.
267 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 17; Kube 1997 *Natural Resources Journal* 861.
268 Kube 1997 *Natural Resources Journal* 861; Raff *Private Property and Environmental Responsibility* 161.
269 Raff *Private Property and Environmental Responsibility* 161.
270 Havlan and Janeček https://is.muni.cz/do/law/shop/publikace/8474430/210-4842-Ukazka.pdf 11; Wantuch-Thole *Cultural Property in Cross-Border Litigation: Turning Rights into Claims* 104.
271 Wantuch-Thole *Cultural Property in Cross-Border Litigation: Turning Rights into Claims* 103-104.
272 Kube 1997 *Natural Resources Journal* 862.
273 Kube 1997 *Natural Resources Journal* 862; Wantuch-Thole *Cultural Property in Cross-Border Litigation: Turning Rights into Claims* 104.
274 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 17; Kube 1997 *Natural Resources Journal* 862.
275 Kube 1997 *Natural Resources Journal* 862.
276 Wieling *Sachenrecht* 26.

to *őffentliche Sache.*[277] Once the property is dedicated, the *őffentliche Sachherr* is cloaked with a duty to ensure that the *őffentliche Sache* is used,[278] protected,[279] conserved,[280] managed and controlled to keep the public property in a good condition to serve the public interest.[281] The specific powers of the *őffentliche Sachherr* are founded in statutes. For example, concerning the protection of public water, Van der Veen indicates that *"[h]et beschermingsregime van de openbare wateren is in essentie neergelegd in het paragraaf 2.3.2 […of the] Wasserhaushaltsgesetz..."*[282] In addition to the above stated duties, Van der Veen[283] argues that the *őffentliche Sachherr* is responsible to ensure that the public has access to the *őffentliche Sache.* It is at this stage submitted that the state's role in *őffentliche Sache* is closer to the concept of public trusteeship as discussed in chapter 4.3.3 above, than to the concept of ownership.

Notably, various public environmental law statutes in Germany acknowledge instances of *őffentliche Sache* that authorise the state and its agencies to issue a *Widmung*, which dedicates a part or the whole of the resource's uses to the public.[284] The *Bundesnaturschhutzgesetz* of 2009 for example prohibits recreational land uses, hunting, or road construction in areas expressly deemed to be of a particular environmental significance.[285] Following the same trend, the *Bundes-Immissionsschutzgesetz*[286] restricts the scope of the possible uses of industrial

277 Although the *őffentliche Sachherr* can be the owner of the property in question, it is not a requirement because, as indicated above, *őffentliche Sache* can be subject to private, individual ownership, state ownership, and even things with no owner at all.
278 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 181.
279 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 181.
280 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 181.
281 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 182; Wieling *Sachenrecht* 26.
282 Van der Veen *Openbare Zaken* 49.
283 Van der Veen *Openbare Zaken* 241.
284 Kube 1997 *Natural Resources Journal* 862.
285 See also *Landesnaturschutzgesetz* of 2010. Article 13(2) of the *Bundesnaturschhutzgesetz* of 2009 stipulates:
> All actions which may lead to destruction of, cause damage to, or induce changes in, a nature reserve or which may be a source of major disturbance for a nature reserve, shall be prohibited, subject to more specific provisions to be adopted. Where this is compatible with the purpose of protection, nature reserves may be accessible to the general public.

286 *Bundes-Immissionsschutzgesetz* of 1990; Bassenge *et al Palandt Bürgerliches Gesetzbuch* 1082.

plants[287] that produce polluting substances.[288] As is indicated in the next chapter, the German water regulatory framework also incorporated the concept of *őffentliche Sache.* This discussion and its relevance are taken further in the next chapter, which is devoted to the concept of *őffentliche Sache* as it functions in German water law.

5.3.5 Concluding remarks: The public law concept of property

The German legal system provides for more than one concept of property. Apart from the private law concept of property that is found in the BGB, the public law treats property in constitutional law, criminal law as well as administrative law. The constitutional law concept of property is a wider and more flexible concept than its private law counterpart and enjoys comprehensive constitutional protection. Brief reference was in the second instance made to custody in criminal law, but in light of the objective of this chapter, emphasis should in the third place be put on the public property concept as regulated by the administrative law. The discussion revealed that the characterisation of a thing, object of resource as public property flows from two aspects, namely its public beneficial function and the establishment of public law dominion through a *Widmung* (dedication) by the *őffentliche Sachherr*.[289] All three of the public law concepts of property are regulated in terms of the public law,[290] which is detached from the traditional understanding and regulation of the private law property concept.

287 *Bundes-Immissionsschutzgesetz* of 1990; The establishment and operation of installations etc. Article 2 of the *Bundes-Immissionsschutzgesetz* See also Winter *German Environmental Law* 151.

288 Article 4 of the *Bundes-Immissionsschutzgesetz* states that the establishment and operation of installations which, on account of their nature or their operation are particularly liable to cause harmful effects on the environment or otherwise endanger or cause significant disadvantages or significant nuisance to the general public or the neighbourhood, shall be subject to licensing.

289 Raff *Private Property and Environmental Responsibility* 161.

290 Wieling *Sachenrecht* 24.

5.4 Concluding remarks

That the concept of property may take more than one form is obvious. The different forms of property are often overlooked due to the dominance of private property and its inherent right to exclude. In Germany, for example, property law textbooks rarely attend to the concept of public property or the sub-category of *öffentliche Sache.*[291] An analysis of the concept of *öffentliche Sache* is, however, crucial in answering the research question of this study, which considers how and to what extent the concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.[292] In order to contextualise and analyse the concept of *öffentliche Sache*, this chapter provided a brief overview of the development of the concept of property in German property law.

The most significant distinction between the concepts of property in German property law lies in the civil or private law concept and the public law concept of property. The chapter accordingly commenced with a discussion of the private law concept of property. Alongside and often interwoven with the notion of private property and its inherent right to exclude, the public law concept of property was subsequently analysed.[293] In public law, the property concept functions in the constitutional law, criminal law and administrative law.

As the concept of property in constitutional law is closely connected to the protection of private property in a civil or private rights context,[294] the discussion on public law property started with the constitutional concept of property. In German law, the Federal Constitutional Court has established a constitutional interpretation of the term *Eigentum* (property) that is different from the private law meaning of the same term. The constitutional meaning of property was interpreted according to the "fundamental purpose question" (purposive or functional approach) that determines whether the inclusion of a specific object or right in property under the protection of the constitutional property clause would serve the purpose of creating and protecting a

291 Van der Veen *Openbare Zaken* 36.
292 See chapter 1.3.1 above.
293 See chapter 5.3 above.
294 Raff *Private Property and Environmental Responsibility* 160.

sphere of personal freedom, within the area of patrimonial law, where the individual can realise and promote the development of his or her own life and personality within the social context. The purposive or functional approach to the fundamental meaning of the property guarantee, as was set out above, explains (and in a sense facilitates) the question whether certain interests should be included or excluded for purposes of the constitutional property guarantee.[295]

It was further indicated that the constitutional property guarantee comprises of two separate, but related guarantees, namely a *Bestandsgarantie,* also the *Individualgarantie* (individual guarantee) and an *Institutionsgarantie,* also the *Einrichtungsgarantie* (institutional guarantee).[296] As to the former guarantee, the constitutional interpretation moved away from the typical private law view of exclusionary property rights and subjected them to constitutional restrictions. The key differences between the traditional private law and constitutional meaning of property include *inter alia* that the objects of property rights in the constitutional property clause are not restricted to corporeal things; that the property rights in the property clause are not restricted to ownership; and that the constitutionally protected property rights are not exclusive or absolute, because they can be inherently limited by the constitutional property clause itself.

The latter institutional guarantee is of particular importance to ultimately understand the meaning of the concept of *öffentliche Sache,* and to determine the constitutionality of the transformation of private property into public property (*öffentliche Sache*). The institutional guarantee concerns the whole system or institution of private property as such, and not merely the individuals or their individual property interests.[297] In this regard, two examples were drawn from case law. In the *Deichordnung Case* (the Hamburg Flood Control Case),[298] it had to be decided if a certain category of property (dikelands) could be removed from the sphere of private property rights, and regarded as public property without infringing upon the constitutional property guarantee. The institutional property guarantee was also interpreted in the series of *Naßauskiesung-*

295 See chapter 5.3.2.2 above.
296 See chapters 5.3.2.2.1 and 5.3.2.2.2 above.
297 See chapter 5.3.2.2.2 above.
298 *BVerfGE* 24, 367.

cases concerning the constitutional validity of the amendments to article 1a(3) of the *Wasserhaushaltgesetz*, which limited a landowner's right to extract groundwater.[299] In both the *Deichordnung* and *Naßauskiesung*-cases the Federal Constitutional Court held that the guarantee of the institution of property is not encroached upon when the security of resources that are vital to the public at large is placed under the authority of the public legal order rather than the private order.[300]

Brief reference has been made to custody in criminal law, but in light of the object of this chapter, the public law concept of property in the field of criminal law falls beyond the scope of this study. This brings us to the legal status and regulation of the concept of public property that is recognised as an established field of the German administrative law.

The various forms of public property in Administrative law were classified into the categories of *res sacrae* (religious use of things)*, Sachen im Verwaltungsgebrauch* (things in administrative use) and *Sachen im Zivilgebrauch* (things available for the use of citizens, including common use, special use and institutional use)*.* The latter category is of particular significance for this research, as unlike the categories of *res sacrae* and *Sachen im Verwaltungsgebrauch*, *Sachen im Zivilgebrauch* comprises property that are available for external use, and which are specifically dedicated to access and use rights by the public.[301] It was indicated that *Sachen im Zivilgebrauch* are sub-categorised under the notions of *Sachen im Gemeingebrauch*, *Sachen im Sondergebrauch* and *Sachen im Anstaltsgebrauch*.[302] The latter category of *Sachen im Anstaltsgebrauch* is connected with the concept of *öffentliche Einrichtung.*[303] *Einrichtung* refers to the fact that a right to access or use has to be obtained individually. Consequently, an individual needs specific permission to access or use facilities such as public schools, or public swimming pools.

299 *NJW* 1978, 2290; *BVerfGE* 58, 300.
300 See chapter 5.3.2.2.2 above.
301 See chapter 5.3.4.2.3 above.
302 See chapter 5.3.4.2.3 above.
303 See chapter 5.3.4.2.3.3 above.

Sachen im Gemeingebrauch comprise the air, beaches, public roads and public waters.[304] It is generally accepted that *Sachen im Gemeingebrauch* are characterised as being available to the public for use and enjoyment without any prior authorisation or permission.[305] Consequently, every individual has a guaranteed *subjective-őffentliche Recht* to use *Sachen im Gemeingebrauch.*[306] Contrary to the unrestricted use of *Sachen im Gemeingebrauch, Sachen im Sondergebrauch* can be used only once permission has been granted to the prospective user.[307] Van der Veen[308] indicates that the use of water for domestic purposes is included into the category of *Sachen im Sondergebrauch.* It seems from the description of *Sachen im Gemeingebrauch* and *Sachen im Sondergebrauch,* that water as a natural resource can be subject to both these categorisations. Van der Veen[309] states in this regard:

> Deze onderscheiding lijkt echter lasting te verenigen met een eerdere constatering, dat sommige zaken in beide categorieën vallen, de wateren. Hier wreekt zich wellicht dat het waterrecht een eigen weg is gegaan.

The German water law seemingly introduced the concept of *őffentliche Sache* into its regulatory framework. As argued above,[310] the concept of *őffentliche Sache* should be understood with reference to the concept of a *Widmung* or dedication. The dedication is a necessary requirement that subjects property to restrictions in the interests of the public.[311] The consequence of a dedication is that the private law owner of the property, if there is one, loses the power to use or dispose of the property in question to the extent to which the property has been dedicated. The concept of *őffentliche*

304 See chapter 5.3.4.2.3.1 above.
305 Within *Gemeingebrauch,* a further distinction is made between *Sondernutzung* and *Anliegergebrauch*. An *Anlieger* is the owner or possessor of immovable property adjacent to a public road. The *Anliegerrecht* does not only ensure that the *Anlieger* has free access to- and from the public road, but provides for numerous activities that are undertaken from or on a property next to a public road. These include *inter alia* the temporary parking of building machinery or depositing building material. No permission is required to undertake the named activities. On the other hand, *Sondernutzung* represents a form of use of *őffentliche Sache*, which is subject to permission. Consequently, in contrast to *Sachen im Gemeingebrauch, Sondernutzung* can only be used if permission or authorisation thereto has been granted. *Sondernutzung* should not be confused with *Sachen im Sondergebrauch.* Van der Veen *Openbare Zaken* 40.
306 Van der Veen *Openbare Zaken* 40.
307 See chapter 5.3.4.2.3.2 above.
308 Van der Veen *Openbare Zaken* 41.
309 Van der Veen *Openbare Zaken* 41.
310 See chapter 5.3.4.4 above.
311 See chapter 5.3.4.4 above.

Sache therefore supplants any private property powers with state management, for reasons of public interest.

The mandate to regulate and protect *öffentliche Sache* lies with *de öffentliche Sachherr.* Generally, the *öffentliche Sachherr* is the legal person (a Government or state institution) with the necessary authority to dedicate the property in question to *öffentliche Sache.*[312] Once the property is dedicated for reasons of public interest, the *öffentliche Sachherr* is cloaked with a duty to control the *öffentliche Sache.* The *öffentliche Sachherr* must ensure that the *öffentliche Sache* is used, protected, conserved, managed and controlled to keep the public property in a good condition and to serve the public interest.[313]

Therefore, in line with Van der Veen's argument, chapter 6 below systematically examines how and to what extent the concept of *öffentliche Sache* developed in the German water regulatory framework. The objective of this examination is to determine if and to what extent the German concept of *öffentliche Sache* in water resources can inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.

312 See chapter 5.3.4.4 above.
313 See chapter 5.3.4.4 above.

Chapter 6

Water as public property (*őffentliche Sache*) in Germany

6.1 Introduction

Embedded in its own historical context, the German legal system provides for different forms of property. Both German private- and public law acknowledge the concept of property.[1] Constitutional law, criminal law and administrative law are more specific areas of public law that provide for the concept of public property. In chapter 5 above, the areas of law where public property manifest, were examined in the process to contextualise and interpret the German public law property concept of *őffentliche Sache*. It was shown that various scholarly descriptions and explanations exist for the latter concept. From the available literature we glean that *őffentliche Sache*, *inter alia*, allows for a formal legislative or administrative *Widmung*, which dedicates a part or the whole of a resource's uses to the public, thereby restricting the rights of private owners - to the benefit of the public.[2] The German water law has been stated to offer a good example of a sector-specific regulatory regime that incorporated the concept of *őffentliche Sache.*[3]

This study is aimed at determining how and to what extent the German concept of *őffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.[4] This renders it necessary to first analyse the application of the *őffentliche Sache* or public property status of water in the German water regulatory framework.[5]

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1 Which is closely linked to a distinction between personal and propriety rights found in the BGB; Bassenge *et al Palandt Bürgerliches Gesetzbuch* 55-57, 1081-1082.

2 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 17; Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 29-37; Kube 1997 *Natural Resources Journal* 862*;* Van der Veen *Openbare Zaken* 6.

3 See Bassenge *et al Palandt Bürgerliches Gesetzbuch* 1082; Breuer *Öffentliches und privates Wasserrecht* 25; Kube 1997 *Natural Resources Journal* 867; Narasimham "Water Law for India: Science and Philosophy Perspectives" 553.

4 See chapter 1.3.1 above.

5 It is important to take cognisance of the fact that Germany is, unlike South Africa, a water-rich country. On face value, some may therefore question the relevance of the German law concept of *őffentliche Sache* to provide interpretative guidance to the South African water framework. However, the German water regulatory model, rooted in the concept of *őffentliche Sache,* provides specific interpretative guidance in light of the fact that Germany efficiently and

This chapter proceeds with an historical overview of the development of the legal status of water in German law and the influence it had on the existing water regulatory regime. The early Germanic law approaches,[6] approaches of the Middle Ages,[7] and approaches of nineteenth[8] and twentieth century Germany are described,[9] followed by a description of the current water law regime. The discussion pays specific attention to the nature of the rights that can be acquired in water as a resource as well as the state's regulatory obligations resulting from the public property regime.[10] The chapter concludes with a description of the public property regime within which Germany's water resources are currently regulated.[11] The scope and functioning of the public property regime is subsequently used in the concluding chapter to inform and guide the interpretation and evaluation of the notion of public trusteeship in South Africa's water regulatory framework.[12]

sustainably regulates water resources amidst major water availability challenges in a highly industrialised, farmed and densely populated country. Although there is ample water in Germany, it is distributed unevenly between the different regions. In the Alps and Central Uplands, for example, it tends to rain and snow often, while other areas receive little precipitation. The latter regions often use more water than they are able to obtain. Without careful management in the water sector, these drier areas would have to succeed with very little surface water. Similar challenges exist in the regulation of groundwater. Due to *inter alia* hydrological, geological and anthropogenic influences, the availability and quality of groundwater in Germany also differs between the regions, and pose major challenges in the water regulatory framework. Against this ecological background, Germany developed and incorporated the concept of *öffentliche Sache* into the water regulatory framework to thereby ensure the best possible management of water resources in Germany. See Association for Drinking Water from Reservoirs *et al* 2015 *Profile of the German Water Sector* https://de.dwa.de/profile_of_the_german_water_Sector.html?file=tl_files/_media/content/PDFs/StOeP/WEB_brachenbild_ENGL_wasserwirtschaft_2015_a4_25062015.pdf; Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (ed) 2003 https://www.fona.de/mediathek/pdf/Water_Flows_in_Germany.pdf.

6 See chapter 6.2.2 below.
7 See chapter 6.2.3 below.
8 See chapter 6.2.4 below.
9 See chapters 6.2.5 and 6.2.6 below.
10 See chapter 6.3 below.
11 See chapter 6.4 below.
12 See chapter 7 below.

6.2 An historical overview of the legal status of water in Germany

6.2.1 Introduction

Chapter 5 indicated that many centuries of legal development contributed to the establishment of a unified, largely codified and modern legal system in Germany. Without pursuing an in-depth analysis of the history of German law, this section discusses different historical approaches to the legal status of water specifically in order to determine the developments behind and the content and functioning of the existing water regulatory regime.

6.2.2 Early Germanic law approaches

The early Germanic period (100 BC- AD 500) was the first known phase in German legal history to have afforded a classifiable legal status to water. The Germanic law concept of Regalia governed the use of water during this period.[13] Regalia designated "rights pertaining to a king; royal powers or privileges."[14] The concept therefore denoted regal competencies, rights, prerogatives and privileges that belonged to a sovereign, king or emperor.[15] Although, in its primary sense, Regalia signified the sovereign powers of a ruler, the concept of Regalia in the German water regulatory framework did not remain confined to the realm of governmental powers.

A catalogue of regal competencies, powers and rights is found in the *Libri Feodorum*.[16] The *Libri Feodorum* is a compilation of twelfth-century Longobardian feudal law.[17] Due to the diverse nature of the things or resources that constituted the components of regal sovereignty, the Regalia were subject to further classifications. The most common categorisation was *Regalia maiora* and *Regalia minora.*[18] The category of *Regalia maiora* denoted rights of the sovereign, king or emperor that were essential

13 Kube 1997 *Natural Resources Journal* 858.
14 Onions (ed) *The Shorter Oxford English Dictionary on Historical Principles* 1689.
15 Kube 1997 *Natural Resources Journal* 858; Van der Vyver "The Ètatisation of Public Property" 266.
16 Van der Vyver "The Ètatisation of Public Property" 267.
17 Earle 2006 *German Law Journal* 326; Freckmann and Wegerich *The German Legal System* 6,12; Whitman *The Legacy of Roman Law in the German Romantic Era* 15.
18 Van der Vyver "The Ètatisation of Public Property" 267-268.

to his or her sovereignty. Incidents that were categorised under *Regalia maiora*[19] comprised governmental powers such as the competence to appoint officials and the authority to execute administration. Of specific relevance for this study, *Regalia minora*[20] included economically qualified prerogatives of the king or emperor in respect of, *inter alia,* the country's dikes, navigable streams and rivers. *Regalia minora* therefore granted the sovereign, king or emperor benefits in, or entitlements to certain resources. Fisch[21] describes a practical example to explain the concept's application: the sovereign, king or emperor had the prerogative to levy river tolls along the Rhine river to financially enrich themselves.[22] Another manifestation occurred in Baden-Württemberg where all rivers, whether navigable or not, were regarded as common property and therefore fell under the prerogative of the sovereign prince.[23] These examples show that, in earliest times, the nobility "owned" water resources, which could in turn be used by the country's citizens.[24] Therefore, with the concept of *Regalia minora*, the sovereigns of Germany reconciled their "ownership interests" in common water resources with the usufructuary interests of the citizens of the country.[25]

6.2.3 Approaches in the Middle Ages

The second period of relevance spanned from the Early Middle Ages and prevailed until the 19th century, which is also known as the period during which the Holy Roman Empire existed.[26] As indicated in chapter 5.2.2 above, the Middle Ages saw the rapid development towards, and comprehensive adoption of the Roman law.[27] The abstract Roman law concepts of *dominium* and *proprietas*, which designated the conception of absolute ownership, were introduced into the Germanic legal system during this

19 Van der Vyver "The Ètatisation of Public Property" 267-268.
20 Van der Vyver "The Ètatisation of Public Property" 268.
21 Fisch "German Administrations and Water Issues in History" 25.
22 These economically qualified prerogatives should not be confused with the sophisticated system of taxation, as the latter was of a later date. Van der Vyver "The Ètatisation of Public Property" 268.
23 Fisch "German Administrations and Water Issues in History" 25.
24 Kube 1997 *Natural Resources Journal* 858.
25 Kube 1997 *Natural Resources Journal* 858; Schmidt-Jortzig 1987 *Neue Zeitschrift für Verwaltungsrecht* 1025, 1026.
26 The Holy Roman Empire evolved over time into a state composed of many member states. Jovanovic *The Economics of International Integration* 482.
27 Cohn *Manual of German Law* 21; *Nestorovska* 2005 *Hanse Law Review* 79.

period.[28] As a result, a new property regime emerged in terms of which property eventually became considered as an exclusive individual right.[29]

Water resources in Germany initially survived the trend towards privatisation. In fact, as is clear from *Das Allgemeine Landrecht für die Preußischen Staaten* of 1794 (the *Prussian General Code*),[30] the Germanic legal concept of *Regalia minora* as applied to water resources was maintained.[31] The *Prussian General Code* stipulated that the navigable streams, together with other natural resources, were the common property of the state.[32] Fisch[33] and Kube,[34] however, indicate that due to the rapid development of the notion of property as an exclusive individual right, water resources became subject to private ownership, rendering the common property status of water in terms of the *Prussian General Code* outdated. As a result of this development, fresh water from springs, as well as groundwater that constituted the source of spring water, were eventually regarded as part of private landownership.[35] Surface water was also often considered to be private property annexed to the private ownership right in the waterbed.[36] The private landowner therefore had the authority to exclude others from the use of surface water. The landowner's right to exclude others from the resource was, however, restricted to the common uses of third parties for, *inter alia,* watering, washing or bathing.[37]

28 Kube 1997 *Natural Resources Journal* 859.
29 Kube 1997 *Natural Resources Journal* 859.
30 The codification of the Prussian states; Kube 1997 *Natural Resources Journal* 859.
31 Kube 1997 *Natural Resources Journal* 859.
32 Section 21 II 14 of the *Prussian General Code.*
33 Fisch "German Administrations and Water Issues in History" 23.
34 Kube 1997 *Natural Resources Journal* 859.
35 Fisch "German Administrations and Water Issues in History" 23.
36 Fisch "German Administrations and Water Issues in History" 23.
37 Fisch "German Administrations and Water Issues in History" 23.

6.2.4 Approaches in nineteenth century Germany

The German Confederation, established in 1815,[38] was a loose association of thirty-nine (39) German states.[39] Each of the states was recognised as being fully independent and sovereign.[40] Each state therefore had legislative powers to regulate internal affairs, including the regulation of water resources.[41] Fisch[42] states that if the legislative approaches of these thirty-nine different states in relation to water resources were to be generalised, it is possible to distinguish between two main approaches, namely that of the Prussian or Northern German states and that of the Southern German states.

6.2.4.1 Northern v Southern states

As a continuation of the development in the Middle Ages that resulted in surface and groundwater being regarded as a constituent part of a landowner's property,[43] water in the Prussian or Northern states of the German Confederation was recognised as private property that exclusively belonged to property owners.[44] As private owners, these landowners could freely dispose of "their" water. In contrast to the Northern German model with its traditional civil law approach, legislation in Southern Germany was characterised by the growing role of the state and the public administration in the regulation of water resources.[45] Although landowners in Southern German states were allowed to use groundwater for domestic or household purposes, those landowners who wanted to use more groundwater than needed for the said domestic or household purposes, had to apply for official permission, which could be denied or refused in order to serve the public interest.[46] Therefore, as a general rule, the Southern German

38 The creation of the Confederation was followed by several attempts to create a unified nation state. The Revolution of 1848 was the most prominent attempt. Legal changes brought about by the German Confederation prevailed throughout the 19th century.
39 Pearson *The Longman Companion to European Nationalism 1789-1920* 76.
40 Pearson *The Longman Companion to European Nationalism 1789-1920* 76.
41 Pearson *The Longman Companion to European Nationalism 1789-1920* 76.
42 Fisch "German Administrations and Water Issues in History" 25.
43 See chapter 6.2.3 above; Narasimham "Water Law for India: Science and Philosophy Perspectives" 553.
44 Fisch "German Administrations and Water Issues in History" 25; Schulte *Eigentum und öffentliches Interesse* 167.
45 Fisch "German Administrations and Water Issues in History" 25-26.
46 Fisch "German Administrations and Water Issues in History" 26.

legislative approach considered groundwater as a common or public good that had to be distributed for public use by the state administration.[47] Similarly, the right to remove surface water from a river without feeding it back after use was separated from the traditional notion of landownership and necessitated official permission.[48] Surface water, as well as groundwater were therefore not in the Southern regions regarded as private property, but as a public resource administered by a public authority.

Conflict between the Confederation's most powerful states, Austria (the traditional principal power in Germany) and Prussia, led to war and resulted in the disintegration of the German Confederation in 1866. The war resulted in the establishment of the North German Confederation in 1867. The North German Confederation included Prussia and other states situated north of the Main River.[49] The different member states of the newly established North German Confederation were allowed to retain their existing laws or to promulgate new statutes where necessary.[50] Throughout the existence of the North German Confederation, the South German states of Wurttemberg, Baden, Bavaria and Southern Hesse remained independent.[51] They continued to acknowledge the role of the different states and their public administration in the regulation of water resources.[52] It was only after the creation of the German Empire in 1871 that all of the said German states were unified. As this period represents a distinct phase in German water law it is discussed separately in the next paragraph.[53]

6.2.4.2 The promulgation of the BGB

In 1900, the BGB was promulgated by the newly unified German Empire.[54] The BGB was, and still is, Germany's private law codification. The use of water resources is, however, not explicitly provided for in the BGB. This is attributed to the fact that article 65(f) of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (the Introductory Law

47 Fisch "German Administrations and Water Issues in History" 26.
48 Fisch "German Administrations and Water Issues in History" 26.
49 The North German Confederation was a Federal state.
50 Hübner *A History of Germanic Private Law* 24.
51 Alexander *Europe's Uncertain Path 1814-1914: State Formation and Civil Society* 143.
52 Fisch "German Administrations and Water Issues in History" 25-26.
53 See chapter 6.2.4.2 below; Alexander *Europe's Uncertain Path 1814-1914: State Formation and Civil Society* 143.
54 See chapter 5.2.3 above.

regulating the coming into force of the BGB), stipulated that water issues, including the regulation of groundwater, fell within the legislative power of the different states of the Empire and was not regulated on a national level. Consequently, the water regulatory regimes remained as defined by the legislation of the individual states.[55] The respective states that considered the right to use water as a right linked to the private ownership right in the waterbed,[56] justified their approach with section 903 of the BGB. In terms of this section, the private law owner of a thing, the surface water or waterbed in this context, could deal with the thing, water, at his or her own discretion. Landowners in the states that considered the right to use water as a right linked to private ownership therefore had the authority to exclude others from the use of surface water. The landowner's entitlement to deal with the water at his discretion was in these states only limited to the extent that it could be contrary to law or infringe on the rights of third parties.[57] In these states, groundwater was also regulated in terms of the private law, or more specifically, in terms of section 905 of the BGB. This section stipulated that the right to own land extends to the space above the surface and to the subsoil under the surface. The states that regulated groundwater in terms of the private law therefore allowed landowners to use the groundwater beneath their property as being linked to their private ownership land right.[58] On the other hand, the states that considered surface water to be a public good,[59] granted public law usufructuary rights or *subjektive öffentliche Rechte* in the public water resource to individuals.[60] In these states, public law mechanisms were also used to manage and distribute groundwater.[61] Every individual, whether a riparian owner or the owner of a waterbed, consequently needed permission in terms of the public law to use the surface or groundwater in question.[62]

55 Fisch "German Administrations and Water Issues in History" 25.
56 Kube 1997 *Natural Resources Journal* 868.
57 In terms of section 903 of the *Bürgerliches Gesetzbuch* the state did in fact have the power to intervene in certain instances to allow a third party to use the water resource.
58 Kube 1997 *Natural Resources Journal* 868-869.
59 Kube 1997 *Natural Resources Journal* 868.
60 See Baur *Lehrbuch des Sachenrechts* 120; Kube 1997 *Natural Resources Journal* 868.
61 See section 19 of the *Bavarian Water Code* of 1907; Kube *Natural Resources Journal* 868-869.
62 Kube 1997 *Natural Resources Journal* 868.

6.2.4.3 Extending the concept of public ownership

With the promulgation of the private law codification (the BGB) in the year 1900, courts and legal scholars progressively resorted to the private law to give legal form to the relationship between the state and natural resources and things dedicated to public use.[63] The idea emerged that the state was the owner of public things similar to any individual owner, with the state's ownership being burdened by the usufructuary interests that vested in the citizens.[64]

During the same period, the idea of "truly public state ownership", which shared no features with private ownership, was promoted.[65] Otto Mayer was one of the protagonists of this concept in German law.[66] Mayer postulated that certain things, objects or resources should totally be removed from the private law realm. In his *Deutsches Verwaltungsrecht*,[67] Mayer argued that the things, objects and resources that serve a vital or other public beneficial function ought to be regulated as "true public property" akin to the French notion of *domaine public*.[68] He proposed that resources that are vital to the public should not be subject to private law, but should be placed outside the sphere of private property altogether.[69] He held that such public resources had to be subject to a category of public or state ownership, "which does not have anything to do with private property".[70] Legally relevant consequences of this concept of public ownership included that the state obtained a comprehensive right of public management (*Sachherrschaft*) over the resource in question, and that such public management could only be effected in terms of the public administrative law.[71]

63 Kube 1997 *Natural Resources Journal* 860.
64 Kube 1997 *Natural Resources Journal* 860.
65 Kube 1997 *Natural Resources Journal* 860; See chapter 5.3.4.2 above.
66 Havlan and Janeček https://is.muni.cz/do/law/shop/publikace/8474430/210-4842-Ukazka.pdf 11; Van der Veen *Openbare Zaken* 44. Some of Mayers' publications on the subject are Mayer 1907 *AöR* 499-522 and Mayer 1920 *AöR* 77-95.
67 Mayer *Deutsches Verwaltungsrecht* 68.
68 Maunz and Dürig *Grundgesetz Kommentar* 56; Stolleis *Public Law in Germany* 1800-1914 399.
69 Mayer *Deutsches Verwaltungsrecht* 68; Van der Veen *Openbare Zaken* 44.
70 Kube 1997 *Natural Resources Journal* 860; Schmidt-De Caluwe *Der Verwaltungsakt in der Lehre Otto Mayers* 122; Van der Vyver "The Ètatisation of Public Property" 272.
71 Maunz and Dürig *Grundgesetz Kommentar* 56; Van der Veen *Openbare Zaken* 45.

Mayer's concept of "truly public ownership" only had limited application.[72] Section 4 of the *Water Code of Baden-Württemberg* of 1988 and section 2 of the *Dikes and Embankments Act* of 1964 for example provided for public ownership in the waters of Baden-Württemberg and the dikes in Hamburg.[73] Apart from the cited statutes, Mayer's theory of public ownership in vital natural resources did not prevail, because the idea that the state is the owner of public things, akin to a private law owner, with state ownership being burdened by the usufructuary interests of the citizens, was so successful that the development of a new approach was not deemed necessary.[74]

6.2.5 Approaches in early twentieth century Germany

After the promulgation of the BGB, the different states' legal approaches to water as inherited from the nineteenth century, continued and remained non-uniform.[75] In the Southern parts of Germany, water was generally regulated in terms of the public law, while water in Northern German states was still regarded as private property of landowners.[76] It is, however, important to take note of the fact that, although groundwater remained private property, the private "owners" of the groundwater had to take into consideration similar rights of other landowners that had water use rights linked to their own land.[77] Furthermore, if the public interest was affected by the extensive use of groundwater by the landowner, the state authorities were allowed (but not bound) to grant an official permit to the landowner to exploit groundwater.[78] In light of these developments, it may be asserted that the German water regulatory framework law during this period started to recognise the public interest in water resources.[79] Whether water was regulated in terms of a comprehensive management

72 Kube 1997 *Natural Resources Journal* 861.
73 Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 82; Maunz and Dürig *Grundgesetz Kommentar* 56.
74 Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 16; Kube 1997 *Natural Resources Journal* 861.
75 Fisch "German Administrations and Water Issues in History" 25; See chapter 6.2.4.1 above.
76 Even though the *Preußisches Wassergesetz* of 1913 (Prussian Water Act) introduced a fee for drawing fresh water if the water was taken from a state-owned navigable river, the Act did not apply to the abstraction of water from a groundwater source. Groundwater thus remained a private property resource in Prussia. Fisch "German Administrations and Water Issues in History" 25.
77 Fisch "German Administrations and Water Issues in History" 25.
78 Fisch "German Administrations and Water Issues in History" 25.
79 Section 903 of the BGB; Kube *Natural Resources Journal* 869.

and distribution of water through public law mechanisms, or in terms of the private law with restrictions on private ownership, water was regulated to the benefit of the public.

During the Weimar Republic (1919-1933),[80] the public interest in water resources was formally acknowledged.[81] Because of the importance of certain resources to the community, restrictions on the extent of private property rights in water resources were introduced at a constitutional level.[82] Article 153 of the *Weimarer Reichsverfassung* of 1919 stipulated that *"...Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste"*.[83] Article 153 proclaimed that property "entails obligations", and that "its use shall serve the public interest".[84] It is in light hereof submitted that early twentieth century German law recognised the interest of the public in water and other natural resources through restrictions on private ownership.

6.2.6 Constitutional law approaches

West Germany became the Federal Republic of Germany in 1949.[85] The *Grundgesetz* was adopted as the "Constitution" or "basic law" of the Federal Republic.[86] The *Grundgesetz* was the result of extensive negotiations characterised by acute awareness of the injustices of the country's past Nazi rule, war and the devastation of the holocaust.[87] Pervaded by the determination to prevent history repeating itself, the drafters of the *Grundgesetz* emphasised values, such as human dignity and individual human rights.[88] Consequently, the *Grundgesetz*, which is still being used today, contains extensive provisions on human rights.[89]

80 See Aguilera-Barchet *A History of Western Public Law Between Nation and State* 323.
81 Kube 1997 *Natural Resources Journal* 859.
82 Kube 1997 *Natural Resources Journal* 859.
83 The first constitution to contain *Grundrechte* (Constitutional Civil Rights). Freckmann and Wegerich *The German Legal System* 24; Leisner *Sozialbindung des Eigentums* 16.
84 A similar formulation is to be found today in Article 14 of the *Grundgesetz.*
85 See chapter 5.3.2.1 above.
86 Tschentscher 2013 http://www.servat.unibe.ch/jurisprudentia/lit/The_Basic_Law_SSRN_2013.pdf 15.
87 Monteiro *Ethics of Human Rights* 219.
88 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 52; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.
89 Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 52.

The question arises as to what the implications of the new constitutional regime were for the historical classification of water as either private or public property. The matter to consider is whether, how and to what extent the German legal system recognises a right to water and what the consequences of this has been for the contemporary legal status of water. This discussion is expected to lay the basis for introducing the doctrine of separation of powers as well as the emergence of the concept of *öffentliche Sache* in the German water regulatory framework.

6.2.6.1 The right to have access to sufficient water

Articles 1 to 19 of the *Grundgesetz* protect a catalogue of basic human rights (*Grundrechte*). Notably, none of these constitutional provisions explicitly recognise a right to water.[90] Although this might be strange for a Constitution that places great emphasis on individual rights,[91] this omission is less surprising when one considers the fact that Germany is rich in water resources, and therefore relatively secured from human vulnerability as a result of water shortages or scarcity.[92]

90 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.

91 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.

92 The "minimalist approach" of not explicitly recognising a right to water should be understood as a consequence "of a perceived lack of necessity, due to the adequate levels of water supply in Germany". By contrast, the German government has taken a proactive role in recognising a water right on international level. The federal government of Germany had since the promulgation of the *Grundgesetz* continually supported and campaigned for the idea of a human right to water, one of the fundamental human rights set forth in the International Covenant on Economic, Social and Cultural Rights. Acting on a German-Spanish initiative in 2013, the United Nations (UN) General Assembly adopted a resolution in which the human right to clean drinking water was explicitly recognised by all UN member states. This resolution calls on member states, therefore including Germany, to *inter alia* put into place appropriate frameworks, rules and investments to gradually improve the population's water supply situation. If the resolution's fundamental human right to water is to be met, every individual is to have access to an adequate supply of safe, clean water of acceptable quality, enough for his or her personal needs. The Committee on Economic, Social and Cultural Rights (a body that monitors the implementation of the Covenant on Economic, Social and Cultural Rights by state parties) played a significant role in the process of adopting, *inter alia,* its General Comment No. 15 on the right to water in 2002. Article I (1) thereof states "[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights. Comments by the Federal Republic of Germany 2007 http://www.ohchr.org/Documents/Issues/Water/StudyContributions/States/Germany.pdf 3; General Comment No. 15, UN Doc. E/C.12/2002/11, para. 2; German Embassy Harare http://www.harare.diplo.de/Vertretung/harare/en/03-foreign-policy/03-human-rights/2-4-drinking-water.html; United Nations Human Rights Office of the High Commissioner http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx; *UN General Assembly Resolution* 68/157 of 18 December 2013; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16, 17.

Thielbörger[93] states that the question of whether the German legal system acknowledges a subjective or individual right to have access to sufficient water, necessitates an investigation into more general legal concepts under German law. Two of these concepts are the concept of *Daseinsvorsorge* and the *Sozialstaatsprinzip*.

The traditional concept of *Daseinsvorsorge* is often translated to mean "services of general interest" or "services of elementary requirements".[94] The concept includes citizens' need for certain goods that the individual cannot achieve by him- or herself.[95] If the concept *Daseinsvorsorge* is used to indicate that part of a state's social responsibility is to provide its individual citizens with the very basic goods and services they need, the concept covers a variety of fields including, but not limited to, energy supply, public transport, cemeteries and water.[96] In terms of the concept of *Daseinsvorsorge*, the state is *inter alia* obliged to create structures and appropriate frameworks to provide the supply of essential goods and services, which the free market alone cannot effectively guarantee.[97]

The question emerges whether the concept of *Daseinsvorsorge* provides for subjective rights or entitlements to, for example, electricity or water.[98] Thielbörger indicates that the concept does not grant individual rights to citizens.[99] The significance of the concept of *Daseinsvorsorge* in the present context lies in the concept's attempt to "socially discipline the state".[100] The focus of *Daseinsvorsorge* therefore lies in the responsibility of the state to provide the supply of essential goods and services, and

93 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.
94 The concept of *Daseinsvorsorge* was originally developed by Ernst Forsthoff. He was of the view that the state executes administrative action by taking care of the life possibilities of citizens by distributive means. See Bogumil *et al* 2010 *Die Gestaltung kommunaler Daseinsvorsorge im Europäischen Binnenmarkt* www.sowi.ruhr-uni-bochum.de/.../gestaltung_kommunaler_daseinsvorsorge.pdf; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.
95 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.
96 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.
97 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.
98 In answering this question, it needs to be acknowledged that Forsthoff's original conception of the concept of *Daseinsvorsorge* was not based on subjective rights. Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.
99 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.
100 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.

not necessarily in individual rights or entitlements.[101] The concept of *Daseinsvorsorge* manifests in the German water regulatory framework in that water supply is generally the duty of municipalities (*örtliche Gemeinschaft*), as is elaborated upon in chapter 6.3.5 below.[102]

As with the concept of *Daseinsvorsorge*, the *Sozialstaatsprinzip* (the social state principle) provides insight into the content and meaning of the right to water in Germany. Although the *Grundgesetz* does not explicitly mention the *Sozialstaatsprinzip*, the Federal Constitutional Court expressly recognised its existence.[103] Scholars[104] argue that the *Sozialstaatsprinzip* is included in the scope of articles 20(1) and 28(1) of the *Grundgesetz.* The latter provisions underpin the extensive involvement of the state in providing for the basic needs of its citizens. Comparable to the concept of *Daseinsvorsorge*, the *Sozialstaatsprinzip* does not create concrete individual rights or entitlements to, for example, social benefits. The *Sozialstaatsprinzip* is understood as one of the state's "guidelines for its political and legal action rather than as a basis for concrete entitlements for citizens".[105]

One of the court cases that explained the *Sozialstaatsprinzip* did so by referring to article 1 of the *Grundgesetz.* Article 1(1) of the *Grundgesetz* stipulates that "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[106] Human dignity, read with the *Sozialstaatsprinzip*, "constitutes an obligation to guarantee the very basic requirements for an existence in human dignity (*Existenzminimum*)." Decisions of the Federal Constitutional Court confirmed the

101 *BVerwGE* 1, 159; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.

102 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 10.

103 *BVerfGE* 1, 97, 105; *BVerfGE* 16, 286; Dreier (ed) *Grundgesetz Kommentar* 1268; Lubens 2007 *Arizona Journal of International & Comparative Law* 389.

104 Alexander 2003 *Cornell Law Review* 109; Becker *Grundzűge des öffentlichen Rechts* 40-42; Foster and Sule *German Legal System and Laws* 187; Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany* 141.

105 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 10; Tisdell 2003 *Social Justice Research* 410.

106 The constitutional value of human dignity confirms an anthropocentric approach of the *Grundgesetz*, recognising the importance of basic rights for each individual. Comments by the Federal Republic of Germany 2007 http://www.ohchr.org/Documents/Issues/Water/StudyContributions/States/Germany.pdf 5; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.

Existenzminimum,[107] thereby affirming the existence of a constitutional entitlement to minimum benefits.[108] There can be no doubt that drinking water, as a vital human need, belongs to this category of "minimum human existence". The state is therefore, in terms of the *Existenzminimum,* obliged to provide its citizens with access to, *inter alia*, drinking water.

A number of German ordinary law statutes arguably "mirror" aspects generally associated with a right to water. The most relevant statute at federal level dealing with water is the *Wasserhaushaltsgesetz* (Federal Water Act or WHG) of 1957. The WHG regulates the use and protection of Germany's water bodies, including surface, ground, and coastal waters. As is indicated in chapter 6.3.3.2.2.2 below, the WHG provides that any use of water that is defined by the Act requires Government permission.[109] The WHG stipulates that permissions to use water must be denied if the water use in question is in violation of the public interest, would otherwise create lasting damage to the water resource,[110] or if the use in question constitutes "a threat to the public welfare, particularly to the public water supply".[111] The application of the said requirement of permission or authorisation ensures that everyone is afforded the right of access to *inter alia* sufficient clean drinking water.

From the discussion thus far it appears that although the *Grundgesetz* does not explicitly recognise a right to water, significant recognition and protection of such a right does exist. The German right of access to sufficient water operates largely on provisions of ordinary law and traditional legal concepts such as the *Daseinsvorsorge* and the *Sozialstaatsprinzip*, which in combination with the fundamental right of human dignity can give rise to concrete subjective rights.[112] While the high *quality* of water is upheld through the WHG's requirement of permission, the *sufficient* and *continuous availability* of water access is regulated by the *Daseinsvorsorge*-concept.[113] The

107 *BVerfGE* 1, 97, 105; BVerfGE 82, 60, 80; Dreier (ed) *Grundgesetz Kommentar* 1268; Lubens 2007 *Arizona Journal of International & Comparative Law* 389

108 *BVerwGE* 1, 159, 161; Thielbörger indicates that this minimum level is not limited to a level necessary for bare survival, but "encompasses the so-called socio-cultural minimum existence level"; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 15.

109 See section 1a(III) of the WHG.

110 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 11.

111 *BVerwGE* 81, 347; Section 6 of the WHG.

112 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13.

113 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 18.

accessibility of water resources is regulated by the *Sozialstaatsprinzip* and article 1 of the *Grundgesetz* in terms of which the state must ensure the socio-economic existential minimum for all people.[114]

6.2.6.2 Separation of powers

The *Grundgesetz* contains important principles that prescribe the foundation and structure for a water regulatory framework that values a right to water.[115] One of these principles is found in article 20(1) of the *Grundgesetz*. In terms of this, the Federal Republic of Germany is a democratic and social federal state. As a federal state, sovereignty in Germany is shared between the federal state (the Federation), the constituent states or *Bundesländer* of West Germany, which since 1919 have been called *Länder*, and Local Government.[116] The Local Government consists of *Kreise* (counties) and *Gemeinden* or *Städte* (municipalities).

Erk[117] explains that the federal structure of Germany, as established by article 20(1) of the *Grundgesetz*, is founded on the doctrine of separation of powers. The doctrine recognises three branches of public power, namely the legislature, executive and the judiciary. Basic policy is set by the legislature, administration is entrusted to the executive, while individual disputes are resolved by the independent judiciary.[118] These powers are then vertically separated between the Federal Government, *Länder* and different types of municipalities.[119] The levels of Government have exclusive

114 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 18.
115 Salman and Bradlow *Regulatory Frameworks for Water Resources Management: A Comparative study* 61.
116 Neumann 1996 *Annual Survey of International & Comparative Law* 70; The historical roots of the different states can be traced back to the Middle Ages when the Holy Roman Empire comprised of numerous territories in central Europe. In terms of the preamble of the *Grundgesetz*, the states of the German Federation are those of Baden-Wurttemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia.
117 Erk *Explaining Federalism State, society and congruence in Austria, Belgium, Canada, Germany and Switzerland* 58.
118 Currie 1993 *The American Journal of Comparative Law* 202.
119 Hergehan 2000 http://www.institutdelors.eu/media/pdf.php?file=Probl5-en.pdf

jurisdiction over the policy areas allocated to them.[120] Schneider alludes to the complexity of this system:[121]

> [T]he German federal system is not based on two completely distinct and separate columns of federal and state powers with no connections between them; rather the German system is like an unbalanced scale or a seesaw, with a concentration of legislative functions at the federal level and of administrative powers at the state level. This is so because the *Länder* implement not only their own statutes but also a large part of federal law. The judiciary is also organised hierarchically: the lower and middle courts are the jurisdiction of the *Länder*, the higher courts of the Federal Government.

Due to the fact that the *Grundgesetz* does not explicitly provide for a right to water, many powers and freedoms are left to the legislature, executive and judiciary to regulate water in Germany.[122] This has important consequences for the contemporary legal status of water, and is examined further in the following sections.[123]

6.2.6.3 The *Wasserhaushaltsgesetz* of 1957

Article 75(4) of the *Grundgesetz* granted the federal legislature[124] the constitutional authority to enact "framework legislation" in the area of water conservation.[125] According to the available literature in the sphere of water regulation,[126] the framework legislation was designed to function in conjunction with the water laws of the *Länder*[127] in the federal German state. The latter legislative measures of the *Länder* then "filled in" the federation's framework legislation.

120 Erk *Explaining Federalism State, society and congruence in Austria, Belgium, Canada, Germany and Switzerland* 58.
121 Schneider www.thomasfleiner.ch/files/categories/IntensivkursII/Germanyg2.pdf
122 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 17.
123 See chapters 6.2.6.3, 6.2.6.4, 6.2.6.5 and 6.3 below.
124 Various legislative measures exist on the federal level that apply to specific aspects of water regulation. See also chapter 6.3.3 below.
125 Breuer *Öffentliches und privates Wasserrecht* 1; Neumann 1996 *Annual Survey of International & Comparative Law* 74.
126 Breuer *Öffentliches und privates Wasserrecht* 1; Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 5; Hergehan 2000 http://www.institutdelors.eu/media/pdf.php?file=Probl5-en.pdf; Winnegge and Maurer 2002 http://www.bafg.de/GRDC/EN/02_srvcs/24_rprtsrs/report_27.pdf?__blob=publicationFile
127 See chapter 6.3.4 below; Breuer *Öffentliches und privates Wasserrecht* 1; Van Wyk 1996 *TSAR* 280. A comprehensive analysis of all the promulgated *Länder* statutes surpasses the scope of the present discussion.

In acknowledging the prolonged historical development of the legal status of water, and keeping in mind the legacy of diverse regulations within the different *Länder*,[128] the drafting committee of the said framework legislation held the view that it would be problematic to simply abolish all existing water regulatory frameworks by the adoption of a single federal statute.[129] On the other hand, the German Federal Parliament realised that the water regulatory frameworks of the *Länder* became insufficient for the industrialised and urban Germany.[130] In an attempt to overcome these opposing difficulties, Parliament proposed an approach of "comprehensive planning" in the water sector that arguably involved the property law.[131] Parliament held that the aim of comprehensive planning in the context of Germany's water resources could only be achieved if the "free disposition by private owners is restricted and if the consideration of the public weal is the starting point of all action".[132] After two failed attempts to introduce framework legislation that was designed to comprehensively regulate all the water resources of the different *Länder*,[133] Parliament drafted and promulgated the *Wasserhaushaltsgesetz* (Federal Water Act or WHG) in 1957. As is explained in more detail below,[134] scholars are of the view that, although not stated explicitly, the federal legislator used the German property law concept of *öffentliche Sache* as a basis for the WHG of 1957.

The Act abolished the distinction at the time between different *Länder* statutes that either provided for private property rights or for public law entitlements to use water. The WHG introduced an overarching, administrative system to regulate water rights. According to that system, any use of water other than for domestic purposes had to be authorised by Government. All prospective water users, including landowners, therefore had to obtain permission to use water.[135] Such authorisation was granted in terms of an administrative act by the executive branch of Government in the form of a

128 See chapters 6.2.4 and 6.2.5 above.
129 Kube 1997 *Natural Resources Journal* 869; Winnegge and Maurer 2002 http://www.bafg.de/GRDC/EN/02_srvcs/24_rprtsrs/report_27.pdf?__blob=publicationFile
130 Kube 1997 *Natural Resources Journal* 869.
131 Narasimham "Water Law for India: Science and Philosophy Perspectives" 553.
132 Kube 1997 *Natural Resources Journal* 869; Schulte *Eigentum und öffentliches Interesse* 262.
133 In 1914 and 1941 respectively. Fisch "German Administrations and Water Issues in History" 39.
134 See chapter 6.3 below.
135 Breuer *Öffentliches und privates Wasserrecht* 1; Narasimham "Water Law for India: Science and Philosophy Perspectives" 553; Schulte *Eigentum und öffentliches Interesse* 247.

license or permit.[136] Water use rights therefore no longer arose from landownership.[137] In fact, no landowner had a claim to receive a permit or license to use water.[138] The WHG of 1957 effectively supplanted private property powers with state management to serve the public interest. Put differently, the WHG dedicated all water resources to restrictions of the public interest.

6.2.6.4 Constitutionality of the WHG

The WHG's dedication of water resources to the public poses questions about possible conflicts with articles 14(1) and (3) of the *Grundgesetz*, because the dedication effectively restricts private property rights, without compensating the property owner. In 1981, this matter was heard by the Federal Constitutional Court.

In the *Naßauskiesung*-case,[139] the plaintiff owned and operated a gravel pit while having unrestricted access to the groundwater below his property, which he used to extract gravel.[140] Following the amendment of the WHG in 1976 that re-affirmed the necessity of a permit or licence to use water resources,[141] the plaintiff applied to the administrative authority for the necessary permission to use the said groundwater beneath his property for his operations.[142] The authority denied the plaintiff a permit to use the underground water, as the public water supply was threatened by the plaintiff's quarry operation.[143] The plaintiff was therefore no longer allowed to abstract groundwater, which was in the previous dispensation regarded as a right annexed to landownership. The plaintiff in the present case challenged the legitimacy of this new system of public management in the water regulatory framework and argued that the denial of the permit to exploit gravel from groundwater was irreconcilable with the constitutional property clause that, *inter alia*, guarantees and protects the institution of

136 Baur and Stürner *Sachenrecht* 317-318; Breuer *Öffentliches und privates Wasserrecht* 25; Kube 1997 *Natural Resources Journal* 870-871.
137 Kube 1997 *Natural Resources Journal* 870.
138 Section 6 of the WHG for example provided that if a permit or license would negatively affect the public weal, such authorisation should not be granted.
139 *BVerfGE* 58, 300; See also chapter 5.3.2.2.2 above.
140 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 257.
141 Section 1a(III) of the WHG; Narasimham "Water Law for India: Science and Philosophy Perspectives" 553.
142 Alexander 2003 *Cornell Law Review* 123; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 257.
143 Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 257.

private property.[144] Although the Federal Supreme Court agreed with the plaintiff that the new public law regime indeed encroached upon the constitutional property guarantee and that the plaintiff should be allowed to exploit the water resources below his property as a result of landownership, the case was referred to the Federal Constitutional Court.[145] The latter acknowledged that the constitutional property guarantee prohibits the legislature from substantially undermining the basic rights annexed to private ownership.[146] The court nevertheless decided that the guarantee of the institution of property was not encroached on when the use of resources that are vital to the public at large is removed from the private legal order and placed under the authority of the public law.[147]

Within the framework provided for by the constitutional property clause, the *Naßauskiesung*-case provided a number of criteria for distinguishing constitutional from unconstitutional dedications. The case[148] drew a clear line between articles 14(1), 14(2) and 14(3) of the *Grundgesetz.* As a base norm, private use of property is constitutionally guaranteed.[149] According to article 14(1) of the *Grundgesetz*, those property interests that are of specific importance for the use and enjoyment of the property, cannot be taken away from the private owner. On the other hand, however, article 14(2) of the *Grundgesetz* provides that aspects of the property right may be considered to be public.[150] To strike a proper balance between private and public interests in property, the Constitutional Court focused on the concept of *Sozialpflichtigkeit* (social obligation).[151] *Sozialpflichtigkeit* is a general recognition that property must be seen in a social context to potentially benefit the public.[152] If the property in question is of particular importance to the public (in the present context, water resources are indeed important for human survival), the concept of

144 Article 14 of the *Grundgesetz.*
145 *BVerfGE* 58, 300; The Constitutional Court's judgment is worth reflecting upon as it is indicative of the German attitude towards the regulation of property, which is characterised by the desire to strike an equitable balance between the property interests of the individual property holder and the public interest.
146 Alexander 2003 *Cornell Law Review* 124.
147 Alexander 2003 *Cornell Law Review* 124; *Groundwater Case* 1981 58 *BVerfGE* 300 at C III; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 259.
148 *BVerfGE* 58, 300.
149 See chapter 5.3.2.2 above.
150 Kube 1997 *Natural Resources Journal* 865.
151 Kube 1997 *Natural Resources Journal* 865.
152 This principle is expressly formulated in article 14(2) of the *Grundgesetz.*

Sozialpflichtigkeit allows the legislature to redefine the contents of property in the said water resources to the detriment of a property owner by allocating use and enjoyment rights to the public.[153] In addition to the concept of *Sozialpflichtigkeit*, the concept of *Situationsgebundenheit* (situational commitment) is also employed by the courts.[154] *Situationsgebundenheit* describes the idea that private property is interwoven with its physical and social surroundings, and furthermore, that a particular environmental context determines the scope of admissible restrictions.[155] The effect of employing the concepts of *Sozialpflichtigkeit* and *Situationsgebundenheit* is that an unduly burdensome redefinition of property does not automatically constitute expropriation that requires compensation. The property restrictions following the WHG are therefore constitutional.[156]

6.2.6.5 Further developments

In recognising the *Situationsgebundenheit*, or physical and social surroundings and their perceived interrelationships in the context of water resources, the Federal Parliament amended the WHG in 1985.[157] The 1985 amendment added section 1a(1), which required water authorities to take cognisance of the fact that water is part of an integregrated ecosystem:[158]

> As an integral part of the natural environment and as a habitat for animals and plants, waters must be protected. They shall be managed in such a way that they serve the public interest, and in harmony with this interest, benefit individual users, and that avoidable impairments to their ecological functions and to the terrestrial ecosystems and wetlands directly depending on them shall not occur, and hence that overall sustainable development is ensured. In this respect, account should be made of the possibility that disadvantageous effects could be transposed from one protected commodity to another; a high level of protection for the environment as a whole, with due regard for the requirements of climate protection, shall be guaranteed.

Despite the view that this amendment did not change the substantive content of the WHG, it added valuable insight for the interpretation of the "public interest".[159] As

153 Kube 1997 *Natural Resources Journal* 865-866.
154 Kube 1997 *Natural Resources Journal* 866; Schulte *Eigentum und öffentliches Interesse* 254.
155 Kube 1997 *Natural Resources Journal* 866; Schulte *Eigentum und öffentliches Interesse* 165.
156 Kube 1997 *Natural Resources Journal* 871.
157 Kube 1997 *Natural Resources Journal* 875.
158 Kube 1997 *Natural Resources Journal* 875.
159 Kube 1997 *Natural Resources Journal* 876.

indicated above, the WHG effectively dedicated all water resources to restrictions of the public interest. Subsequent to the amendment, the "public interest" in the German water regulatory framework could be interpreted to embrace ecological values.[160] The applicable water authorities were in terms of the amendment required to also consider the sustenance of water resources when regulating or allocating water resources, for example.[161]

6.2.7 Concluding remarks: Historical perspectives on the legal status of water

The comprehensive adoption of Roman law during the Middle Ages as preferred over Germanic customary law significantly influenced the legal status of water resources in Germany.[162] Prior to the adoption of Roman law, water was the common property of the state, governed by the Germanic law concept of *Regalia minora*.[163] The concept of *Regalia minora* reconciled the ownership interests of the sovereign or king with the usufructuary interests of the citizens in that common resource.[164] However, following the adoption of Roman law, water resources progressively became subject to private, individual ownership.[165] As a result, fresh water from springs, as well as groundwater that is the source of spring water, were in some regions regarded as part of private land ownership.

During the nineteenth century, a clear line could be drawn between legislative approaches to the legal status of water. On the one hand, in the Northern parts of Germany, water was persistently recognised as private property that exclusively belonged to property owners.[166] Within these private property regimes, the landowner could therefore, dispose of groundwater freely for his or her household uses and economy. On the other hand, legislation in Southern Germany reflected the growing role of the state and its administration in the regulation of water resources.[167]

160 Kube 1997 *Natural Resources Journal* 876.
161 Kube 1997 *Natural Resources Journal* 876.
162 See chapters 5.2.2 and 6.2.3 above.
163 See chapter 6.2.2 above.
164 See chapter 6.2.2 above.
165 See chapter 6.2.3 above.
166 Fisch "German Administrations and Water Issues in History" 25.
167 Fisch "German Administrations and Water Issues in History" 25-26.

The trend towards state administration of water resources was strengthened with the emergence of the idea of "public ownership" of water. The idea of public ownership was in certain demographic areas used to justify the removal of water resources from the private property sphere to place it in the hands of the state as public owner, and to regulate water resources in terms of administrative law. Formal legislative developments towards the complete removal of water resources from the private property sphere only occurred after West Germany became the Federal Republic of Germany in 1949.[168]

The *Grundgesetz*, the Constitution of the Federal Republic of Germany, does not explicitly recognise a right to water. Significant recognition and protection of such a right do, however, exist. Examination of the normative content of the implicit right to water indicated that use and access rights to water resources in Germany are structured and governed by the three-tier state to meet the needs of society as a whole.[169] A formal move towards the comprehensive state management of water resources in Germany occurred with the promulgation of the WHG in 1957. Not even the monumental German reunification of West and Eastern Germany in 1990 changed the *status quo.* As is explained in more detail below, the German water law offers a good example of a sector-specific regulatory regime that incorporated the concept of *öffentliche Sache.*[170]

168 See chapter 6.2.6 above.
169 See chapters 6.2.6.1 and 6.2.6.2 above.
170 Kube 1997 *Natural Resources Journal* 867.

6.3 Contemporary perspectives on the legal status of water

6.3.1 Introduction

As indicated earlier,[171] article 75(4) of the *Grundgesetz* granted the federal legislature[172] the constitutional authority to enact "framework water legislation". It was in terms of article 75(4) that the federal legislature promulgated the WHG in 1957.[173] The WHG provided a "legal frame" for water resources management, while the *Länder* legislators "filled in" its details.[174] Wollmann[175] indicates that the power to pass framework law has led to a complicated web of federal and *Länder* law provisions in the water sector.

With the re-organisation of legislative competences during the course of the federalism reform of 2006,[176] article 75(4) of the *Grundgesetz* that initially granted the federal legislature the constitutional authority to enact "framework legislation" in the water sector, was repealed. The federal legislative competences relating to the management of water resources were transferred to articles 72 and 74 of the *Grundgesetz.*[177] In terms of the latter sections, the Federal Government obtained concurrent legislative competence for the comprehensive management of water resources. Accordingly, both the federal legislature and the *Länder* may pass context-specific legislation in the

171 See chapter 6.2.6.3 above.
172 Various legislative measures exist on the federal level that apply to specific aspects of water regulation. See chapter 6.3.3 below.
173 See chapter 6.2.6.3 above.
174 Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 5.
175 Wollmann 2013 http://www.uio.no/english/research/interfaculty-research-areas/democracy/news-and-events/events/conferences/2013/Programme/wollmann.-reform-of-german-federalism.-draft-dec.pdf
176 Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 1.
177 Since the 2006 federation reform, the legislative power between the Federation and *Länder* is shared and regulated under articles 71 to 75 of the *Grundgesetz.* In terms of articles 71 to 75, the federal state has exclusive legislative competence in certain fields and either "concurrent" or "framework" (*Rahmengesetzgebung*) powers in others. Article 71 of the *Grundgesetz* deals with the exclusive legislative power of the Federation. In matters in which the Federation has exclusive legislative power, the *Länder* have legislative duty only to the extent the duty is vested in them by a Federal Act. Article 72 provides a definition of the term "concurrent legislative power", referring to those matters the *Länder* have legislative power only to the extent to which the Federation did not exercise its legislative power. Articles 73 and 74 of the *Grundgesetz* provide catalogues on matters of exclusive and concurrent legislative power.

water sector. The *Länder* may set out regulations that differ from the federal provisions if the variant rules do not pertain to materials or facilities associated with water management. However, federal legislation prevails and supersedes *Länder* legislation in case of conflict.[178]

In light of the objective of this chapter, this section proceeds with an analysis of the *őffentliche Sache* or public property status of water provided for by the contemporary water regulatory framework. This is done by revisiting different characteristics of the *őffentliche Sache*-concept, and by evaluating them against existing water regulatory measures of the German federation on federal, *Länder* and municipal level.

6.3.2 Federal law

After federal reform and by virtue of its newly acquired competence, the Federal Government revised,[179] reformed[180] and updated the WHG in 2009.[181] The revised WHG entered into force on 1 March 2010 and effectively recodified Germany's water legislation.[182] The existing framework legislation (the WHG of 1957)[183] has therefore in terms of its 2009 version been replaced by the WHG of 2010 that applies to all

178 Duetscher Bundestag *Competencies of the German Federation and the Länder* https://www.bundestag.de/htdocs_e/bundestag/function/legislation/competencies/245700.

179 Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 1.

180 Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 1.

181 Irmer and Kirschbaum (eds) 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf 33; Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 1

182 Irmer and Kirschbaum (eds) 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf 33; Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 1

183 Breuer *Öffentliches und privates Wasserrecht* 1.

sixteen (16) *Länder* of the Federal Republic.[184] Reinhardt[185] indicates that the amended WHG incorporated into German law binding provisions of the European Union (EU).[186] Above and beyond these changes, the new WHG systematises and unifies water legislation with the aim of improving the practicability of Germany's complex water legislation which, on a federal level, *inter alia* consists of the *Abwasserabgabengesetz* of 2005,[187] the *Abwasserverordnung* of 2004,[188] the *Grundwasserverordnung* of 1997,[189] the *Rohrfernleitungsverordnung* of 2002,[190] the *Infecktionsschutzgesetz* of 2000,[191] the *Trinkwasserverordnung* of 2001[192] and the *Düngeverordnung* of 1996.[193]

In terms of its general structure and aims, the amended WHG resembles the old WHG of 1957.[194] All references to the WHG in the sections below are therefore to the latest or amended version of 2009.

6.3.2.1 The WHG of 2009

Kube[195] explains that the federal legislator used the concept of *őffentliche Sache* as a basis for the WHG. Although the amended WHG, which is similar to its predecessor, does not explicitly recognise the concept of *őffentliche Sache*, the Act contains

184 Baur and Stürner *Sachenrecht* 319; Irmer and Kirschbaum (eds) 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf 24.
185 Reinhardt https://www.google.com/search?q=reinhardt+water+law+germany&ie=utf-8&oe=utf-8 17.
186 Of specific importance is the incorporation of the EU Water Framework Directive 2000/60/EC (WFD) into national- or federal law. The core objective of the WFD is to prevent the deterioration of aquatic ecosystems and to restore polluted surface- and groundwater bodies to a "good status". Albrecht 2013 *Land Use Policy* 381, 384.
187 The Waste Water Charges Act prescribes charges for the discharge of waste water into waters.
188 The Waste Water Ordinance provides applicable minimal standards for the introduction of waste water into waters.
189 The Ordinance on Groundwater specifies the application of water and waste law regulations to substances enumerated in the EC Directive.
190 The Ordinance on Long-Distance Pipelines sets out standards with the aim of protecting man and environment from harmful exposure to substances conveyed through pipelines.
191 The Infection Protection Act contains provisions on the quality of water for human use, swimming and bathing pools, as well as on the safe removal of waste water.
192 The Ordinance on Drinking water sets out requirements for the quality of water for human use.
193 The Ordinance on Fertilizing aims at improving the protection of waters from contamination through agricultural sources; See Reinhardt https://www.google.com/search?q=reinhardt+water+law+germany&ie=utf-8&oe=utf-8 17.
194 Irmer and Kirschbaum (eds) 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf 33.
195 Kube 1997 *Natural Resources Journal* 869-870.

principles and features that are so similar to that of the concept of *öffentliche Sache* that the only logical submission is that the legislator incorporated the concept of *öffentliche Sache* into the WHG. The incorporation of the concept of *öffentliche Sache* into the WHG is clear when the characteristics of the concept of *öffentliche Sache* are considered.[196] As indicated,[197] the characterisation of *öffentliche Sache* flows from two aspects, namely its public beneficial function and the establishment of public law dominion by a *Widmung* (dedication).

6.3.2.1.1 The public beneficial function of *öffentliche Sache*

Chapter 5.3.4.1 above explains that the special status of public property or *öffentliche Sache* is dependent on the public beneficial function (*die Gemeinwohlfunktion*) of the thing, object or resource in question. Through its use, public property directly and specifically serves particular needs of the public. Public property is regulated by an administrative law order outside the private law to fulfil the thing, object or resource's public beneficial function.

Water resources also serve public beneficial function(s). These include the resource's central and critical role in the natural environment and human survival, which links to aspects of food security and the like. Article 1a of the WHG provides that as a part of the ecobalance and as a habitat for animals and plants, the country's waters have to be secured. Being bound to these public beneficial functions, water resources are subject to the provisions of the public or administrative law. In this regard, the WHG stipulates that water resources should be managed in such a way that they serve the general well-being of current and future generations and, in harmony with this, also serve the purposes of an individual and that any avoidable damage to their ecological functions does not occur.[198] Based on this particular feature of a public beneficial function, it is contended that the WHG (analogous to its 1957 version) regards water as *öffentliche Sache.*

196 Kube 1997 *Natural Resources Journal* 861.
197 See chapters 5.3.4.4 and 6.3.2 above; Raff *Private Property and Environmental Responsibility* 161.
198 Article 1a of the WHG.

6.3.2.1.2 The establishment of public law dominion by a *Widmung*

As indicated previously,[199] the key to understanding the concept of *öffentliche Sache* is the concept of a *Widmung* or dedication to the public.[200] Legislation, an administrative act or custom normally constitutes the *Widmung*.[201]

The WHG is the *Widmung* through which all of Germany's water resources uses are dedicated to the public. Consequently, with the commencement of the WHG the private owner, if there was one, lost the power to use or even dispose of water resources to the extent to which the use of resources have been dedicated to the public. Apart from a few exceptions,[202] all uses of water are subject to official Government authorisation. Any person, whether a landowner or not, whose activities affect the quantity and quality of water therefore must procure a permit or license in terms of the WHG for specified purposes.[203]

Öffentliche Sache are regulated outside the boundaries of the private property regime. In a matter concerning land use planning, the Federal Constitutional Court held that "[t]he impossibility to increase the area of land as well as its absolute importance to everybody prohibit leaving its use completely to the management of through market forces".[204] In terms of this judgment, which deals with a limited resource, natural resources cannot be left to private law ownership without some degree state intervention. Rather, such natural resources must be managed in terms of a public property regime within which the resource can be protected. Along the same lines, Narasimhan[205] states that no private property exists at all from the outset where a natural resource is statutorily assigned to the public. Dedicated resources that serve

199 See chapters 5.3.4.4 and 6.3.2 above.
200 Kube 1997 *Natural Resources Journal* 861; Wieling *Sachenrecht* 26.
201 Kube 1997 *Natural Resources Journal* 861; Raff *Private Property and Environmental Responsibility* 161.
202 See chapter 6.3.3.2.2.2 below.
203 Baur and Stürner *Sachenrecht* 317; Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 257; Maunz and Dürig *Grundgesetz Kommentar* 57; Section 1a(III) of the WHG.
204 *BVerfGE* 21, 73; Narasimham "Water Law for India: Science and Philosophy Perspectives" 553; Kube 1997 *Natural Resources Journal* 863.
205 Narasimhan briefly discussed modern natural resources law in Germany to explain public trust principles in found in European law. See Narasimham "Water Law for India: Science and Philosophy Perspectives" 553.

a public beneficial function are subject to a public law dominion.[206] Chapter 6.3.4.4 above indicates that a *Widmung* usurps all private law rights and powers in certain resources to the extent that the state manages the resources on behalf of the nation as *de őffentliche Sachherr*. The *őffentliche Sachherr* is cloaked with a duty to ensure that the *őffentliche Sache* is used,[207] protected,[208] conserved,[209] managed and controlled to keep the public property in a good condition and to serve the public interest.[210] The *őffentliche Sache*-status of water resources is confirmed by the fact that waterbodies are in terms of the WHG subject to state control.[211]

6.3.2.1.2.1 The state's duty to regulate water resources

As the *őffentliche Sachherr*, the state (consisting of three branches and different levels) must ensure that the nation's water resources are used, protected, conserved, managed and controlled to keep the waterbodies in a good condition and to serve the public interest. The duties of the state are outlined by the legislator. Article 20(a) of the *Grundgesetz* for example assigns to the state the duty of protecting the "natural foundations of life",[212] and formulates an "aim" or "objective" when dealing with the protection of natural resources:

> Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Article 20(a) of the *Grundgesetz* therefore makes it an important duty of the state to protect the natural foundations of life, which includes the environment, an important objective and principle of state policy.[213] The *Grundgesetz* does not only require the

206 Public law dominion differs from private law ownership. See chapter 2.4.4 above.
207 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 181.
208 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 181.
209 Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 181.
210 Dolzer 1976 "Property and the Environment: The Social Obligation Inherent in Ownership: A Study of the German Constitutional Setting" 46; Hennekens *Openbare Zaken naar Publiek- en Privaatrecht* 182.
211 Reinhardt https://www.google.com/search?q=reinhardt+water+law+germany&ie=utf-8&oe=utf-8 18.
212 Maes, Cliquet, Du Plessis and McLeod-Kilmurray (eds) *Biodiversity and Climate Change Linkages at International, National and Local Levels* 348.
213 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 6; See Wurzel Lundmark 1997 http://eds.a.ebscohost.com.nwulib.nwu.ac.za/eds/detail/detail?vid=9&sid=44ff8106-84a1-47fc-

protection of natural resources for the current generation, but also widens the obligation of the state to protect the natural foundations of life for future generations.[214]

The WHG also outlines the state's regulatory obligations relating to the protection of Germany's water resources. In line with the provisions of the *Grundgesetz*, section 1 read with section 6 of the WHG, stipulates that all the water in Germany, as part of the ecosystem and as a habitat for fauna and flora, must be protected and managed in a way that avoids any preventable impairments to their ecological function, and to serve the general public interest.[215] Section 6(1)(1), read with sections 6(1)(2), 6(1)(4) and 6(1)(7) of the WHG, further provide that the country's water resources must be managed and protected in a sustainable manner for current and future generations. Also, in allocating water use rights, section 6(1)(3) requires the official administrative body to manage the country's water resources in such a manner that it serves both the public interest and individual interests.[216] These obligations imposed on the executive authority to protect the nation's water resources are further concretised by section 8(2) of the WHG. The latter section expressly provides that if a permit or licence would negatively affect the public interest, or if the adverse impacts cannot be prevented by the imposition of conditions or measures in terms of section 12 of the Act, the permit or licence must be refused.[217] In terms of the WHG, a high level of water resource protection must therefore be ensured.

The judiciary confirmed the state's duties to protect the country's water resources.[218] To ensure the protection of water resources, the Constitutional Court judgment in the

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b9ad-755af92bc588%40sessionmgr4007&hid=4211&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=9702075380&db=eih; *Environmental policy-making in Britain, Germany and the European Union The Europeanisation of air and water pollution control* 10.

214 See Bogdanović *International Law of Water Resources: Contribution of the International Law Association* 115; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 6-7.

215 Irmer and Kirschbaum (eds) 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf 33; Lundmark 1997 http://eds.a.ebscohost.com.nwulib.nwu.ac.za/eds/detail/detail?vid=9&sid=44ff8106-84a1-47fc-b9ad-755af92bc588%40sessionmgr4007&hid=4211&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=9702075380&db=eih

216 Sections 1 and 8(2) of the WHG.

217 Section 12(1) of the WHG.

218 *BVerfGE* 10, 89; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.

Großer Erftsverband-case for example justified stricter limitations to the rights of mining companies to extract water[219]. This approach of protecting water as a public resource was also followed in the *Wasserpfennig*-case.[220] The court in *Wasserpfennig* held that drinking water supply is dependent on high quality groundwater. To protect the groundwater, the court approved higher prices for those who extract groundwater for industrial or economic needs.[221]

In the current water regulatory framework, the state and its executive bodies or water administrators can therefore not only consider the sustenance of water resources with reference to human uses when allocating water uses, but should include into their decision-making processes, ecological values for current and future generations. The chapter thus far indicates that in the water regulatory framework of Germany, the state's decision-making authority must structure, allocate, protect and govern access and use rights in water in such a way that it not only protects the resource, but to also meets the needs and purposes of society as a whole, as well as the needs of individuals of current and further generations.

6.3.2.1.2.2 A system of public administrative use rights

6.3.2.1.2.2.1 Introductory remarks: A system of administrative use rights

In accordance with the concept of *öffentliche Sache*, all uses of water, including the withdrawal or diversion of water from surface waters,[222] the damming or drawing-down of surface waters,[223] the withdrawal of solid material from surface waters where this affects the properties of such waters or their flow,[224] the introduction or discharge of substances into waters,[225] and the withdrawal, conveyance to the surface, or diversion of groundwater[226] are subject to official Government authorisation. The principal mechanism used by the German Government for the public management of water

219 *BVerfGE* 10, 89; Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 16.
220 *BVerfGE* 93, 319.
221 *BVerfGE* 93, 319, 350.
222 Section 9(1)(1) of the WHG.
223 Section 9(1)(2) of the WHG.
224 Section 9(1)(3) of the WHG.
225 Section 9(1)(4) of the WHG.
226 Section 9(1)(5) of the WHG.

resources, is the institution of water rights that are allocated in terms of the WHG.[227] Water rights are granted by way of permit of license. In an effort to explain this "system of water rights", the establishment of water rights,[228] the allocation of these rights,[229] the duration of the rights,[230] the transferability thereof,[231] as well as the loss of right(s) to use water[232] as provided for by the German water regulatory framework are discussed below.

6.3.2.1.2.2.2 Establishment of water use rights

The WHG reformed the water regulatory framework with the assertion of state control over water resources and the introduction of complex public regulatory mechanisms for the allocation of water use rights.[233] Consequently, ownership of land does not bestow any entitlement to use water which requires a permit or license.[234] There are only a limited number of circumstances in which the right to use water can be established without a permit or license.[235] These include the instances where property owners and riparian owners, or those authorised by owners, may use surface water, provided that the water use does not harm others and does not result in detrimental changes in the properties of the water.[236] Likewise, section 46(1) of the WHG provides that an authorisation to use groundwater is not required, *inter alia*, where the groundwater is used for domestic purposes.

The general rule in the water regulatory framework is that a prospective water user, as an individual or juristic person, can only establish a water right once he or she

227 Baur and Stürner *Sachenrecht* 318; Breuer *Öffentliches und privates Wasserrecht* 25; Hodgson *Land and Water- the rights interface* 1.
228 See chapter 6.3.3.2.2.2.1 below.
229 See chapter 6.3.3.2.2.2.2 below.
230 See chapter 6.3.3.2.2.2.3 below.
231 See chapter 6.3.3.2.2.2.4 below.
232 See chapter 6.3.3.2.2.2.5 below.
233 In contrast, chapter 6.2.6.3 above indicated that history had the result that, in many German states, water rights have for a long time been considered as a subsidiary component of landownership. In fact, a right to use water often depended on landownership. Therefore, in the German states that used private law concepts to regulate water resources, landowners obtained water rights together with, or as an extension of their land title. Hodgson *Land and Water- the rights interface* 5.
234 Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 62; Section 4(3) of the WHG; Tisdell 2003 *Social Justice Research* 412.
235 See section 8 of the WHG.
236 Section 25 of the WHG.

formally applied for and received official authorisation from the relevant public authority.[237] The *rationale* is to prevent impairments to the water resource.[238] The different uses of water that fall under the ambit of the WHG, and which requires official authorisation, are enumerated in section 9 of the Act and are listed in chapter 6.3.2.1.2.2.1 above. A permit or license is merely an administrative use or *usufructory* right to use water that is allocated by an administrative body.[239] Such a water use right does not provide its holder any legal title to the water resource.[240]

6.3.2.1.2.2.3 Allocation of water use rights

The allocation of water use hinges on a complex administrative process.[241] The administrative procedure normally provides for *inter alia* the prospective water user to submit a written application to the decision-making authority, accompanied by an environmental impact assessment.[242] The process further provides for a period during which third parties may file formal objections against the said water use application.[243] Once these stages in the administrative process are duly adhered to, the water administration authority proceeds with an administrative process to assess whether and to what extent the proposed water right may impair the ecological or chemical status of the water.[244] The review process ultimately results in the official allocation or

237 Breuer *Öffentliches und privates Wasserrecht* 25; Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 64.

238 Irmer and Kirschbaum (eds) 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf 33.

239 Hodgson *Land and Water- the rights interface* 15; Solanes Solanes and Gonzalez-Villarreal 1999 http://www.tnmckc.org/upload/document/bdp/2/2.7/GWP/tac-3.pdf

240 Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 63; See also Solanes Solanes and Gonzalez-Villarreal 1999 http://www.tnmckc.org/upload/document/bdp/2/2.7/GWP/tac-3.pdf

241 The complexity is ascribed to the nature of both the water resource and water rights themselves. See also Hodgson *Modern Water Rights: Theory and Practice* 43.

242 Section 11(1) of the WHG; The environmental impact assessment is dependent on the size and nature of the proposed water use. Lundmark 1997 http://eds.a.ebscohost.com.nwulib.nwu.ac.za/eds/detail/detail?vid=9&sid=44ff8106-84a1-47fc-b9ad-755af92bc588%40sessionmgr4007&hid=4211&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=9702075380&db=eih; Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 64.

243 Section 11(2) of the WHG.

244 Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 64.

refusal of a water right. A permit or license can for example be refused if the proposed use is likely to be detrimental to the water resource or public interest.[245]

The water regulatory framework requires rational and effective decision-making by the administration.[246] One of the mechanisms used in German water law to ensure non-arbitrary decision-making, is planning.[247] In this regard, the European Union Water Framework Directive (FWD),[248] which has been incorporated into the WHG, obliges Germany to engage in the preparation and periodic review of River Basin Management Plans, for example. The purpose of such plans goes beyond the mere allocation of water rights. The Management Plans set out development and management priorities.[249] It is within this framework of planning that decisions regarding the regulation of water rights must be made.

Once a decision for water allocation has been made in favour of the applicant, a permit or license is issued subject to conditions that are designed to, *inter alia,* prevent detrimental impacts on the water resource itself, as well as to other water users.[250] The conditions can be either of general application, which are applicable to all water rights, and which are spelt out in the WHG,[251] or of specific application to individual rights, as set out in the particular license or permit. Specific conditions typically constitute details on how the water in question should be used, measured and treated.[252] These conditions form an integral part of the water right and allow the administration to exercise a degree of control over how the water in question is

245 Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch* 113; Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 64.
246 Hodgson *Land and Water- the rights interface* 31.
247 Hodgson *Modern Water Rights: Theory and Practice* 43.
248 Reinhardt indicates that the amended WHG of 2009 furthermore incorporated into German law binding provisions of the European Union (EU). Of specific importance is the incorporation of the EU Water Framework Directive 2000/60/EC (WFD) into national- or federal law. The core objective of the WFD is to prevent the deterioration of aquatic ecosystems and to restore polluted surface- and groundwater bodies to a "good status". Notably, the legislative incorporation of the WFD affected water management at the national, regional and local levels. Albrecht 2013 *Land Use Policy* 381, 384; Reinhardt https://www.google.com/search?q=reinhardt+water+law+germany&ie=utf-8&oe=utf-8 17; Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 61; Thiel 2015 *Land Use Policy* 176.
249 Hodgson *Land and Water- the rights interface* 31.
250 Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 64.
251 See section 12 of the WHG; Hodgson *Land and Water- the rights interface* 56.
252 Hodgson *Land and Water- the rights interface* 23.

used.[253] A water right provides its holder with a revocable right to use water for a particular purpose[254] in a specific way as prescribed by the conditions, and for a limited period of time that is determined by the administrative authority.[255]

6.3.2.1.2.2.4 Duration of water use rights

Hodgson[256] argues that when the duration of water rights is determined, the water authority should strike an appropriate balance between the security needed to encourage investment by the license or permit holder, as well as the need for flexibility with regard to future allocations of water. If the duration of a water right is too short, the right to use water will not confer a sufficient period over which its holder can recoup a return on investments, while too long of a period constrains future re-allocation of water resources.[257] Section 14(2) of the WHG provides that an authorisation to use water should be granted for a certain period, and may only in special cases exceed thirty (30) years.[258]

Once a water right has been allocated, the right holder has a legitimate expectation to rely on that water right throughout its duration.[259] The general rule is that the water administration may not arbitrarily suspend or re-allocate water that is already subject to a water right of a third party.[260] However, water may be re-allocated in particular circumstances that might include *force majeure* or the public interest or public weal. As previously indicated in the *Naßauskiesung-case*,[261] for example, the Government may invoke the public interest to justify the re-allocation of water rights.

253 Hodgson *Land and Water- the rights interface* 23.
254 Section 10(1) of the WHG.
255 Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 64.
256 Hodgson *Land and Water- the rights interface* 19.
257 Hodgson *Land and Water- the rights interface* 20.
258 Bruns *et al Renewable Energies in Germany's Electricity Market: A Biography of the Innovation Process* 364; Hodgson *Land and Water- the rights interface* 20. Generally, modern water rights last for fifteen (15) to twenty (20) years, but may be longer for major investments such as the construction of new hydro-power dam.
259 Hodgson *Land and Water- the rights interface* 21.
260 Hodgson *Land and Water- the rights interface* 22-23.
261 *BVerfGE* 58, 300; See chapter 5.3.2.2.2 above.

6.3.2.1.2.2.5 Transferability of water use rights

Salman and Bradlow[262] explain that, unless otherwise specified at the time the authorisation is granted, both a permit and a license can in certain instances be passed to a legal successor. In this regard, section 8(4) of the WHG provides that, unless otherwise specified when the permit is granted, the permit or license shall be passed on to any legal successor together with the water utilisation plant, or in cases where a permit has been granted for land, together with the relevant piece of land. However, the WHG only provides for the transferability of water rights where the water rights were allocated to, or in connection with an utilisation plant or piece of land.[263] It is therefore comparable to a servitude. Hence, the water allocation runs with the property.[264] It is impossible for a water right holder to simply transfer or sell his or her water right to another individual, independent from the utilisation plant or piece of land it is attached to.

6.3.2.1.2.2.6 Loss of the right to use water

Once the stipulated period of time for which the water right or permit was allocated comes to an end, the water right becomes void. In terms of section 18(1) of the WHG, a license can also be revoked.[265] A license may, however, only be revoked without compensation if its holder fails to commence use of the water within the appropriate period specified or has not used it for an uninterrupted period of three years.[266]

262 Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study* 65.
263 Section 8(4) of the WHG.
264 Kube 1997 *Natural Resources Journal* 862.
265 Tisdell 2003 *Social Justice Research* 410.
266 Section 18(2)(1) of the WHG.

6.3.2.1.2.2.7 Concluding remarks: A system of administrative use rights

All water licenses or permits are subject to conditions and are issued for a fixed period, may be revoked, and that may not exceed thirty years.[267] The allocations therefore *inter alia* imply a restriction of the free disposition by private owners.[268] As the holder of the water right cannot freely decide on the unlimited use or exploitation of the resource, water rights in Germany cannot be subject to private, exclusionary water rights.

Water uses in Germany were therefore removed from the scope of private property and placed in a public law management regime. In the latter regime, the relevant administrative authority has the discretion to allocate or dedicate the country's water resources' uses to the public.

6.3.3 Länder law

In accordance with the notions of concurrent legislative power and separation of powers, article 72(3)(5) of the *Grundgesetz* provides that the different *Länder* may enact laws refining that of the Federal or National Government.[269] The different *Länder's* laws are mainly focused on the regulation of water resources within the respective *Länder. Länder* legislation is therefore passed to "implement" and "complete" federal legislation.[270]

The water legislation of the *Länder* supplements the federal legislation.[271] Whereas the WHG does not contain any provisions on the water abstraction charge, the *Wassergesetz für Baden-Württemberg* of 2005,[272] the *Wassergesetz des Landes*

267 Section 14(2) of the WHG.
268 Kube 1997 *Natural Resources Journal.*
269 Section 72(3)(5) of the *Grundgesetz.*
270 Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 5.
271 Reinhardt https://www.google.com/search?q=reinhardt+water+law+germany&ie=utf-8&oe=utf-8 23.
272 See para 17(a) of the *Wassergesetz für Baden-Württemberg* (Water Law of *Baden-Württemberg*).

Mecklenburg-Vorpommern of 1992[273] and the *Saarländisches Wassergesetz* of 1960[274] for example levy a charge for the abstraction of water.

Although the *Länder* may "fill out" some areas with their own legislative provisions, all *Länder* have to adapt their respective water laws to the underlying principle that water uses in Germany are regulated by the state.[275] This emphasises the fundamental principle of Germany's water regulatory framework that water resources form part of the public domain.[276]

6.3.4 Municipal law

The *Grundgesetz,* in article 28(2), and most constitutions of the *Länder*, provide for the local self-government of municipalities. This means that municipalities (local authorities) have the necessary autonomy and authority to adopt by-laws (local level laws) and to execute certain administrative powers. Amongst others, the administrative powers of municipalities generally include the enforcement of procedures prescribed by water-related legislation on federal, *Länder* and local level, and the monitoring of the quality and quantity of water resources in their municipal areas.[277]

A comprehensive analysis of all the promulgated municipal statutes surpasses the scope of the present discussion. It suffices to state that the water laws of the different municipalities generally regulate the local implementation and organisation of water supply and wastewater disposal in a manner that benefits the public.[278] Legislative authority pertaining to drinking water and wastewater disposal therefore generally falls under the obligation of municipalities.[279] The *Landeswassergesetz* of *Rheinland-Pfalz*

273 See para 16 of the *Wassergesetz des Landes Mecklenburg-Vorpommern* (Water Law of *Mecklenburg-Vorpommern*).
274 See para 1 of the *Saarländisches Wassergesetz* (Water Law of Saarland).
275 Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 5.
276 See section 3 of the *Hessisches Wassergesetz* of 2010.
277 Hodgson *Modern Water Rights: Theory and Practice* 43; Irmer, Huber and Walter (eds) 2013 https://www.umweltbundesamt.de/.../wawi_teil_01_englisch_barrierefrei.pdf 29.
278 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 13-14.
279 Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 18.

for example obliges municipalities to safeguard the public water supply,[280] while the *Wassergesetz* of Berlin provides that it is the responsibility of the *Berliner Wasserbetriebe*, a public water supply organisation, to safeguard a proper water supply within Berlin.[281] Similarly, the City of Heidelberg[282] statutorily provides for waste water charges and prescribes the obligation to connect to the municipal water supply as well as the waste water removal system. As indicated earlier, in the case of discrepancies between federal and *Länder* or municipal law, federal law will prevail.[283]

6.3.5 Concluding remarks: The contemporary legal status of water

Research of the post-federalist reform water regulatory regime has shown that the WHG characterises water resources as *öffentliche Sache.* The WHG constitutes the *Widmung* through which all of Germany's water resources uses are dedicated to the public. Any person, whether a landowner or not, whose activities affect the quantity and quality of water resources has to procure a permit or license in terms of the WHG to use water. Water uses that require official authorisation include the withdrawal or diversion of water from surface waters,[284] the damming or drawing-down of surface waters,[285] the withdrawal of solid material from surface waters where this affects the properties of such waters or their flow,[286] the introduction or discharge of substances into waters,[287] and the withdrawal, conveyance to the surface, or diversion of groundwater.[288]

Chapter 6.2.6.3 above indicates that the WHG usurped all private law rights and powers in certain resources to the extent that the state manages the water resources on behalf of the nation as *de öffentliche Sachherr*. The *öffentliche Sachherr* is cloaked

280 Sections 2(1) and 46(1) of the *Landeswassergesetz* of *Rheinland-Pfalz* of 2004.
281 Section 37(a) of the *Berliner Wassergesetz* of 2005.
282 Statute on Public Waste-water Removal of the City of Heidelberg of 1980; Tiroch and Kirschner 2002 http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk 5.
283 Office of the United Nations High Commissioner for Human Rights http://www.ohchr.org/Documents/Issues/Water/ContributionsPSP/GermanyII.pdf
284 Section 9(1)(1) of the WHG.
285 Section 9(1)(2) of the WHG.
286 Section 9(1)(3) of the WHG.
287 Section 9(1)(4) of the WHG.
288 Section 9(1)(5) of the WHG.

with a duty to ensure that the *őffentliche Sache* is used, protected, conserved, managed and controlled to keep the country's water resources in a good condition and to serve the public interest.[289] The state, as the *őffentliche Sachherr*, accordingly regulates Germany's water resources in terms of the construct of concurrent legislative power that shows its full impact through the interaction of the different regulation levels of federal, *Länder* and local law.

6.4 Conclusion: The water rights regime as informed by the concept of őffentliche Sache

The historical perspectives in chapter 6.2 above provide a rich background against which the legal status of water and the contemporary water rights regime in Germany must be understood. Whereas water resources were historically classified as either common, private or public property, a formal move towards the comprehensive public law management of water resources in Germany occurred after Germany became a federal Republic and when the federal legislature promulgated the WHG using the property law concept of *őffentliche Sache* as its basis.

The WHG supplanted the traditional rights of a private property holder to use and dispose of his or her property and vested control of water resources in the state. Although the WHG usurped all private law rights and powers in water resources, the state merely manages the resources on behalf of the nation as *de őffentliche Sachherr*. The *őffentliche Sachherr* is cloaked with a duty to ensure that the country's water resources are used, protected, conserved, managed and controlled to keep the water in a good condition and to serve the public interest.[290] It should be reiterated that water is not "owned" by the state. In fact, the concept of *őffentliche Sache* disregards "ownership".[291] It merely regulates the *use* of water resources by removing the right to *use* water resources from the private property regime, and by placing it in a public property regime.

289 See chapter 5.3.4.4 above.
290 See chapter 6.3.3.2.2.1 above.
291 See chapters 5.3.4.4 and 6.3.2 above.

This public property or state management regime operates on the allocation of water use entitlements granted at the discretion of the state. Consequently, apart from few exceptions, any person, whether a landowner or not, whose activities affect the quantity and quality of water has to procure a permit or license to use water.[292] Once a permit or license is allocated, it affords a right to use water and does not provide the holder thereof any legal title to the water.[293] The water rights are administrative use or *usufructuary* rights.[294] The water use rights do not represent ownership rights. The authorisation by license or permit merely provides the holder thereof a revocable right to use a body of water which are constrained by the interests of others, for a particular purpose, subject to conditions, and for a limited period of time. This public property management regime therefore gives the state complete control over the waters in Germany to promote *inter alia* the concept of *Daseinsvorsorge* and the *Sozialstaatsprinzip.*[295]

Attention is very often only given to the national level of the state in the regulation of water resources. However, because of the incorporation of the state managing regime underpinned by the concept of *öffentliche Sache*, the regulation of all water resources in Germany is the duty and responsibility of all organs of state, including the authorities or persons exercising legislative, executive or judicial powers on federal, *Länder* and local levels.[296] Whereas the legislature sets the parameters for water regulation and vests the necessary authority or power to dedicate natural resources in executive bodies, legislation imposes a specific obligation on the executive authority.[297] Individuals or bodies performing executive powers are obliged to manage the country's water resources in such a way that *inter alia* avoidable impairments to their ecological functions shall not occur, and hence that overall sustainability is ensured for current and further generations.[298] In turn, the judiciary is mandated to ensure that both the legislative and executive authorities maintain a high level of water protection.[299] This public property regime is used as a tool to achieve a sensible and useful distribution

292 See chapter 6.3.3.2.2.2 above.
293 See chapter 6.3.3.2.2.2 above.
294 See chapter 6.3.3.2.2.2 above.
295 See chapter 6.2.6.1 above.
296 See chapter 6.2.6.2 and 6.3 above.
297 See chapter 6.3.3.2.2.1 above.
298 See chapter 6.3.3.2.2.1 above.
299 See chapter 6.3.3.2.2.1 above.

of water quality and quantity in Germany. Therefore, in order to attain this high level of water distribution or allocation, water uses in Germany are in terms of the concept of *öffentliche Sache* subject to state control.[300]

The trend in the German water law that allows for a public law status of water resources shows similarities to the South African concept of public trusteeship. Investigation of such similarities between the concepts might reveal new insight into the development and interpretation of the South African concept of public trusteeship. The next chapter concludes this study by determining how and to what extent the German concept of *öffentliche Sache* may inform the development and interpretation of the concept of public trusteeship as entrenched in the NWA.

300 See chapter 6.3.2 above.

Chapter 7

Conclusion and recommendations

7.1 Background

Water is an essential resource for human and ecological existence.[1] Being a water scarce country, where the demand for water is often in excess of the resource's physical availability, the Government of South Africa faces unique challenges in providing everyone with access to water.[2] These challenges become even more complex when considered against the background of South Africa's political history, characterised by a reality of inequitable access to water.[3] In order to transform the legacy of inequitable access to this essential resource, the legislature promulgated the NWA in 1998, thereby introducing a novel concept in the water regulatory framework of South Africa, namely the concept of public trusteeship.

Within South Africa's water regulatory framework, public trusteeship has thus far been understood as a concept that places water resources under the custodial or fiduciary control of the National Government.[4] However, due to the novelty of the concept in the South African water regulatory regime, the concept's exact content, meaning and implications are still unclear. It is uncertain, for example, whether elements of the Anglo-American public trust doctrine have been introduced to South African water law; whether the existing notion of *res publicae* is now statutorily entrenched in South African water law; or whether the notion underpins a stewardship principle that emphasises and defines the National Government's fiduciary duty towards the resource. Uncertainty also exists, amongst others, a) regarding the extent to which the notion affects the state's proprietary relationships, b) corresponding duties with

1 See chapter 1.1 above.
2 Essa 2015 http://www.aljazeera.com/news/2015/11/south-africa-midst-epic-drought-151104070934236.html; UNEP FI Chief Liquidity Series http://www.unepfi.org/fileadmin/publications/water/chief_liquidity1_South_Africa.pdf 42.
3 The political history resulted in the unfortunate situation that many South Africans were denied of access to sufficient water. See the introduction of the *White Paper on a National Water Policy for South Africa*, 1997.
4 Van der Schyff 2013 *The South African Law Journal* 374.

relation to water, as well as c) the nature and extent of access and water use rights acquired by the public.

Due to the fact that the concept of public trusteeship is a novel concept in South African jurisprudence without established links to existing principles of law, existing foreign legal frameworks that acknowledge public trusteeship, or related concepts in the water law context were considered for interpretative guidance. The Anglo-American public trust doctrine serves as one such foreign framework that is often analysed by scholars dealing with the concept of public trusteeship in South Africa's natural resources.[5] However, this study explored a "functional equivalent" of the Anglo-American public trust doctrine to inform the development and interpretation of the South African concept of public trusteeship, namely the German property law concept of *őffentliche Sache.*[6]

7.2 Revisiting the research question and objectives

The question that underpinned this study is how and to what extent the German concept of *őffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.

In order to address the research question, and to test the stated hypothesis,[7] the following secondary objectives were set:

1. To theoretically examine perspectives on the "idea" of property in order to indicate the relevance that the particular property rights regime within which a resource is regulated has for the regulation of access to the resource; the extent of a Government's concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource;

5 See chapter 1.2 above.
6 See chapter 1.2 above.
7 See chapter 1.3.3.2 above.

2. To examine the property concept in the South African legal context to provide a property rights paradigm against which the statutorily introduced, public trusteeship-based property regime in water resources law can be measured. This objective can only be reached if the examination of the property concept in the legal context of South Africa includes a discussion of the current differentiation between private and public property, an explanation of the extent of constitutional protection, as well as the regulation of property in South Africa;
3. To discuss the development of the legal status of water as the contextual point of departure for understanding the implications of the introduction of the public trusteeship paradigm for water regulation in South Africa;
4. To provide a brief overview of the development of the concept of property in German property law in order to contextualise the analysis of the concept of *öffentliche Sache* as it functions in German law;
5. To discuss the development of water as public property in German law and to examine the nature of water rights that can be acquired in the resource as well as the state's regulatory obligations resulting from the public property regime; and
6. To distil from the German law analysis of *öffentliche Sache* lessons learned and to make recommendations for the interpretation and development of South Africa's concept of public trusteeship within the scope of the NWA.

7.3 The methodology

This study was based on a literature review. The study commenced with a review of scholarly literature on *inter alia* the idea of property. It also explored sources on the theoretical foundations, content, forms and meaning of the property concept in South Africa. The meaning and implications of water as property in South Africa as well as the concept of public trusteeship, generally, were reviewed. The discussion on the property concept and its relation to water as a natural resource was repeated albeit in the context of German law. The theoretical foundations, content, forms and meaning of the property concept in German law were explored, followed by a discussion of the property rights regime in Germany wherein water is managed. The literature review included the review of relevant historical developments in South Africa and Germany

and a parallel evaluation of the concepts of public trusteeship and *öffentliche Sache* in the said jurisdictions. The *rationale* for evaluating the South African concept of public trusteeship against the German concept of *öffentliche Sache*, in preference to, for example the Anglo-American public trust doctrine, is explained in chapter 1.2 above.

The said parallel evaluation between the concepts of the South African and German law posed opportunities and challenges. On the one hand, the methodology posed the opportunity to examine German property law concepts, practices, ideas and institutions that Germany designed and implemented to effectively regulate water resources. The methodology therefore fostered critical thinking about *inter alia* legal concepts and other institutions that may ultimately inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA. On the other hand, however, the method of parallel evaluation posed challenges and risks. As a parallel evaluation generally requires a researcher to undertake a thorough review of *inter alia* technicalities of the legal systems in question, the different legal system's historical developments, their cultures, traditions and practices, the investigation may become so comprehensive and vast that the researcher ultimately looses focus.

To ensure that the opportunities provided by the said method were enhanced and the challenges limited, the evaluation was restricted to a parallel discussion of relevant developments in South African and German property and water law. The aim with the parallel evaluation was limited to a determination of the extent to which the German property law, and particularly the public property concept of *öffentliche Sache*, may assist in developing the South African concept of public trusteeship and to distil from the former analysis lessons in the German context that may be adapted for use and application in South Africa.

7.4 Structure of the analysis

This study was divided into chapters in accordance with the focus of the various chapters' objectives. Chapter 1 dealt with the background to the research question, the problem under discussion, a description of the adopted research methodology, objectives of the research and the hypothesis tested. Chapter 2 provided perspectives on the "idea" of property and focused on the relevance and importance of property rights regimes for the regulation of resources. Chapter 3 focused on the South African property rights paradigm and its different property concepts. The first part of chapter 4 focused on the development of water as public property in South African law. The second part of chapter 4 contextualised the introduction and implications of the South African water regulatory public trusteeship paradigm. Chapter 5 dealt with the development of the German concept of property and contextualised the concept of *őffentliche Sache* as it functions in German law. Chapter 6 dealt with the development of water as public property in Germany and focused on the nature of water rights that can be acquired in the resource, as well as the state's regulatory obligations resulting from the public property paradigm.

7.5 Main findings

The objectives of the study as stated in section 7.2 above, translated into the focus areas of the chapters of this thesis. Each chapter investigated one or more dimensions of the research question and in doing so, resulted in a set of main findings. These have subsequently been used to draw some conclusions and to inform the knowledge generated in this study on the future development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.

7.5.1 Property as an abstract and multi-faceted notion

With the introduction of the concept of public trusteeship in the South African legal realm, the foundation and regulatory practices of the water law dispensation changed fundamentally. The new water law dispensation abolished private control of water and appointed the National Government as the trustee of the nation's water resources.[8] The changed system brought about a reallocation and redefinition of property rights to natural resources;[9] a transformation that will inevitably impact on the nature, form, extent, limits and protection of access and use rights that can be acquired in water as a natural resource. In order to shed light on the property rights paradigm within which water is managed in a public trusteeship model, chapter 2 of this study engaged in a theoretical discussion to determine the meaning attributed to the concept of "property" and existing property regimes within which water as a natural resource can be regulated. The aim and objective of the chapter was to determine the relevance and importance that a particular property rights regime within which a resource is regulated has for the regulation of access to the resource; the extent of Governments' concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.

The chapter proceeded with an examination of the content and meaning of property. After considering the different opinions of several property law scholars, it became clear that property is an abstract concept that is hard to pin down to a single definition.[10] The reason is that property is a changing and fluid concept that progressively incorporates "non-private property" such as common and public property into its meaning and scope.[11] Following the abstract nature of property, property theories that underlie and govern the concept of property were examined to provide further guidance and clarity on the topic. The examination of the property theories added important insights, *inter alia,* into the logic behind private, common and public property respectively. From the research on the different property theories, it further transpired that property, as a legal concept, has an allocative function.[12]

8 Section 3 of the NWA.
9 See chapter 2.1 above.
10 See chapter 2.2 above.
11 See chapter 2.2 above.
12 See chapter 2.3 above.

The research indicated that if property rights are allocated in terms of principles underlying a specific property theory or combination of property theories, a set of rights and duties comes into existence that characterises the relationship of individuals amongst each other with respect to the property in question. This "complex of rights and duties" delineates the property rights regime within which an "object", "thing" or "resource" must be regulated.[13] As property literature generally differentiates between three primary property rights regimes, namely private property, common property and public property, the content and meaning of these three property regimes were examined.[14] Each of the three regimes is of particular relevance and importance for the regulation of access to resources; the extent of Governments' concomitant regulatory powers; and the nature, extent and protection of use rights that can be acquired in the resource.

Arguments favouring the relevance and importance of the private property regime for the regulation of access to resources were based on the individualistic nature of private property. As a private property right, ownership provides its holder with the exclusive right to determine access to and control over things;[15] the exclusive right to the services of the resource; and the right to exchange the resource at mutually agreeable terms to the individual[16] as right-holder. The private property regime is of further relevance and importance when a Government's regulatory powers and the nature or extent of private property rights are considered. This is so because ownership rights in property do not necessarily provide unqualified, "absolute and complete" rights to an owner. The research indicated that a state may indeed impose limitations on ownership rights. Other limitations to private, exclusionary ownership rights may arise from private property rights of other individuals in terms of limited real rights (the rights of others), or even creditors' rights. Apart from these limitations, the extent of a private property right is limited by duties that are imposed on an owner of property in a private property regime. For example, in terms of the maxim of "*sic utere tuo ut alienum non laedas*", an owner may exercise his or her indefinite right to use,

13 See chapter 2.3.2 above.
14 See chapters 2.4.2, 2.4.3 and 2.4.4 above.
15 See chapter 2.4.2.1 above.
16 Or legal (judicial) person.

control, and dispose of the property in question, only to the extent that the use of the owner's right does not damage that of his or her neighbour's property. Private property rights or entitlements of the owner (which are restricted by limitations and duties) are recognised in law and protected by various private law legal remedies.[17]

In contrast to the private property regime that acknowledges that property may exclusively be owned by private individuals, albeit subject to certain restrictions, research confirmed that a common property regime may be used to *inter alia* regulate access rights, Government's regulatory powers, and use rights in "things", "objects" and resources that are available or open to all individuals (common resources).[18] A common property regime is particularly well suited for the management of "common resources", because the common property regime is a community arrangement that regulates the access, use, preservation, protection, maintenance, and consumption of the resource. This study confirmed that the rules that govern access to and control of resources in the common property regime are organised on the basis that each common resource is in principle available for the use of every member of society alike.[19] In the case of finite resources, the common property regime requires procedures for determining a fair allocation of the extent of uses allocated to individual members of the group or society. The Government in a common property regime may intervene and adopt different institutional management approaches to protect and to regulate access to these resources so that they can be used not only by this generation, but also by future generations.[20]

After considering the nature and characteristics of a public property regime, it became clear that a public property regime separates the ownership, control and management of public property from its actual use. In a public law regime, "ownership" therefore usually vests in the state that controls and manages public property by a group of elected individuals, while the statutorily regulated use and access rights reside with the public.[21] "State ownership" is not similar to private ownership in the sense that the state has absolute power and dominion over property. As the "owner" of public

17 See chapter 2.4.2.1 above.
18 See chapter 2.4.3.1 above.
19 See chapter 2.4.3.1 above.
20 See chapter 2.4.3.1 above.
21 See chapter 2.4.4.1 above.

property, the state, by virtue of its sovereignty,[22] has the right to determine and prescribe how and to what extent the property in question should be used.[23] The state is bound to structure, allocate, protect and govern use and access rights in public property in such a way that it meets the needs and purposes of society as a whole, and not only the needs of individuals.[24] Within a public property regime, the state or public property is therefore dedicated to the use of the public.

The discussion of the idea of property informed understanding of the concept of property and specifically the meaning and importance of different rights property regimes. It also provided the necessary context for understanding the statutorily introduced public trusteeship and *öffentliche Sache*-based property regimes in water resources law according to which water resources are regulated in South Africa and Germany respectively.

7.5.2 A transformed property concept in the context of South African law

In chapter 3 the focus fell on the property concept in the South African legal context. The aim of this chapter was to establish a unique South African property paradigm perspective against which the statutorily introduced public trusteeship-based property regime in water resources may eventually be evaluated, informed and further developed.[25]

The chapter proceeded with historical perspectives on the development of the South African concept of property to indicate the influence it had on the existing context-specific South African concept of property. The South African concept of property followed the Roman and Roman-Dutch legal tradition, in terms of which lawyers generally defined and regulated property in a private property regime. In this private

22 See chapter 2.4.4.1 above.
23 See chapter 2.4.4.1 above.
24 See chapter 2.4.4.1 above.
25 The chapter provides a lens through which the statutorily introduced public trusteeship-based property regime may eventually be measured in the sense that it *inter alia* provides a theoretical foundation of the legal context within which the South African concept of property continues to develop; provides clarity on the development of the content, meaning, types and forms of property; establishes the scope, content, meaning and forms of constitutional protected property in South Africa; and elucidates whether the South African property law provides for the concept of public property, and if so, what it entails.

law regime, property was generally conceptualised as a legal relationship between persons and corporeal things.[26] Ownership epitomised the most comprehensive and absolute real right in property and was the source of all other limited real rights in the private property regime, except perhaps for some statutorily created limited real rights.[27] Alongside the notion of private property, the Roman-Dutch law concept of public property (*res publicae*) was also historically entertained in South Africa.[28] Public property, as interpreted by South African jurisprudence prior to 1996, was either described by the notion of collective ownership of the state or citizenry at large, or it described the public use to which the property was put.[29]

The development of both private and public property in South Africa reached a low point under the Apartheid regime. Apartheid resulted in severe racial discrimination *re* access and opportunities to the black majority of South Africans, and was particularly clear from their limited property rights to land. Access to land, and therefore water as natural resource attached to land, were due to the strict Apartheid policy restricted and available only to the white minority of the country.[30] The inclusion of a property clause in the Constitution reformed the legal tradition of the South African concept of property.

The Constitution introduced a concept of property that is much more open to interpretation than what was historically the case.[31] In fact, the constitutional property clause opened up new layers of meaning for the meaning of property in South Africa. As the concept of "property" is not defined by the Constitution, the content, meaning and types of property that fall within the ambit of constitutional protection were explored. From the analysis, various interests that can enjoy constitutional protection were categorised into three main themes.[32] The first category comprised immovable and movable corporeal property[33] while the second category concerned rights to incorporeal property, which included copyrights, patents and trademarks.[34] The third

26 Although incorporeals were also eventually included. See chapter 3.2.3 above.
27 See chapter 3.2.3.2 above.
28 See chapters 3.2.3.3.2 and 3.2.4.3 above.
29 See chapter 3.2.4.3 above.
30 See the introduction of the *White Paper on a National Water Policy for South Africa*, 1997.
31 See chapter 3.3 above.
32 See chapter 3.3.2.2 above.
33 See chapter 3.3.2.2.1 above.
34 See chapter 3.3.2.2.2 above.

category involved non-contractual debts and claims (new property).[35] The interests forming part of the third group are generally based upon public law participation claims against the state. They therefore include welfare rights (such as pensions, medical benefits and unemployment benefits) and forms of state "largesse" (such as licenses, permits and the use of public resources issued by the state).[36] The latter category is of particular importance for this study, as it implies that licenses or permits to use water can also fall under the ambit of constitutional protection in the context of South African law. The regulation of rights in natural resources therefore had to be examined further.

A novel "stewardship ethic of public trusteeship" in the regulation of rights in natural resources was introduced.[37] The latter refers to the notion that Governments exercise a fiduciary trust on behalf of their people, and that certain interests are so important that they ought to be reserved for the whole of the populace. Through the NWA, this notion was statutorily introduced as the basis of the water regulatory regime. The notion's influence on or implications for the regulation of property and the property regime within which water resources are regulated in South Africa, was discussed in a subsequent chapter.

7.5.3 Water as a public resource in South Africa

In order to develop understanding of the implications of the water law dispensation founded on the notion of public trusteeship, it was necessary to reflect on a number of contextual matters. From a property law perspective, it was particularly important to determine whether the introduction of the notion of public trusteeship affected the legal status of water. For this reason, chapter 4 focused on the legal status of water in South Africa. The chapter commenced with an analysis of different historical water rights regimes in the country. The historical dimensions accentuated the nature and extent of the change brought about by the recent inception of the public trusteeship model.

35 See chapter 3.3.2.2.3 above.
36 See chapter 3.3.2.2.3 above.
37 See chapter 3.3.2.3.2 above.

Prior to colonisation, water rights were generally regarded a "community resource".[38] After the arrival of the Dutch at the Cape in 1652, the VOC adopted the status of *dominus fluminis,*[39] in terms of which the state, as "public owner", controlled its water resources. It was confirmed that the *dominus fluminis*-principle influenced the legal status of water to the extent that water was no longer regarded a community resource, but subject to a state-controlled model in terms of which individuals could obtain temporary and revocable rights in the resource. Research done on legal developments within the period following the colonisation of the British in 1806, showed that the English law influenced the water law of South Africa to such an extent that a differentiation was made between public and private waters, and furthermore, that the new regime provided for riparian ownership, resulting in preferential use rights to riparian owners.[40] The riparian ownership model minimised the power of the state to control water entitlements to the benefit of the nation. This minimisation of state power was particularly evident from the limited scope of state regulation of private water. The inquiry into the use of private water, or water rising upon a landowner's land, confirmed the limited role of the state by emphasising the landowner's exclusive and unlimited use rights to private water. The riparian ownership principle and the distinction between public and private water ultimately contributed to the sorry state of Apartheid.[41] This is so because land ownership, which was linked to access to water, generally resided in the hands of the minority group of whites. The black majority of South Africans were effectively denied the right of access to sufficient water.[42]

Following the advent of the Constitution, with the constitutional right to have access to sufficient water enshrined in section 27(1)(b), a novel legal framework for water resources regulation was introduced. The right to have access to sufficient water is at the core of the new, post-constitutional water regulatory framework. Interpretation of the constitutional water right, which included a discussion of case law,[43] confirmed that the state is charged with positive as well as negative duties to progressively realise

38 See chapter 4.2.2 above.
39 See chapter 4.2.3.1 above.
40 See chapter 4.2.4.1 above.
41 See chapter 4.2.4.3 above.
42 See chapter 4.2.4.3 above.
43 See chapter 4.3.2 above.

the section 27- water right to everyone.[44] It was in adherence to these obligations that the NWA was promulgated. The NWA fundamentally changed the foundations of the country's water law system. Changes included *inter alia* the abolition of the differentiation made between private and public water and the rejection of the direct link that existed between land ownership and access to water.[45] The accompanying legal framework further statutorily introduced the concept of public trusteeship in terms of which all water use rights are placed under the centralised control of the state or public trustee to *inter alia* improve the distribution, management, use, conservation and equality of access to this scarce resource.[46]

The introduction of the notion of public trusteeship affected the legal status of water. Public trusteeship, as infused by stewardship, placed natural resources under the custodial or fiduciary control of the National Government as public trustee.[47] The fiduciary responsibility of the public trustee, in the context of water resources law, denotes a duty to manage and protect access to water resources for the benefit of generations of South Africans. The principal mechanism used by the public trustee for the public regulation of water resources is the system of administrative water use rights in the form of licenses and permits. Research done on *inter alia* the establishment, allocation and duration of these administrative water use rights, suggested that the legal status of water resources in the post-constitutional, public-trusteeship paradigm can indeed not be of a private nature.

To confirm and explain the latter, the characteristics of the private, common, and public property regimes were revisited. From these characteristics, it was asserted that water resources were removed from the private property domain. The concept of public trusteeship, which advocates a public rights system that allocates water in the public interest, converted water to public property, thereby changing the legal nature of South Africa's water resources. This transformation lead to further research to understand the implications for water regulation brought about by the public trusteeship paradigm. To do so, the research proceeded with a determination of how and to what extent the

44 See chapter 4.3.2.3 above.
45 See chapter 4.3.3 above.
46 See chapter 4.3.3 above.
47 See chapter 4.3.3.3.3 above.

German concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.

7.5.4 Manifestations of private and public law concepts of property in Germany

Chapter 5 focused on the development of the concept of property in German property law. The aim of the chapter was to contextualise and analyse the concept of *öffentliche Sache* as it functions in German law.

Roman law not only sculpted the development of German property law, but was also comprehensively adopted into the German private law regime.[48] The concept of property encapsulated in the German private law codification (the BGB), namely *Eigentum* (or ownership), proved to be similar to the Roman law concept of ownership that epitomised the most comprehensive real right in property that provided to its holder entitlements that *inter alia* included the owner's exclusive right to determine access to and control over things.

Property gradually moved into the sphere of public law. The property concept developed in the constitutional law sphere. The first signs favouring the notion of constitutional property protection emerged in Germany during the 1800's and ultimately materialised years later in article 153 of the *Weimarer Reichsverfassung* of 1919. It was, however, indicated that the National Socialists seized power in 1930, resulting in *inter alia* war and the devastation of the holocaust. Pervaded by the determination to prevent anything similar to National Socialism from happening again, the *Grundgesetz* was drafted and enacted in 1949. The *Grundgesetz* contains a constitutional property clause in article 14. The German constitutional property law *inter alia* guarantees and protects the individual property holder and his or her property holdings against state interferences. It has been shown, however, that the constitutional property guarantee is not absolute. In fact, article 14(1)(2) of the *Grundgesetz* underpins the legitimacy of statutory regulation of property that may result in the limitation or infringement of property rights.[49] A discussion of constitutional

48 See chapter 5.2 above.
49 See chapter 5.3.2.2 above.

case law confirmed that such limitations or infringements are indeed constitutionally valid, especially if and when existing private law uses of resources that are vital to the public at large, such as water resources, are limited and placed under the authority of the public legal order.[50]

The concept of property also functions in other areas of public law. One of which is the German administrative law.[51] The German administrative law acknowledges at least three forms of public property, namely "public property proper" (*őffentliche Sache*), "factually public things" and "public property held in a private capacity by a public authority to execute its public functions". The latter category represents things or objects that never truly leave the private law, such as an office building that is leased to a private tenant to generate public income.[52] An example of a "factually public thing" is that of a privately owned art gallery. "Factually public things", also technically remain in the private law realm, because such things are not administrated by a public authority, but managed by a private owner to serve a public purpose.[53] The remaining category, that of "public property proper" (*őffentliche Sache*) includes those things or objects that, through their use, directly and permanently serve particular needs of the public administration, the public interest or the common good.[54]

In essence, the concept *őffentliche Sache* denotes an approach that regulates the *use* of resources that serve a beneficial public function (*Gemeinwohl*).[55] The concept of *őffentliche Sache* should further be understood with reference to the concept of a *Widmung*. A *Widmung* is a legislative or administrative dedication by a public authority that effectively subjects property of particular importance for the public to restrictions of the public interest.[56] Once the property is dedicated for reasons of public interest, the property is regulated in a public law order. In the event that the dedicated property was privately owned, the private law owner, without compensation, loses the power to use or dispose of the property to the extent to which the property has been dedicated.

50 See chapter 5.3.2.2.2 above.
51 See chapter 5.3.4 above.
52 See chapter 5.3.4.2 above.
53 See chapter 5.3.4.2 above.
54 See chapter 5.3.4.2 above.
55 See chapter 5.3.4.4 above.
56 See chapter 5.3.4.4 above.

With the concept of *őffentliche Sache*, property that is of interest to the public is removed from the sphere of private property and placed in a public property regime, where a public law dominion is established in the *őffentliche Sachherr.* By virtue of the public law dominion, the *őffentliche Sachherr* is cloaked with a duty to control the *őffentliche Sache.* The *őffentliche Sachherr* must *inter alia* ensure that the *őffentliche Sache* is used, protected, conserved, managed and controlled in a way that keeps the property in a good condition and that it serves the public interest.[57] Various public environmental law statutes in Germany acknowledge instances of *őffentliche Sache.*[58]

7.5.5 Water resources as public property (őffentliche Sache) in Germany

Chapter 6 focused on the legal status of water in Germany. The objective was to discuss the development of the legal status of water. The chapter departed from historical perspectives on the matter and described early Germanic law approaches,[59] approaches of the Middle Ages[60] and approaches of nineteenth[61] and twentieth century Germany.[62] In the early Germanic period water was initially regarded as the common property of the state, governed by the Germanic law concept of *Regalia minora*.[63] During the Middle Ages, the abstract Roman law concepts of *dominium* and *proprietas*, which designated the conception of absolute ownership, were introduced into the Germanic legal system.[64] As a result, a new property regime emerged in terms of which property eventually became considered to be an exclusive individual right.[65] In terms of this private property regime, fresh water from springs, as well as the groundwater that is the source of spring water, were often regarded as part of private land ownership.

During the nineteenth century, a clear line could be drawn between approaches in legislation to the legal status of water. On the one hand, in the Northern parts of

57 See chapter 5.3.4.4 above.
58 See chapter 5.3.4.4 above.
59 See chapter 6.2.2 below.
60 See chapter 6.2.3 below.
61 See chapter 6.2.4 below.
62 See chapters 6.2.5 and 6.2.6 below.
63 See chapter 6.2.2 above.
64 See chapter 6.2.3 above.
65 See chapter 6.2.3 above.

Germany, water was recognised as private property that exclusively belonged to property owners.[66] These Northern *Länder* used the concept of private ownership to allocate and regulate surface water. Such *Länder* considered the right to use water as a right linked to the private ownership right in the waterbed.[67] In these private law regimes, landowners had the authority to exclude others from the surface water and was only restricted to the extent that a statute or the rights of a third party did not conflict with the powers of the owner. On the other hand, legislation in Southern Germany reflected the growing role of the state and its administration in the regulation of water resources.[68] These Southern *Länder* considered surface water to be a public good that was regulated in a public law regime.[69] In the public law regimes, usufructuary rights or *subjektive öffentliche Rechte* in public water resources were granted to individuals. Every individual, whether a riparian owner or the owner of a waterbed, consequently needed explicit and individual permission in terms of the public law to use the surface water in question.[70] These different approaches of private and public water rights regimes were also applied to groundwater resources. Some of the *Länder* regulated their groundwater in terms of the private law that allowed landowners to use the groundwater beneath their property as linked to their private ownership land right, while other *Länder* used public law mechanisms to manage and distribute groundwater.[71] It therefore became clear that the legal status afforded to water resources was never uniform.

The *Grundgesetz*, as adopted in 1949, marked the dawn of a new constitutional era in Germany. The new regime affected the historical classification of water as private or public property. The *Grundgesetz* transformed the water regulatory sector by implicitly recognising a right to have access to water and the introduction of the doctrine of separation of powers. Examination of the normative content of the implicit right to water indicated that use and access rights to water resources in Germany are structured and governed in a public law regime by the three-tier state to meet the

66 See chapter 6.2.4.1 above.
67 See chapter 6.2.4.1 above.
68 See chapter 6.2.4.1 above.
69 See chapter 6.2.4.1 above.
70 See chapter 6.2.4.1 above.
71 See chapter 6.2.4.1 above.

needs and purposes of society as a whole.[72] Many powers and freedoms are left to the legislature, executive and judiciary in the federal, *Länder* and local levels to recognise, regulate, interpret and realise a right to water in Germany.

The federal legislature prompted a formal move towards the comprehensive state management of water resources in Germany with the promulgation of the WHG. The WHG, in its original and current form,[73] involves an approach of "comprehensive planning" in the water sector that arguably involves the property law concept of *öffentliche Sache*. With the promulgation of the WHG, the federal legislature introduced a public law regime into the German water law dispensation.[74] The WHG abolished the distinction that historically existed between private and public water rights regimes and introduced an overarching, resource-managing public law regime according to the concept of *öffentliche Sache*. The latter concept conceptually describes the interplay between private ownership rights in water resources and restrictions on its exclusive use for the benefit of the public.[75]

The concept of *öffentliche Sache* is understood with reference to its public beneficial function and the concept of a *Widmung*. In the context of German water resources, a *Widmung* denotes the formal legislative mechanism (the WHG) by which the country's water resources were dedicated to the public.[76] The WHG replaced private property powers in relation to water that is of interest of the public, with state or public management. A public law dominion was established in the *öffentliche Sachherr* in terms of which the latter receives the duty to control the dedicated water resources. The *öffentliche Sachherr* must *inter alia* ensure that the water is used, protected, conserved, managed and controlled in a way that keeps the property in a good condition and that it serves the public interest.[77] Analysis of case law confirmed that the regime, rooted in the concept of *öffentliche Sache*, which removes resources that

72 See chapters 6.2.6 above.
73 See chapters 6.2.6.3 and 6.3.3.2 above.
74 See chapter 6.3.1 above.
75 See chapters 5.3.4.4 and 6.3.2 above.
76 See chapter 6.6.3.2.2 above.
77 See chapters 5.3.4.4 and 6.3.2 above.

are vital to the public from the private law order and places it under the authority of the public legal order rather than the private order, is constitutionally valid.[78]

In accordance with the concept of *öffentliche Sache* all uses of water, including but not limited to uses such as the abstraction or discharge of water,[79] are in terms of the WHG subject to official Government authorisation in terms of the public administrative law. The principal mechanism used by the German Government for the public management of water resources is the institution of water rights that are allocated in terms of the WHG.[80] Water rights are assigned in the form of licenses or permits. Water licenses or permits in Germany are subject to conditions and are issued for a fixed period, which may be revoked and that may not exceed thirty years.[81] The holder of the water right can therefore not freely decide on the unlimited use or exploitation of the resource. Rather, the water right holder's entitlements or competencies in water resources are defined by a licence or permit. As to their substance, the water rights in Germany are administrative use or *usufructuary* rights. Water rights therefore do not confer the legal title of the water resource to the holder thereof.[82] Rather, the Federal Government laid down the type of Germany's administrative rights regime by, with the implicit incorporation of the concept of *öffentliche Sache,* placing the country's water resources completely within the control of the state.[83]

With the WHG's incorporation of the concept of *öffentliche Sache* into the German water regulatory framework, the notions of ownership and property were effectively separated. The traditional exclusive private law ownership-object approach in water resources evolved into a rights-based approach. This transformation removed water resources from the private property domain. In fact, water has been converted from private to public property. The regulation of water as public property is the duty and responsibility of all organs of state, therefore including the authorities or persons exercising legislative, executive or judicial powers on federal, *Länder* and local levels. The German public property regime that acknowledges water as public property

78 See chapter 6.2.6.4 above.
79 See chapter 6.3.3.2.2.2 above.
80 See chapter 6.3.3.2.2.2 above.
81 See chapter 6.3.3.2.2.2.1 above.
82 See chapter 6.3.3.2.2.2.1 above.
83 See chapter 6.3.3.2.2.2 above.

promotes an efficient allocation of water uses across all spheres and levels of Government.

7.6 A proposed understanding of the concept of public trusteeship in South Africa

On the basis of the above, it is possible to distil a number of lessons from Germany and to further formulate a novel approach to the understanding of public trusteeship in South Africa or, at least, to contribute to existing understanding of public trusteeship.

7.6.1 A domestic product of statutory origin

Many centuries of legal developments contributed to the fact that the German water regulatory regime gradually changed from a common, to a private law regime, and formally transformed to a public law regime, that incorporated the property concept of *őffentliche Sache* with the promulgation of the WHG in 1957. The development towards a public property water regulatory regime is an effect of Germany's own legal development, and should not be interpreted as a transplantation of, for example, the French notion of *domaine public*.[84] Similarly, the assumption held by some scholars that the South African concept of public trusteeship was borrowed or transplanted from the Anglo-American public trust doctrine may not be entirely correct.[85] As discussed earlier,[86] South African law originated from Roman-Dutch law and was further influenced by English law. It would be unlikely to find in South Africa's NWA a virtual "copy" or replica of the Anglo-American public trust doctrine. In fact, in light of the historical development of South Africa's water regulatory regime, the author of this thesis is not inclined to agree to the wholesale or blanket importation of the foreign public trust doctrine into South African law. The South African concept of public trusteeship is rather a domestic ("native") product of statutory origin, resultant from South Africa's own legal development that must be interpreted in its own context and

84 See chapter 6.2.4.3 above.
85 See chapter 4.3.3.2 above.
86 See chapters 3.2 and 4.2 above.

independently from the Anglo-American public trust doctrine.[87] The drafters of the NWA designed a doctrine of public trust for South Africa's circumstances.

7.6.2 Transformation of the law

The statutory incorporation of the concept of public trusteeship into the South African water law resulted in legal transformation. With the introduction of the concept, the water regulatory framework changed from one that linked access to water to land ownership and differentiated between private and public water, to a framework that applies to "all water" in South Africa and that acknowledges that "water belongs to all people".[88] The traditional exclusive private law ownership-object approach in water resources evolved into a rights-based approach. In terms of the concept of public trusteeship, all of South Africa's water resources, including surface and groundwater, are defined as part of an "inalienable public trust" that is the fiduciary responsibility of the National Government. We are therefore witnesses of a transformation in which property rights were redefined, often to the disadvantage of property owners that previously enjoyed access to water as an "extension" of land ownership.

This transformation may be justified by the same understanding held by the Germans, namely that water resources are so central to the well-being of all South Africa's citizens and its economy, that water cannot in a post-constitutional dispensation be susceptible to exclusionary, private property rights. Notably, however, the legal transformation did not necessarily result in a wholesale transfer of water to "state ownership". The transformation rather affected the property rights regime of South Africa wherein water resources are managed by elevating the public interest above any private interests in the resource and defining the National Government's claim to the resource as purely fiduciary. The National Government's title as public trustee therefore differs from the title a state would hold in land intended for sale. The National Government's title in water resources is characterised by the fiduciary responsibility to

87 See chapter 4.3.3 above.
88 See chapter 4.3.3 above.

inter alia protect, use, develop, conserve, manage and control water resources in a sustainable manner for current and future generations.[89]

However, the NWA does not explicitly determine that the nation's water resources are owned by the National Government who holds it in trust. The NWA states that water as a natural resource "belongs to all people". Through the introduction and application of the concept of public trusteeship, water resources have been converted from private to public property. Public property is susceptible to use by everyone. The legislature intented the public property regime to explain that water as a natural resource in South Africa "belongs to all people". In its public property regime, the NWA provides for water use rights that are assigned in the form of licences, permits or other authorisations. Similar to the German counterpart, these rights in South Africa are not private in nature, but are administrative use or *usufructuary* rights. These rights do not confer legal title of the water resource to the holder thereof, but provides their holders with a right to use water for a limited period of time, subject to strict conditions.

7.6.3 The implications of public trusteeship for a semi-federal Government construct

The German property rights regime within which water resources are currently regulated was instated by the WHG. With the WHG's implicit incorporation of the concept of *öffentliche Sache,* the property rights regime within which water resources are regulated provide for the fact that exclusive water use rights that were previously

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

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

regarded as “property”, were replaced by discretionary water allowances that are allocated by the state. The establishment and allocation of rights to use water, rather than exclusive rights of ownership, vest considerable regulatory power in the state. In Germany, the regulation of all water resources is the duty and responsibility of all organs of state, therefore including the authorities or persons exercising legislative, executive or judicial powers on federal, *Länder* and local levels.[90] The public property regime wherein Germany’s water resources is regulated shows its full impact in the different branches and spheres of the federal state. Legislation is set by the legislature, administration is entrusted to the executive, while disputes are resolved by the judiciary.

Federal legislation obliges the state to ensure that the country’s water resources are used, protected, conserved, managed and controlled to serve the public interest. In terms of the legislative competences granted to the *Länder* and local legislatures, they may set out regulations that flesh out and detail the duties of the state. They may also promulgate legislation that differ from the federal provisions, permitted the variant rules do not pertain to materials or facilities associated with water management. The federal legislator, however, sets the public regulatory framework within which water resources should be managed and prevails or supersedes the *Länder* legislation in case of conflict.[91]

The executive branch of the German Government is entrusted with complex regulatory mechanisms for the allocation of water use rights. The allocation of water use rights hinges on a complex administrative decision-making process[92] that should normally be accompanied by an environmental impact assessment report.[93] Once these stages in the administrative process are duly adhered to, the water administration authority proceeds with an administrative process to assess whether and to what extent the proposed water right may impair the ecological or chemical status of the water. The review process ultimately results in the official allocation or refusal of a water right.[94] The executive is furthermore burdened with various duties when water allocations are

90 See chapter 6.2.6.2 and 6.3 above.
91 See chapter 6.3.3 above.
92 See chapter 6.3.3.2.2.2 above.
93 See chapter 6.3.3.2.2.2.2 above.
94 See chapter 6.3.3.2.2.2.2 above.

made. The water regulatory framework requires rational and effective decision-making processes by the administration.[95] The latter are ensured through mechanisms such as careful planning. Planning goes beyond the mere allocation of water rights, but should set out development and management priorities in the water sector.[96] It is within this broader framework of planning that decisions regarding the regulation of water rights must be made. The state's decision-making authority must structure, allocate, protect and govern access and use rights in water in such a way that it does not only protect the water resource, but that the access and use rights also meet the needs and purposes of society as a whole, as well as the needs of individuals of current as well as further generations.

The judiciary interprets the law and enforces legal principles. As indicated,[97] the German courts justified the constitutionality of the public water regulatory regime, because the natural supply of water is *inter alia* of importance for the economic development of Germany, as well as the sustenance of life in general.

The way in which Germany's governing power is shared between different state branches on federal, *Länder* and local level is relevant to the situation of South Africa. Similar to Germany, the South African Government has three independent, but interrelated branches, situated in three spheres - national, provincial and local. Based on the lessons learned from Germany, and in light of some similarities between the German and South African water regulatory frameworks, it is recommended that the concept of public trusteeship could be understood to mean and require the following in South Africa's semi-federal Government construct:

On national level, the South African legislature has set a public regulatory framework within which South Africa's water resources should be managed. The provincial and local legislatures have the necessary legislative authority to "fill in" or "flesh out" principles and other legal provisions to regulate South Africa's water resources in a public property regime. The national legislature statutorily introduced a unique concept of public trusteeship into South Africa's water regulatory framework that not only

95 See chapter 6.3.3.2.2.2.2 above.
96 See chapter 6.3.3.2.2 above.
97 See chapter 6.2.6.4 above.

altered the nature of ownership, but also introduced an institutional regime that re-defined property rights. Administrative water use rights that are allocated by the state replaced exclusive water use rights that were previously regarded as “property”. The statutory introduction of the concept of public trusteeship therefore removed all of South Africa’s water resources from the sphere of private property. The concept of public trusteeship effectively converted all waters from private to public property.

The National Government is appointed as the public trustee of the country’s water resources. In terms hereof, the Government has a fiduciary responsibility to *inter alia* allocate and regulate administrative water use entitlements to South Africa’s public water resources to the benefit of the public. While executing its public trust fiduciary duty, the public trustee must employ *inter alia* equitable and sustainability principles in the South African water regulatory regime to protect the water resources and to meet the needs and purposes of society as a whole, as well as the needs of individuals of current and future generations.

The public trusteeship paradigm of South Africa has already resulted in novel approaches to the protection, development, conservation, management, control, allocation and regulation of water resources in the country. The mechanism used to *inter alia* allocate and regulate South Africa’s water resources in the public interest, is the licensing or permitting system.[98] Consequently, in permitting (or licensing) any use of water, the concept of public trusteeship obliges the National Government and all its repositories of decision-making power, therefore including the different levels of executive and legislative authorities, to take into account and to give effect to the stated principles and objectives of the NWA as well as the state's constitutional mandate to realise the right to have access to sufficient water.[99]

The South African judiciary, or the courts, are the protectors of the statutorily introduced public trust concept in South Africa’s water regulatory regime. The courts must investigate the motives, methodologies and administrative processes behind the executive’s decisions (in the national, provincial and local spheres) and review the

98 See chapter 4.3.4 above.
99 See chapter 4.3.2 above.

considerations taken into account when any public use is impaired. The courts must ensure that the public trust concept forms part of what the South African Government may be expected to account for with respect to its protection, promotion and realisation of the constitutional duty to provide access to sufficient water to all. It is recommended that the judiciary interprets the section 27(1)(b) water right in the context of the public property regime within water is currently regulated.

7.7 Answering the research question of the thesis

The research question underpinning this study was how and to what extent the German concept of *öffentliche Sache* may inform the development and interpretation of the South African concept of public trusteeship as entrenched in the NWA.

Retrospectively seen, this study found that the German law concept of *öffentliche Sache* and the South African notion of public trusteeship have similar meaning and features within the respective country's water regulatory regimes. The shared features *inter alia* include-

- the exclusion of private ownership rights in water as a vital resource;
- the recognition and entrenchment of the obligation of the state or National Government to control water as a public resource;
- to meet the needs of present and future generations;
- to promote the efficient, sustainable and beneficial use of water in the public interest; and
- to protect associated ecosystems and their biological diversity, and to reduce and prevent pollution and degradation of water resources.

The parallel evaluation of the German law concept of *öffentliche Sache* and the South African notion of public trusteeship therefore revealed similarities and co-occurrences. It thus seems as if the public trusteeship concept, which is often seen as a product of a political process to transform the South African water dispensation specifically, find similar application in some foreign legal systems. In addition to Germany and South Africa and the Anglo-American dispensations, there has been a global trend towards

increasingly bringing water under state control through the imposition of administrative water use rights.[100] From this, it follows that private law may no longer be the preferred system wherein valuable resources such as water are to be managed or regulated.

A concise answer to the research question would be that the property rights regime within which Germany's water resources are regulated provides a comparable model against which the re-allocation and redefinition of property rights in water resources in South Africa can be evaluated. The examples gleaned from the German context improve understanding of: a) the potential impacts of the concept of public trusteeship on the property rights regime wherein water resources in South Africa are currently regulated; b) the nature, form, extent, limits and protection of access and use rights that can be acquired in water as a natural resource; and c), the implications of public trusteeship for the functions and duties of a responsive semi-federal South African Government.

As to the impacts of the concept of public trusteeship on the property rights regime wherein water resources are currently regulated, the German law showed that the concept of public trusteeship resulted in legal transformation. The concept affected the property rights regime of South Africa wherein water resources are managed by elevating the public interest above any private interests in the resource and defining the National Government's claim to the resource as purely fiduciary. The concept of public trusteeship hence replaced the previous system of exclusive water use rights with a system of administrative water use rights. Water uses were therefore removed from the scope of private property and placed in a public law management regime. In this public property regime, a set of rights and duties comes into existence that describes the nature, form, extent, limits and protection of access and use rights to water that reside with the public. The National Government, in its entirety, therefore including the different levels of executive and legislative authorities, must ensure that use and access rights to water resources are structured, allocated, protected and governed in such a way that it meets the needs and purposes of society as a whole, as well as the needs of individuals of current and future generations.

100 See for example the water regulatory regimes of Chile, Mexico, Uganda, Ghana, the United States of America and Australia. Movik and De Jong 2011 *Law, Environment and Development Journal* 68; Tisdell 2003 *Social Justice Research* 406.

7.8 Future research agenda

This thesis was limited to a parallel evaluation of property concepts between South African and German law. It is however viable to explore whether and how other foreign legal systems acknowledge and execute public trusteeship or related public property concepts in water resources law. The French water regulatory framework for example acknowledges a model in terms of which water resources belong to the public domain. Research on *inter alia* the French model could be pursued to further inform the development and interpretation of the South African concept of public trusteeship. Any further parallel analysis on public property concepts in water resources law will enhance the present legal discourse – a development that must be pursued given the pressures on the public sector in the face of a national water crisis due to water scarcity and drought.

In light of South Africa's uncertain water availability, it is also imperative that organs of state in all three spheres of Government confront and take up the implications and promises of the concept of public trusteeship in the South African water sector. Serious engagement with the implications of the concept of public trusteeship in the water sector is part and parcel of the Government's duty to respect, protect, promote and fulfil *inter alia* South Africa's constitutional right of access to water and the objectives that have been set with the country's primary water legislation.

7.9 Conclusion

Being mostly familiar with a legal system that primarily acknowledges private property rights, individuals want to know and understand what is theirs.[101] People want to protect what is theirs from harm caused by others, including Government, but this demands clarity - clarity of what is yours and clarity on the boundaries of those responsible and accountable for its protection. It is therefore understandable that private property holders are inclined to invoke their existing vested rights in water resources. This is logical given the fact that society is entirely dependent on water resources for its survival and well-being.

101 See chapter 2.2 above.

Historically, however, the already scarce water resources of South Africa were restricted and available only to the white minority of the country. This caused severe human suffering. Against the backdrop of a history of inequitable access to water, the legislature introduced the concept of public trusteeship into the South African water law to achieve the progressive realisation of the right to have access to sufficient water to all.

Any attempt to understand the extent of the legal transformation brought about by the concept of public trusteeship is reliant on an understanding of the impact of the concept in the broader South African water law context. The discussions in this study confirmed that the novel concept of public trusteeship affected the property rights regime of South Africa wherein water resources are currently managed by elevating the public interest above any private interests in the resource and defining the National Government's claim to the resource as purely fiduciary. While the German context provides understanding of the implications of the water law dispensation founded on the notion of public trusteeship, it remains incredibly important that everyone in South Africa, especially the National Government, should ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable manner, for the benefit of all persons and in accordance with its constitutional mandate.

BIBLIOGRAPHY

Books and Collective Works

Aguilera-Barchet *A History of Western Public Law Between Nation and State*
Aguilera-Barchet B *A History of Western Public Law Between Nation and State* (Springer Heidelberg 2015)

Alexander *Europe's Uncertain Path 1814-1914: State Formation and Civil Society*
Alexander RS *Europe's Uncertain Path 1814-1914: State Formation and Civil Society* (Wiley-Blackwell Oxford 2012)

Alexander & Peñalver *An Introduction to Property Theory*
Alexander GS & Peñalver EM *An Introduction to Property Theory* (Cambridge University Press New York 2012)

Baade "The Education and Qualification of Civil Lawyers in Historical Perspective: From Jurists and Orators to Advocates, Procurators and Notaries"
Baade HW "The Education and Qualification of Civil Lawyers in Historical Perspective: From Jurists and Orators to Advocates, Procurators and Notaries" in Cairns JW, Watson A and Robinson OF (eds) *Critical Studies in Ancient Law, Comparative Law and Legal History* (Hart Publishing Oregon 2004) at 213-234

Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property*
Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5th ed (Butterworths Durban 2006)

Bähr and Hoffmann *Grundzüge des Bürgerlichen Rechts*
Bähr P and Hoffmann R *Grundzüge des Bürgerlichen Rechts* (Verlag Franz Vahlen München 1978)

Barnes *Property Rights and Natural Resources*
Barnes R *Property Rights and Natural Resources* (Hart Publishing Oxford 2009)

Bassenge *et al Palandt Bürgerliches Gesetzbuch*
Bassenge P *et al Palandt Bürgerliches Gesetzbuch* (CH Beck'sche Verlagsbuchhandlung München 1991)

Baur *Lehrbuch des Sachenrechts*
Baur HCF *Lehrbuch des Sachenrechts* 12th ed (CH Beck'sche Verlagsbuchhandlung München 1983)

Baur and Stürner *Sachenrecht*
Baur JF and Stürner R *Sachenrecht* (CH Beck'sche Verlagsbuchhandlung München 1999)

Becker *Grundzűge des öffentlichen Rechts*
Becker F *Lernbűcher fűr Wirtschaft und Recht Grundzűge des öffentlichen Rechts* (Franz Vahlen Műnchen 1986)

Bentham *The Theory of Legislation*

Bentham J *The Theory of Legislation* (Translated from the French by Hidreth R) 2nd ed (Trübner & Co London 1894)

Bogdanović *International Law of Water Resources: Contribution of the International Law Association*

Bogdanović S *International Law of Water Resources: Contribution of the International Law Association* (Kluwer Law The Hague 2001)

Boyce *Natural Assets: Democratizing Ownership of Nature*

Boyce J *Natural Assets: Democratizing Ownership of Nature* (Island Press Washington 2003)

Brand and Heyns (eds) *Socio-Economic Rights in South Africa*

Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (Pretoria University Press Cape Town 2005)

Bray "Feudal Law: The Case for Reform"

Bray J "Feudal Law: The Case for Reform" Dixon M (ed) *Modern Studies in Property Law* 99-121 (Hart Publishing Oxford 2009) at 99-121

Breuer *Öffentliches und privates Wasserrecht*

Breuer R *Öffentliches und privates Wasserrecht* (Beck München 1976)

Bruns *et al Renewable Energies in Germany's Electricity Market: A Biography of the Innovation Process*

Bruns E *et al Renewable Energies in Germany's Electricity Market: A Biography of the Innovation Process* (Springer Heidelberg 2009)

Capelle *Bürgerliches Recht Sachenrecht*

Capelle KH *Bürgerliches Recht Sachenrecht* (Betriebswirtschaftlicher Verlag Wiesbaden 1963)

Çoban *Protection of Property Rights within the European Convention on Human Rights*

Çoban AR *Protection of Property Rights within the European Convention on Human Rights* (Aldershot Ashgate Publishing 2004)

Cohn *Manual of German Law*

Cohn EJ *Manual of German Law* (Oceana Publications London 1968)

Cribbet *et al Property Cases and Materials*

Cribbet *et al Property Cases and Materials* 7th ed (The Foundation Press New York 1996)

Cullet *Water Law, Poverty, and Development Water Reforms in India*

Cullet P *Water Law, Poverty, and Development Water Reforms in India* (Oxford University Press Oxford 2009)

Currie and De Waal *The Bill of Rights Handbook*
Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005)

Dahm *Deutsches Recht*
Dahm G *Deutsches Recht* (Kohlhammer Stuttgart 1963)

De Waal, Currie and Erasmus *The Bill of Rights Handbook*
De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 3rd ed (Juta Lansdowne 1999)

Dilcher *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*
Dilcher H *et al J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* 12th ed (J Schweitzer Verlag Berlin 1980)

Diósdi *Ownership in Ancient and Pre-Classical Roman Law*
Diósdi G *Ownership in Ancient and Pre-Classical Roman Law* (Académiai Kiadó Budapest 1970)

Dreier (ed) *Grundgesetz Kommentar*
Dreier H (ed) *Grundgesetz Kommentar* (Mohr Siebeck Tübingen 2004)

Dunning "Antiquity of the Public Right"
Dunning HC "Antiquity of the Public Right" in Beck RE (ed) *Waters and Water Rights* (Michie Law Publishers Charlottesville Virginia 1996) at 7-15

Du Plessis *Re-Interpretation of Statutes*
Du Plessis L *Re-Interpretation of Statutes* (LexisNexis Durban 2002)

Eisenhardt *Deutche Rechtsgeschichte*
Eisenhardt U *Deutche Rechtsgeschichte* (CH Beck München 1984)

Erk *Explaining Federalism State, society and congruence in Austria, Belgium, Canada, Germany and Switzerland*
Erk J *Explaining Federalism State, society and congruence in Austria, Belgium, Canada, Germany and Switzerland* (Routledge London 2008)

Erman *et al Handkommentar zum Bürgerlichen Gesetzbuch*
Erman W *et al Handkommentar zum Bürgerlichen Gesetzbuch* (Aschendorffsche Verlagsbuchhandlung Münster 1989)

Fisch "German Administrations and Water Issues in History"
Fisch S "German Administrations and Water Issues in History" in Raadschelders JCN (ed) *The Institutional Arrangements for Water Management in the 19th and 20th Centuries* (IOS Press Amsterdam 2005) at 23-43

Flores-Mimiça and Hervé-Espejo “Chile: Early Attempts to Develop Access and Benefit-Sharing Regulations”

Flores-Mimiça L and Hervé-Espejo D “Chile: Early Attempts to Develop Access and Benefit-Sharing Regulations” in Carrizosa S, Brush SB, Wright BD and McGuire PE (eds) *Accessing Biodiversity and Sharing Benefits: Lessons from Implementing the Convention on Biological Diversity* (IUCN, Gland, Switzerland and Cambridge 2004) at 227-241

Foster and Sule *German Legal System and Laws*

Foster N and Sule S *German Legal System and Laws* 4rd ed (Oxford University Press New York 2011)

Freckmann and Wegerich *The German Legal System*

Freckmann A and Wegerich T *The German Legal System* (Street & Maxwell London 1999)

Freedman *The Cambridge Companion to Rawls*

Freedman SF *The Cambridge Companion to Rawls* (Cambridge University Press Cambrige 2003)

Füller *Eigenständiges Sachenrecht?*

Füller JT *Eigenständiges Sachenrecht?* (Mohr Siebeck Tübingen 2006)

Glazewski *Environmental Law in South Africa*

Glazewski J *Environmental Law in South Africa* 2nd ed (LexisNexis Butterworths Durban 2005)

Grace *The Concept of Property in Modern Christian Thought*

Grace F *The Concept of Property in Modern Christian Thought* (The University of Illinois Press Urbana 1953)

Graham *Lawscape Property, Environment, Law*

Graham N *Lawscape Property, Environment, Law* (Routledge Oxfordshire 2011)

Gray and Gray “The Idea of Property in Land”

Gray K and Gray SF “The Idea of Property in Land” in Bright S and Dewar JK (eds) *Themes and Perspectives* (Oxford University Press Oxford 1998) at 15-51

Guelke “Freehold farmers and frontier settlers, 1657-1780”

Guelke L “Freehold farmers and frontier settlers, 1657-1780” in Elphick R and Giliomee H (eds) *The Shaping of South African Society, 1652-1840* (Maskew Miller Longman (Pty) Ltd Cape Town 1989) at 66-108

Hahlo and Kahn *The South African Legal System and its Background*

Hahlo HR and Kahn E *The South African Legal System and its Background* (Juta Cape Town 1968)

Hall *The Origin and Development of Water Rights in South Africa*
Hall CG *The Origin and Development of Water Rights in South Africa* 1st ed (University Press Oxford 1939)

Hall and Burger *Hall on Water Rights in South Africa*
Hall CG and Burger AP *Hall on Water Rights in South Africa* 4th ed (Juta Cape Town 1974)

Harris "Is Property a Human Right"
Harris J "Is Property a Human Right" in McLean J (ed) *Property and the Constitution* (Hart Publishing Ltd Portland Oregon 1999) at 64-87

Harris *Property and Justice*
Harris JW *Property and Justice* (Oxford University Press New York 1996)

Hennekens *Openbare Zaken naar Publiek- en Privaatrecht*
Hennekens HPJAM *Openbare Zaken naar Publiek- en Privaatrecht* (WEJ Tjeenk Willink Zwolle 1993)

Hodgson *Land and Water- the rights interface*
Hodgson S *Land and Water- the rights interface* (FAO Rome 2004)

Hodgson *Modern Water Rights: Theory and Practice*
Hodgson S *Modern Water Rights: Theory and Practice* (FAO Rome 2006)

Honoré *Making Law Bind*
Honoré AM *Making Law Bind* (Clarendon Press Oxford 1987).

Houser, Wilczenski and Ham *Culturally Relevant Ethical Decision-Making in Counseling*
Houser R, Wilczenski FL and Ham M *Culturally Relevant Ethical Decision-Making in Counseling* (Sage Publications, Inc California 2006)

Hübner *A History of Germanic Private Law*
Hübner R *A History of Germanic Private Law* (The Lawbook Exchange Ltd New Jersey 2000)

Hösch *Eigentum und Freiheit*
Hösch U *Eigentum und Freiheit* (Mohr Siebeck Tübingen 2000)

Humby, Kotzé and Du Plessis (eds) *Introduction to Law and Legal Skills in South Africa*
Humby T, Kotzé LJ and Du Plessis AA (eds) *Introduction to Law and Legal Skills in South Africa* (Oxford University Press Cape Town 2012)

Jacobs *Private Property in the 21st Century The Future of an American Ideal*
Jacobs HM *Private Property in the 21st Century The Future of an American Ideal* (Edward Elgar Publishing Limited Cheltenham 2004)

Johnson, Pete and Du Plessis *Jurisprudence A South African Perspective*
Johnson D, Pete Sand Du Plessis M *Jurisprudence A South African Perspective* (Butterworths Durban 2001)

Jovanovic *The Economics of International Integration*
Jovanovic MN *The Economics of International Integration* 2nd ed (Edward Elgar Publishing Cheltenham 2015)

Juta *Water Rights under Common Law and The Irrigation Act No 32 of 1906*
Juta H *Water Rights under Common Law and The Irrigation Act No 32 of 1906* (Juta Cape Town 1907)

Kaser *Eigentum und Besitz im älteren römischen Recht*
Kaser M *Eigentum und Besitz im älteren römischen Recht* 2nd ed (Böhlaus Wiemar 1956)

Kaser *Roman Private Law* (*Das Römische Privatrecht*)
Kaser M *Roman Private Law* 2nd ed (Butterworths Durban 1968)

Kaser *Römische Rechtsgeschichte*
Kaser M *Römische Rechtsgeschichte* (Vandenhoeck & Ruprecht Göttingen 1978)

Kidd *Environmental Law*
Kidd M *Environmental Law* (Juta Cape Town 2011)

Kleyn and Boraine *Silberberg and Schoeman's The Law of Property*
Kleyn DG and Boraine A *Silberberg and Schoeman's The Law of Property* 3rd ed (Butterworths Durban 1992)

Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany*
Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* 2nd ed (Duke University Press Durhham and London 1997)

Laufs *Rechtsentwicklungen in Deutschland*
Laufs A *Rechtsentwicklungen in Deutschland* 3rd ed (Walter de Gruyter Berlin 1984)

Larenz *Methodenlehre der Rechtswissenschaft*
Larenz K *Methodenlehre der Rechtswissenschaft* 5th ed (Springer-Verlag Berlin 1983)

Leisner *Sozialbindung des Eigentums*
Leisner W *Sozialbindung des Eigentums* (Dunker & Humblot Berlin 1972)

Lehmann *Sacherrschaft und Sozialbindung?*
Lehmann J *Sacherrschaft und Sozialbindung? Ein Beitrag zu Gegenwart und Geschichte des zivilrechtelichen Eigentumsbegriffs* (Duncker & Humblot Berlin 2004)

Lewis *Water Law Its Development in the Union of South Africa*
Lewis AD *Water Law Its Development in the Union of South Africa* (Juta Cape Town and Johannesburg 1932)

Libecap "State Regulation of Open-Access, Common-Pool Resources"
Libecap GD "State Regulation of Open-Access, Common-Pool Resources" in Ménard C and Shirley MM (eds) *Handbook of New Institutional Economics* (Springer Heidelberg 2008) at 545-572

Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution*
Liebenberg S *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Juta Claremont 2010)

Locke *Second Treatise of Government*
Locke J *Second Treatise of Government* originally published in 1690 and edited by Macpherson CB (ed) *Second Treatise of Government* originally published in 1690 (Hackett Publishing Indiana 1980)

Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius*
Maasdorp AFS *The Introduction to Dutch Jurisprudence of Hugo Grotius* 3rd ed (Juta Cape Town 1903)

Maes, Cliquet, Du Plessis and McLeod-Kilmurray (eds) *Biodiversity and Climate Change Linkages at International, National and Local Levels*
Maes F, Cliquet A, Du Plessis W and McLeod-Kilmurray H (eds) *Biodiversity and Climate Change Linkages at International, National and Local Levels* (Edward Elgar Cheltenham 2013)

Maine *Ancient Law*
Maine HJS *Ancient Law* (JM Dent & Sons London 1861)

Maunz and Dürig *Grundgesetz Kommentar*
Maunz T and Dürig G *Grundgesetz Kommentar* Loose Leaf Edition (Verlag CH Beck München 2013)

Mayer *Deutsches Verwaltungsrecht*
Mayer O *Deutsches Verwaltungsrecht* (Duncker und Humblot Leipzig 1896)

McHarg, Barton, Bradbrook and Godden “Property and the law in energy and natural resources”

McHarg A, Barton B, Bradbrook A and Godden L “Property and the law in energy and natural resources” in McHarg A, Barton B, Bradbrook A and Godden L (eds) *Property and the Law in Energy and Natural Resources* (Oxford University Press Oxford 2010) at 1-18

Meyerson *Jurisprudence*

Meyerson D *Jurisprudence* (Oxford University Press Melbourne 2011)

Miller and Pope *Land Title in South Africa*

Miller DLC and Pope A *Land Title in South Africa* (Juta Cape Town 2000)

Milton “Ownership”

Milton JRL “Ownership” in Zimmerman R and Visser D (eds) *Southern Cross Civil Law and Common Law in South Africa* (Juta Cape Town 1996) at 657-699

Monteiro *Ethics of Human Rights*

Monteiro AR *Ethics of Human Rights* (Springer Heidelberg 2014)

Mostert *The Constitutional Protection and Regulation of Property in South Africa and Germany*

Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany A Comparative Analysis* (Springer-Verlag Heidelberg 2002)

Mostert and Pope (eds) *The Principles of The Law of Property in South Africa*

Mostert H and Pope A (eds) *The Principles of The Law of Property in South Africa* (Oxford University Press Cape Town 2009)

Mousourakis *The Historical and Institutional Context of Roman Law*

Mousourakis G *The Historical and Institutional Context of Roman Law* (Ashgate Publishing Ltd Hampshire 2003)

Mousourakis *Fundamentals of Roman Private Law*

Mousourakis G *Fundamentals of Roman Private Law* (Springer Heidelberg 2012)

Munzer *A Theory of Property*

Munzer SR *A Theory of Property* (Cambridge University Press Cambridge 1990)

Narasimham “Water Law for India: Science and Philosophy Perspectives”

Narasimham TN “Water Law for India: Science and Philosophy Perspectives” in Iyer RR (ed) *Water and The Laws of India* (Sage India 2009) at 535-566

Nealer and Van Eeden “Challenges regarding potable water supply management by South African municipalities”

Nealer EJ and Van Eeden ES “Challenges regarding potable water supply management by South African municipalities” in Brebbia CA and Popov V (eds) *Water Resources Management V* (WIT Press Southampton 2009) at 55-64

Nwabueze *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information*

Nwabueze RN *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information* (Ashgate Publishing England 2007)

Olivier, Pienaar and Van der Walt *Sakereg Studentehandboek*

Olivier NJJ, Pienaar GJ and Van der Walt AJ *Sakereg Studentehandboek* (Juta Cape Town 1992)

Ostrom, Gardner and Walker *Rules, Games, & Common-Pool Resources*

Ostrom E, Gardner R and Walker J *Rules, Games, & Common-Pool Resources* (The University of Michigan Press Michigan 2006)

Papier *Recht der öffentlichen Sachen*

Papier HJ *Recht der öffentlichen Sachen* (Walter De Gruyter Berlin 1998)

Page “Reconceptualising property: Towards a sustainable paradigm”

Page J “Reconceptualising property: Towards a sustainable paradigm” in Edgeworth B, Moses L, Sherry C (eds) *Property Law Review Multiple perspectives on the law of real and personal property* (Thomson Reuters Sydney 2011)

Pearson *The Longman Companion to European Nationalism 1789-1920*

Pearson R *The Longman Companion to European Nationalism 1789-1920* (Routledge New York 2014)

Penner *The Idea of Property in Law*

Penner JE *The Idea of Property in Law* (Oxford University Press New York 1997)

Pienaar and Van der Schyff “The history, development and allocation of water rights in South Africa”

Pienaar GJ and Van der Schyff E “The history, development and allocation of water rights in South Africa” in Tempelhoff JWN *African Water Histories Transdisciplinary Discourses* (Vaal Triangle Faculty, North West University Vanderbijlpark 2005) at 263-280

Rabie “The Impact of Environmental Conservation on Land Ownership”

Rabie MA “The Impact of Environmental Conservation on Land Ownership” in Bennett TW *et al* (ed) *Land Ownership – Changing Concepts* (Juta Cape Town 1986) at 289-313

Radding and Ciaralli *The Corpus Iuris Civils in the Middle Ages Manuscripts*
Radding CM and Ciaralli A *The Corpus Iuris Civils in the Middle Ages Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill Leiden 2007)

Raff *Private Property and Environmental Responsibility*
Raff M *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (Kluwer Law International The Hague 2004)

Raiser "Eigentum als Recht des Menschen"
Raiser L "Eigentum als Recht des Menschen" in Schwartländer J and Willoweit D *Das Recht des Menschen auf Eigentum* (NP Engel Verlag, Kehl am Rhein Straβburg 1983) at 121-128

Rawls *A Theory of Justice*
Rawls J *A Theory of Justice* (*Harvard University Press* Cambridge 2009)

Reeve *Property*
Reeve A *Property* (Macmillan London 1986)

Roux "Property"
Roux T "Property" in Woolman S and Bischop M (eds) *Constitutional Law of South Africa* Loose-leaf edition Revision Service 6 2014 (Juta Cape Town 2003)

Ruddle "Changing the Focus of Coastal Fisheries Management"
Ruddle K "Changing the Focus of Coastal Fisheries Management" in Pomeroy RS (ed) *Community Management and Common Property of Coastal Fisheries in Asia and the Pacific: Concepts, Methods and Experiences* (ICLARM Philippines 1994) at 63-86

Salman and Bradlow *Regulatory Frameworks for Water Resources Management A Comparative Study*
Salman SMA and Bradlow DD *Regulatory Frameworks for Water Resources Management A Comparative Study* (The World Bank Washington DC 2006)

Schmidt-De Caluwe *Der Verwaltungsakt in der Lehre Otto Mayers*
Schmidt-De Caluwe R *Der Verwaltungsakt in der Lehre Otto Mayers: staatstheoretiesche Grundlagen, dogmatische Ausgestaltung und deren verfassungsbedingte Vergänglichkeit* (Mohr Siebeck Tübingen 1999)

Schulte *Eigentum und öffentliches Interesse*
Schulte H *Eigentum und öffentliches Interesse* (Duncker & Humblot Berlin 1970)

Singh *German Administrative Law In Common Law Perspective*
Singh MP *German Administrative Law In Common Law Perspective* (Springer-Verlag Heidelberg 1985)

Sonnekus and Neels *Sakereg Vonnisbundel*
Sonnekus JC and Neels JL *Sakereg Vonnisbundel* (Durban Butterworths 1994)

Stein *Roman Law in European History*
Stein P *Roman Law in European History* (Cambridge University Press Cambridge 2000)

Stolleis *Public Law in Germany* 1800-1914
Stolleis M *Public Law in Germany* 1800-1914 (Berhhahn New York 2001)

Taylor and Grinlinton "Property Rights and Sustainability: Toward a New Vision of Property"
Taylor P and Grinlinton D "Property Rights and Sustainability: Toward a New Vision of Property" in Grinlinton D and Taylor P (eds) *Property Rights and Sustainability The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Leiden 2011) at 1-20

Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*
Thielbörger P *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* (Springer Heidelberg 2014)

Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private law*
Thomas PHJ, Van der Merwe GG and Stoop BC *Historical Foundations of South African Private law* 2nd ed (Butterworths Durban 2000)

Thompson *Water Law A Practical Approach to Resource Management & The Provision of Services*
Thompson H *Water Law A Practical Approach to Resource Management & The Provision of Services* (Juta Cape Town 2006)

Tully *A Discourse on Property: John Locke and His Adversaries*
Tully J *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press Cambridge 1980)

Underkuffler *The Idea of Property: Its Meaning and Power*
Underkuffler LS *The Idea of Property: Its Meaning and Power* (Oxford University Press Oxford 2003)

Van Banning *The Human Right to Property*
Van Banning TRG *The Human Right to Property* (Intersentia Antwerpen 2001)

Van der Merwe *Sakereg*
Van der Merwe CG *Sakereg* (Butterworths Durban 1979)

Van der Merwe *"*Neighbour law*"*

Van der Merwe D *"*Neighbour law*"* in Zimmerman R and Visser D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta Kenwyn 1996) at 762-765

Van der Merwe and De Waal *The Law of Things & Servitudes*

Van der Merwe CG and De Waal MJ *The Law of Things & Servitudes* (Butterworths Durban 1993)

Van der Schyff "South African Natural Resources, Property Rights, and Public Trusteeship"

Van der Schyff E "South African Natural Resources, Property Rights, and Public Trusteeship" in Grinlinton D and Taylor P (eds) *Property Rights and Sustainability The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Leiden 2011) at 323-339

Van der Veen *Openbare zaken*

Van der Veen GA *Openbare zaken* (W.E.J Tjeenk Willink The Netherlands 1997)

Van der Vyver "The Ètatisation of Public Property"

Van der Vyver JD "The Ètatisation of Public Property" in Visser DP (ed) *Essays on the History of Law* (Juta Cape Town 1989) at 261-299

Van der Walt *Constitutional Property Clauses A Comparative Analysis*

Van der Walt AJ *Constitutional Property Clauses A Comparative Analysis* (Kluwer International Juta Cape Town 1999)

Van der Walt *Constitutional Property Law*

Van der Walt AJ *Constitutional Property Law* 3rd ed (Juta Cape Town 2011)

Van der Walt *The Constitutional Property Clause*

Van der Walt AJ *The Constitutional Property Clause A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Juta Kenwyn 1997)

Van der Walt *The Law of Neighbours*

Van der Walt AJ *The Law of Neighbours* (Juta Cape Town 2010)

Van der Walt and Pienaar *Introduction to the Law of Property*

Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* (Juta Claremont 2009)

Van Leeuwen *Censura Forensis*

Van Leeuwen S *Censura Forensis Part 1* of Book 5 translated by Hewett M in SA Law Commission Research Series no 15 (Pretoria 1991)

Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg*
Van Zyl DH *Geskiedenis en Beginsels van die Romeinse Privaatreg* (Butterworths Durban 2003)

Venter *Constitutional Comparison Japan, Germany, Canada & South Africa as Constitutional States*
Venter F *Constitutional Comparison Japan, Germany, Canada & South Africa as Constitutional States* (Juta Cape Town 2000)

Venter "The Rule of Law as a Global Norm for Constitutionalism"
Venter F "The Rule of Law as a Global Norm for Constitutionalism" in Silkenat JR, Hickey JE, Barenboim PD (eds) *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer London 2014) at 91-104

Vos *Principles of South African Water Law*
Vos WJ *Principles of South African Water Law* (Juta Cape Town 1978)

Waldron *The Right to Private Property*
Waldron J *The Right to Private Property* (Oxford University Press New York 1988)

Wantuch-Thole *Cultural Property in Cross-Border Litigation: Turning Rights into Claims*
Wantuch-Thole M *Cultural Property in Cross-Border Litigation: Turning Rights into Claims* (De Gruyter Berlin 2015)

Wessels *History of the Roman-Dutch Law*
Wessels JW *History of the Roman-Dutch Law* (African Book Company Ltd Grahamstown 1908)

Whitman *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change*
Whitman JQ *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton University Press Oxford 1990)

Wieling *Sachenrecht*
Wieling HJ *Sachenrecht* (Springer Berlin 2007)

Wolff and Raiser *Sachenrecht*
Wolff M and Raiser L *Sachenrecht* (JCB Mohr Tübingen 1957)

Wilhelm *Sachenrecht*

Wilhelm J *Sachenrecht* (De Gruyter Berlin 2002)

Wurzel *Environmental policy-making in Britain, Germany and the European Union The Europeanisation of air and water pollution control*

Wurzel RKW *Environmental policy-making in Britain, Germany and the European Union The Europeanisation of air and water pollution control* (Manchester University Press Manchester 2002)

Zekoll and Reimann *Introduction to German Law*

Zekoll J and Reimann M *Introduction to German Law* 2nd ed (Kluwer Law International The Hague 2005)

Ziff *Principles of Property Law*

Ziff B *Principles of Property Law* 5th ed (Carswell Toronto 2010)

Theses and Dissertations

Du Plessis *Fulfilment of South Africa's constitutional environmental right in the local government sphere*

Du Plessis AA *Fulfilment of South Africa's constitutional environmental right in the local government sphere* (LLD-thesis University of North-West 2008)

Du Plessis *Compensation for Expropriation under the Constitution*

Du Plessis E *Compensation for Expropriation under the Constitution* (LLD-thesis Stellenbosch University 2009)

Erlank *Property in Virtual Worlds*

Erlank W *Property in Virtual Worlds* (LLD-thesis Stellenbosch University 2012)

Kellerman *The Constitutional Property Clause and Immaterial Property Interests*

Kellerman M *The Constitutional Property Clause and Immaterial Property Interests* (LLD-thesis Stellenbosch University 2010)

Van der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?*

Van der Schyff E *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* (LLM-dissertation North-West University 2003)

Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002*

Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD-thesis North-West University 2006**)**

Van der Walt *Die Ontwikkeling van Houerskap*

Van der Walt AJ *Die Ontwikkeling van Houerskap* (LLD-thesis Potchefstroom University for Christian Higher Education 1985)

Van der Walt *The concept of "beneficial use" in South African water law reform*

Van der Walt M *The concept of "beneficial use" in South African water law reform* (LLD-thesis North-West University 2011)

Viljoen *The Public Trust Doctrine in South African Water Law*

Viljoen G *The Public Trust Doctrine in South African Water Law* (LLM-dissertation North-West University 2009)

Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling*

Wessels C *Waterreg in 'n nuwe Konstitutionele Bedeling* (LLM-dissertation Potchefstroomse Universiteit vir Christelike Hoër Onderwys 2001)

Young *Public Trust and Res Publicae in South African Law*

Young CL *Public Trust and Res Publicae in South African Law Towards a unified regulatory system of water in light of the National Water Act* 36 of 1998 (LLB-dissertation University of Cape Town 2009)

Young *Public Trusteeship and Water Management*

Young CL *Public Trusteeship and Water Management: Developing the South African concept of public trusteeship to improve management of water resources in the context of South African water law* (PhD-thesis University of Cape Town 2014)

Old authorities

De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid*

De Groot H *Inleidinge tot de Hollandsche Rechts-geleerdheid* (Amsterdam 1738)

Gaius *Institutes*

Gaius *The Institutes of Gaius* Translated by Gordon WM and Robinson OF (Duckworth London 1988)

Groenewegen *De Legibus Abrogatis*

Groenewegen S *De Legibus Abrogatis* (Hoogenhuysen, 1664)

Hume *A Treatise of Human Nature*

Hume D *A Treatise of Human Nature* reprinted by Selby-Bigge LA (ed) (Clarendon Press Oxford 1896)

Van Leeuwen *Rooms-Hollandsch Regt*

Van Leeuwen S *Rooms-Hollandsch Regt* (Jan Boom Amsterdam 1720)

Vinnius *Institutionum Imperialium Commentarius*

Vinnius A *Institutionum Imperialium Commentarius* (Amsterdam 1722)

Voet *Commentarius ad Pandectas*

Voet J *Commentarius ad Pandectas* as translated by Gane P in *The Selective Voet being the Commentary on the Pandects by Johannes Voet* (Butterworths Durban 1955)

Journals

Albrecht 2013 *Land Use Policy*

Albrecht J "The Europeanization of water law by the Water Framework Directive: A second chance for water planning in Germany" 2013 *Land Use Policy* 381-391

Alchian 1965 *II Politico*

Alchian AA "Some Economics of Property Rights" 1965 *II Politico* 816-829

Alexander 2003 *Cornell Law Review*

Alexander GS "Property as a Fundamental Constitutional Right? The German Example" 2003 *Cornell Law Review* 101-144

Alexander 1982 *Columbia Law Review*

Alexander GS "The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis" 1982 *Columbia Law Review* 1545-1599

Anderson 2006 *Journal of Legal Education*

Anderson JL "Comparative Perspectives on Property Rights: The Right to Exclude" 2006 *Journal of Legal Education* 539-550

Ault and Rutman 1979 *Journal of Law and Economics*

Ault DE and Rutman GL "The Development of Individual Rights to Property in Tribal Africa" 1979 *Journal of Law and Economics* 163-182

Barrett and Jaichand 2007 *SAJHR*

Barrett D and Jaichand V "The Right to Water, Privatised Water and Access to Justice: Tackling United Kingdom Water Companies' Practices in Developing Countries" 2007 *South African Journal of Human Rights* 543-562

Bell, Henry and Wray 2004 *Review of Social Economy*

Bell SA, Henry JF and Wray LR "A Chartalist Critique of John Locke's Theory of Property" 2004 *Review of Social Economy* 51-65

Bell and Parchomovsky 2005 *Cornell Law Review*

Bell A and Parchomovsky G "A Theory of Property" 2005 *Cornell Law Review* 531-615

Blumm 2010 *Pace Environmental Law Review*

Blumm MC "The Public Trust Doctrine and Private Property: The Accommodation Principle" 2010 *Pace Environmental Law Review* 649-667

Blumm and Guthrie 2012 *University of California Davis Law Review*

Blumm MC and Guthrie RD "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" 2012 *University of California Davis Law Review* 471-808

Bonfield 1970 *University of Pennsylvania Law Review*
Bonfield AE "Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts" 1970 *University of Pennsylvania Law Review* 540-611

Bouckaert 1990 *Harvard Journal of Law and Public Policy*
Bouckaert B "What is Property?" 1990 *Harvard Journal of Law and Public Policy* 775-816

Bowen 1925-1926 *The Cornell Law Quarterly*
Bowen E "The Concept of Private Property" 1925-1926 *The Cornell Law Quarterly* 41-48

Bratspies 2001 *Harvard Environmental Law Review*
Bratspies R "Finessing King Neptune: Fisheries management and the limits of international law" 2001 *Harvard Environmental Law Review* 213-258

Ciriacy-Wantrup and Bishop 1975 *Natural Resources Journal*
Ciriacy-Wantrup SV and Bishop RC "'Common Property' as a concept in natural resources policy" *Natural Resources Journal* 713-727

Claeys 2009 *Seattle University Law Review*
Claeys ER "Property 101: Is Property a Thing or a Bundle?" 2009 *Seattle University Law Review* 617-650

Cloete 2003 *Obiter*
Cloete R "Die Plek en Rol van Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg: 'n Kritiese Oorsig" 2003 *Obiter* (24) 65-86

Cohen 1927-1928 *The Cornell Law Quarterly*
Cohen MR "Property and Sovereignty" 1927-1928 *The Cornell Law Quarterly* 8-30

Coles 1993 *Boston College Environmental Affairs Law Review*
Coles CM "Land Reform for Post-Apartheid South Africa" 1993 *Boston College Environmental Affairs Law Review* 699-759

Cox *et al* 2009 *Southern Economic Journal*
Cox JC, Ostrom E, Walker JM and Castillo AJ "Trust in Private and Common Property Experiments" 2009 *Southern Economic Journal* 957-975

Cribbet 1986 *University of Illinois Law Review*
Cribbet JE "Concepts in Transition: The Search for a New Definition of Property" 1986 *University of Illinois Law Review* 1-42

Crow and Sultana 2002 *Society & Natural Resources: An International Journal*
Crow B and Sultana F "Gender, Class and Access to Water: Three Cases in a Poor and Crowded Delta" 2002 Society & Natural Resources: An International Journal 709-724

Currie 1993 *The American Journal of Comparative Law*
Currie DP “Separation of Powers in the Federal Republic of Germany” 1993 *The American Journal of Comparative Law* 201-260

Dagan 2003 *California Law Review*
Dagan H “The Craft of Property” 2003 *California Law Review* 1517-1572.

Demsetz 1967 *The American Economic Review*
Demsetz H “Toward a Theory of Property Rights” 1967 *The American Economic Review* 347-359

Diamond 2009 *Saint Louis University Public Law Review*
Diamond M 2009 “The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty” Saint *Louis University Public Law Review* 85-112

Du Bois and Visser 2003 *Transnat’l L. & Contemp. Probs*
Du Bois F and Visser D “The Influence of Foreign Law in South Africa” 2003 *Transnat’l L. & Contemp. Probs* 13 593-658

Dunning 1988-1989 *Environmental Law*
Dunning HC “The Public Trust: A Fundamental Doctrine of American Property Law” 1988-1989 *Environmental Law* 515-525

Du Plessis 2010 *Review of European Community & International Environmental Law*
Du Plessis AA “A Government in Deep Water? Some Thoughts on the State’s Duties in Relation to Water Arising from South Africa’s Bill of Rights” 2010 19 *Review of European Community & International Environmental Law* 316-327

Earle 2006 *German Law Journal*
Earle W “Review Essay- Murray Raff’s Private Property and Environmental Responsibility- A Comparative Study of German Real Property Law” 2006 *German Law Journal* 323-332

Fay 1911 *The American Historical Review*
Fay SB “The Roman Law and the German Peasant” 1911 *The American Historical Review* 234-254

Feris 2012 *Law Environment and Development Journal*
Feris L “The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa” 2012 *Law Environment and Development Journal* 1-18

Fuo 2013 *Murdoch University Law Review*
Fuo ON “The Right of Access to Sufficient Water in South Africa: Comments on *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128” 2013 *Murdoch University Law Review* 20(2) 21-37

Gabru 2005 *PER*
Gabru N “Some comments on Water Rights in South Africa” 2005 *PER* 1-33

George 2005 *Oxford Journal of Legal Studies*
George A “The Difficulty of Defining ‘Property’” 2005 *Oxford Journal of Legal Studies* 793-813

Ginsburg and Dixon 2011 *Constitutional Court Review*
Ginsburg T and Dixon R “The South African Constitutional Court and Socio-Economic Rights as “Insurance Swaps”” 2011 *Constitutional Court Review* 1-29

Guelke and Shell 1992 *J. South. Afr. Stud.*
Guelke L and Shell R “Landscape of conquest: frontier water alienation and Khoikhoi strategies of survival, 1652-1780” 1992 *J. South. Afr. Stud.* 803-824

Gleick 1993 *International Security*
Gleick PH " Water and Conflict: Fresh Water Resources and International Security" 1993 *International Security* 79-112

Gleick 1998 *Water Policy*
Gleick PH “The human right to water” 1998 *Water Policy* 487-503

Glück 2002 *Forest Policy and Economics*
Glück P “Property rights and multipurpose mountain forest management” 2002 *Forest Policy and Economics* 125-134

Goldberg 2012 *Harvard Law Review*
Goldberg JCP “Introduction: Pragmatism and Private Law” 2012 *Harvard Law Review* 125 1640

Grafton, Squires and Fox 2000 *Journal of Law & Economics*
Grafton RQ, Squires D and Fox KJ “Private Property and Economic Efficiency: A Study of a Common-Pool Resource” 2000 *Journal of Law & Economics* 679-714

Habdas 2011 *TSAR*
Habdas M “Who needs a park or a city square? The notion of public real estate as *res publicae*” *TSAR* 626-649

Haddad 2003 *Ecological Economics*
Haddad BM “Property rights, ecosystem management, and John Locke’s labour theory of ownership” 2003 *Ecological Economics* 19-31

Hardin 1968 *Science*
Hardin G “The Tragedy of the Commons” 1968 *Science* 1243-1248

Hart 1979 *Columbia Law Review*
Hart HLA “Between Utility and Rights” 1979 *Columbia Law Review* 828-846

Hausman 1995 *Mind Association*
Hausman DM “The Impossibility of Interpersonal Utility Comparisons”1995 *Mind Association* 474

Hausman and McPherson 2009 *Economics and Philosophy*
Hausman DM and McPherson MS “Preference satisfaction and Welfare economics” 2009 *Economics and Philosophy* 1-25

Jansen van Rensburg 2008 *Stellenbosch Law Review*
Jansen van Rensburg L “The right of access to adequate water [Discussion of Mazibuko v The City of Johannesburg Case No:06/13865]” 2008 *Stellenbosch Law Review* (19) (3) 415-435

Johnson 2007-2008 *Vermont Law Review*
Johnson DR “Reflections on the Bundle of Rights” 2007-2008 *Vermont Law Review* 247-272

Juergensmeyer and Wadley *Natural Resources Journal*
Juergensmeyer JC and Wadley JB “The Common Lands Concept: A "Commons" Solution To A Common Environmental Problem” 1974 *Natural Resources Journal* 361-381

Katz 2008 *University of Toronto Law Journal*
Katz L “Exclusion and Exclusivity in Property Law” 2008 *University of Toronto Law Journal* 275-315

Klare 1998 *SAJR*
Klare K “Legal culture and transformative constitutionalism" 1998 *SAJHR* 146-188

Klasen 2000 *Review of Income and Wealth*
Klasen S "Measuring Povert and Deprivation in South Africa" 2000 *Review of Income and Wealth* 33-58

Kleyn 1996 *SAPR/PL*
Kleyn D “The constitutional protection of property: a comparison between the German and the South African approach” 1996 *SAPR/PL* 402-445

Kotzé 2007 *Review of European, Comparative & International Environmental Law*
Kotzé LJ “The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection” 2007 *Review of European, Comparative & International Environmental Law* 298-311

Kotzé 2010 *Journal of Human Rights and the Environment*
Kotzé LJ “Phiri, the plight of the poor and the perils of climate change: time to rethink environmental and socio-economic rights in South Africa?” 2010 *Journal of Human Rights and the Environment* 135-160

Kotzé and Du Plessis 2010 *Journal of Court Innovation*
Kotzé LJ and Du Plessis AA "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa" 2010 *Journal of Court Innovation* 157-176

Kube 1997 *Natural Resources Journal*
Kube H "Private Property in Natural Resources and the Public Weal in German Law- Latent Similarities to the Public Trust Doctrine?" 1997 *Natural Resources Journal* 857-880

Lipton 1999 *International Journal of Law and Information Technology*
Lipton JD "A Revised "Property" Concept for the New Millennium" 1999 *International Journal of Law and Information Technology* 171-190

Lobingier *Michigan Law Review*
Lobingier CS "The Reception of the Roman Law in Germany" 1916 *Michigan Law Review* 562-569

Longo 1981-1983 *University of Tasmania Law Review*
Longo JP "The Concept of Property and the concept of compensation on compulsory acquisition of land" 1981-1983 *University of Tasmania Law Review* 279-294

Lubens 2007 *Arizona Journal of International & Comparative Law*
Lubens R "The Social Obligation Of Property Ownership: A Comparison Of German And U.S. Law" 2007 *Arizona Journal of International & Comparative Law* 389-449

Mabin 2007 *Journal of South African Studies*
Mabin A "Comprehensive Segregation: the Origins of the Group Areas Act and its Planning Apparatuses" 2007 *Journal of South African Studies* 18(2) 405-429

Mayer 1907 *AöR*
Mayer O "Der gegenwärtige Stand der Frage des öffentlichen Eigentums" 1907 *AöR* (21) 499-522

Mayer 1920 *AöR*
Mayer O "Neues vom öffentlichen Eigentum" 1920 *AöR* (39) 77-95

Marais 2015 *PER*
Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" 2015 PER 2983-3031

Merril 1998 *Nebraska Law Review*
Merril TW "Property and the Right to Exclude" 1998 *Nebraska Law Review* 730-755

Merrill and Smith 2001 *The Yale Law Journal*
Merrill TW and Smith HE "What Happened to Property in Law and Economics?" 2001 *The Yale Law Journal* 357-398

Mossoff 2003 *Arizona Law Review*
Mossoff A "What is Property? Putting the Pieces Back Together" 2003 *Arizona Law Review* 371-443

Mostert 2002 *The South African Law Journal*
Mostert H "Land Restitution, Social Justice and Development in South Africa" 2002 *The South African Law Journal* 400-428

Mostert 2003 *SAJHR*
Mostert H "The Distinction between Deprivations and Expropriations and the Future of the "Doctrine" of Constructive Expropriation in South Africa" 2003 *SAJHR* 567-592

Mostert 2010 *The South African Law Journal*
Mostert H "Engaged Citizenship and the Enabling State as Factors Determining the Interference Parameter of Property: A Comparison of German and South African Law" 2010 *The South African Law Journal* 273

Movik and De Jong 2011 *Law, Environment and Development Journal*
Movik S and De Jong F "Licence to Control: Implications of Introducing Administrative water use rights in South Africa" 2011 *Law, Environment and Development Journal* 66-78

Murphy 1993 *THRHR*
Murphy J "Property rights in the new Constitution: An analytical framework for constitutional review" 1993 *THRHR* 623-644

Nestorovska 2005 *Hanse Law Review*
Nestorovska D "Influences of Roman Law and Civil Law on the Common Law" 2005 *Hanse Law Review* 79-88

Neumann 1996 *Annual Survey of International & Comparative Law*
Neumann MT "The Environmental Law System of the Federal Republic of Germany" 1996 *Annual Survey of International & Comparative Law* 69-42

Olson 1975 *Detroit College of Law Review*
Olson J "The Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Reallocation of Natural Resources in Michigan" 1975 *Detroit College of Law Review* 161-209

Ostrom *et al* 1999 *Science*
Ostrom E, Burger J, Field CB, Norgaard RB and Policansky D "Revisiting the Commons: Local Lessons, Global Challenges" 1999 *Science* 278-283

Ostrom 2003 *Journal of Theoretical Politics*
Ostrom E "How Types of Goods and Property rights jointly affect collective action" 2003 *Journal of Theoretical Politics* 239-270

Penner 1995-1996 *UCLA Law Review*
Penner JE "The 'Bundle of Rights' Picture of Property" 1996 *UCLA Law Review* 711-820

Pienaar 1986 *TSAR*
Pienaar GJ "Ontwikkelings in die Suid-Afrikaanse Eiendomsbegrip in Perspektief" 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308

Pienaar 1989 *THRHR*
Pienaar GJ "Die ruimtelike Aspek van Eiendomsreg op Onroerende Goed- die *cuius est solum* Beginsel" 1989 (52) *THRHR* 216-227

Pienaar and Van der Schyff 2007 *Law Environment and Development Journal*
Pienaar GJ and Van der Schyff E "The Reform of Water Rights in South Africa" 2007 *Law Environment and Development Journal* (3/2) 181-194

Pieterse 2003 *The South African Law Journal*
Pieterse M "Towards a useful role for section 36 of the Constitution in Social Rights Cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council" 2003 *The South African Law Journal* 41-48

Philbrick 1938 *University of Pennsylvania Law Review*
Philbrick FS "Changing conceptions of Property in law" 1938 *University of Pennsylvania Law Review* 691-732

Pulido 2010 *Annals of the Association of American Geographers*
Pulido L "Rethinking Environmental Racism: White Privilege and Urban Development in Southern California" 2010 *Annals of the Association of American Geographers* 12-40

Rawls 1980 *The Journal of Philosophy*
Rawls J "Kantian Constructivism in Moral Theory" 1980 *The Journal of Philosophy* 515-572

Rawls 1985 *Philosophy & Public Affairs*
Rawls J "Justice as Fairness: Political not Metaphysical" 1985 *Philosophy & Public Affairs* 223-251

Reich 1964 *The Yale Journal*
Reich CA "The New Property"1964 *The Yale Journal* 733-787

Rheinstein 1958-1959 *Indiana Law Journal*
Rheinstein M "The Approach to German Law" 1958-1959 *Indiana Law Journal* 546-558

Rose 1989-1990 *Tennessee Law Review*
Rose CM “Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach” 1989-1990 *Tennessee Law Review* 577-594

Rose 1999 *Yale Law School Legal Scholarship Repository*
Rose CM “Canons of Property Talk, or Blackstone’s Anxiety” 1999 *Yale Law School Legal Scholarship Repository* 601-632

Rose 2003 *Law and Contemporary Problems*
Rose CM “Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age” 2003 *Law and Contemporary Problems* 89-110

Rose 1996 *Washington and Lee Law Review*
Rose CM “A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation” 1996 *Washington and Lee Law Review* 265-299

Rose 1986 *The University of Chicago Law Review*
Rose CM “The Comedy of the Commons: Commerce, Custom, and Inherently Public Property” 1986 *The University of Chicago Law Review* 711-781

Rüegger 2014 *Law, Environment and Development Journal*
Rüegger V “Water Distribution in the Public Interest and the Human Right to Water: Swiss, South African and International Law Compared” 2014 *Law, Environment and Development Journal* 1-19

Sax 1970 *Michigan Law Review Association*
Sax JL “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention” 1970 *Michigan Law Review Association* 471-566

Sax 1982-1983 *Washington Law Review*
Sax JL “Some Thoughts on the Decline of Private Property” 1982-1983 *Washington Law Review* 481-496

Sand 2004 *Global Environmental Politics*
Sand P “Sovereignty bounded: Public trusteeship for common pool resources” 2004 *Global Environmental Politics* 47-71

Sarkin 1998 *Journal of Constitutional Law*
Sarkin J “The effect of Constitutional Borrowings” 1998 (1:2) *Journal of Constitutional Law* 176-204

Schlager and Ostrom 1992 *Land Economics*
Schalger E and Ostrom E “Property-Rights Regimes and Natural Resources: A conceptual Analysis” 1992 *Land Economics* 249-262

Schmidt-Jortzig 1987 *Neue Zeitschrift für Verwaltungsrecht*
Schmidt-Jortzig E "Vom öffentlichen Eigentum zur öffentlichen Sache" 1987 *Neue Zeitschrift für Verwaltungsrecht* 1025-1031

Seckler, Barker and Amarasinghe 1999 *International Journal of Water Resources Development*
Seckler D, Barker R & Amarasinghe U "Water Scarcity in the Twenty-first Century" 1999 *International Journal of Water Resources Development* 29-42

Serfontein 2013 *Journal of Juridical Science*
Serfontein EM "Die Ontwikkeling van die Suid-Afrikaanse gemenereg: 'n Geskiedkundig-sosiaal-kontekstuele analistiese benadering" 2013 *Journal of Juridical Science* 38(1) 1-26

Seipp 1994 *Law and History Review*
Seipp DJ "The Concept of Property in the Early Common Law" 1994 *Law and History Review* (12)(91) 29-91

Smith 2012 *Harvard Law Review*
Smith HE "Property as the Law of Things" 2012 *Harvard Law Review* 1691-1726

Snare 1972 *American Philosophical Quarterly*
Snare F "The Concept of Property" 1972 *American Philosophical Quarterly* 200-206

Soltau 1999 *Acta Juridica*
Soltau F "Environmental Justice, Water Rights and Property" 1999 *Acta Juridica* 229-253

Stein 2005 *Texas Law Review*
Stein R "Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System" 2005 *Texas Law Review* 2167-2183

Stewart and Horsten 2009 *SAPL*
Stewart L and Horsten D "The role of sustainability in the adjudication of the right to access to adequate water" 2009 *SAPL* 486-505

Tewari 2009 *Water SA*
Tewari DD "A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present" 2009 *Water SA* 639-710

Thiel 2015 *Land Use Policy*
Thiel A "Constitutional state structure and scalar re-organization of natural resource governance: The transformation of polycentric water governance in Spain, Portugal and Germany" 2015 *Land Use Policy* 176-188

Tisdell 2003 *Social Justice Research*
Tisdell JG “Equity and Social Justice in Water Doctrines” 2003 *Social Justice Research* 401-416

Turnipseed *et al* 2010 *Environment*
Turnipseed M *et al* ”Reinvogorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law” 2010 *Environment* 6-14

Trealease 1957 *California Law Review*
Trealease FJ “Government Ownership and Trusteeship of Water” 1957 *California Law Review* 638-654

Van der Schyff 2010 *PER*
Van der Schyff E “Unpacking the Public Trust Doctrine: A Journey into Foreign Territory” 2010 13(5) *PER* 122-159

Van der Schyff 2013 *The South African Law Journal*
Van der Schyff E “Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African soil?” 2013 *The South African Law Journal* 369-389

Van der Schyff and Pienaar 2007 *Law Environment and Development Journal*
Van der Schyff E and Pienaar GJ “The Reform of water rights in South Africa” 2007 *Law Environment and Development Journal* 181-194

Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa*
Van der Schyff E and Viljoen G “Water and the public trust doctrine- a South African perspective” 2008 *The Journal for Transdisciplinary Research in Southern Africa* 339-354

Van der Walt 1988 *De Jure*
Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” 1988 *De Jure* 16-35

Van der Walt 1988 *De Jure*
Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)” 1988 *De Jure* 306-325

Van der Walt 1993 *SAPR/PL*
Van der Walt AJ “The Impact of a bill of rights on property law” 1993 *SAPR/PL* 296-319

Van der Walt 1994 *THRHR*
Van der Walt AJ “Notes on the interpretation of the Property Clause in the New Constitution” 1994 *THRHR* 181-203

Van der Walt 1995 *SAPR/PL*

Van der Walt AJ “Towards a theory of rights in property: exploratory observations on the paradigm of post-apartheid property law” 1995 *SAPR/PL* 299-345

Van der Walt 1995 *South African Journal on Human Rights*

Van der Walt AJ “Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law” 1995 *South African Journal on Human Rights* 169-209

Van der Walt 1995 *TSAR*

Van der Walt AJ “Rights and reforms in property theory-a review of property theories and debates in recent literature: part iii” 1995 *TSAR* 496-526

Van der Walt 1997 *SAPR/PL*

Van der Walt AJ “The limits of constitutional property” 1997 *SAPR/PL* 275-330

Van der Walt 2001 *The South African Law Journal*

Van der Walt AJ “Dancing with the codes- Protecting, Developing and Deconstructing property rights in s constitutional state” 2001 118 *The South African Law Journal* 258-311.

Van der Walt 2002 *SAPR/PL*

Van der Walt AJ “Resisting orthodoxy- again: Thoughts on the development of post-apartheid South African law” 2002 *SAPR/PL* 258-278

Van der Walt 2002 *SAJHR*

Van der Walt AJ “Exclusivity of Ownership, Security of Tenure and Eviction orders: A Critical Evaluation of Recent Case law” 2002 *SAJHR* 372-420

Van der Walt 2002 *TSAR*

Van der Walt AJ “Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African Land-reform legislation” 2002 *TSAR* 254-289.

Van der Walt 2004 *SAPR/PL*

Van der Walt AJ “An overview of developments in constitutional property law since the introduction of the property clause in 1993” 2004 *SAPR/PL* 46-89

Van der Walt 2004 *SAPR/PL*

Van der Walt AJ “The Public Aspect of Private Property” 2004 (19:3) *SAPR/PL* 676-723

Van der Walt 2005 *TSAR*

Van der Walt AJ “Transformative constitutionalism and the development of South African property law (part 1)” 2005 *TSAR* 655-689

Van der Walt 2008 *Stell LR*
Van der Walt AJ “Property, Social Justice and Citizenship; Property law in Post-Apartheid South Africa” 2008 *Stell LR* (3) 325-346

Van der Walt and Shay 2014 *PER*
Van der Walt AJ and Shay RM “Constitutional Analysis of Intellectual Property” 2014 *PER* 54-87

Vandevelde 1980 *Buffalo Law Review*
Vandevelde KJ “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property” 1980 *Buffalo Law Review* 325-367

Van Wyk 1996 *TSAR*
Van Wyk J “Neighbours- their place and role in town and regional planning- a perspective from German law”1996 *TSAR* 279-301

Van Wyk and Oranje 2014 *Planning Theory*
Van Wyk J and Oranje M “The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?” 2014 *Planning Theory* 349-369

Van Warmelo 1957 *Tijdschrift voor Rechtsgeschiedenis*
Van Warmelo P “Aspects of Joint Ownership in Roman Law” 1957 *Tijdschrift voor Rechtsgeschiedenis* 126-195

Venter 2001 *PER*
Venter F "Utilizing constitutional values in constitutional comparison" *PER* 4:1 1-22

Venter 2012 *McGill Law Journal*
Venter F “South Africa: A Diceyan Rechtsstaat?” 2012 *McGill Law Journal* 57(4) 721-747

Waldron 1985 *Oxford Journal of Legal Studies*
Waldron J “What is Private Property?” 1985 *Oxford Journal of Legal Studies* 313-349

Welch 1983 *Policy Sciences*
Welch WP “The Political Feasibility of Full Ownership Property Rights: The Cases of Pollution and Fisheries” 1983 *Policy Sciences (16)* 165-180

Wenar 1997 *Columbia Law Review*
Wenar L “The Concept of Property and the Takings Clause” 1997 *Columbia Law Review* 1923-1946

Zellmer and Harder 2007 *Nebraska Lawyer*
Zellmer SB and Harder J “Is water property?” 2007 *Nebraska Lawyer* 5-12

Zimmerman 2005 *South African Law Journal*

Zimmerman J "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *South African Law Journal* 378-418

Miscellaneous

Onions (ed) *The Shorter Oxford English Dictionary on Historical Principles*

Onions (ed) The Shorter Oxford English Dictionary on Historical Principles (Oxford University Press 1968)

Seekings 2005 *The Colour of Desert: Race, Class and Distributive Justice in Post-Apartheid South Africa*

Seekings J 2005 *The Colour of Desert: Race, Class and Distributive Justice in Post-Apartheid South Africa* CSSR Working Paper 126 (Centre for Social Science Research University of Cape Town 2005)

Turnbull (ed) *Oxford Advanced Learner's Dictionary International Student's Edition*

Turnbull J (ed) *Oxford Advanced Learner's Dictionary International Student's Edition* 8th edition (Oxford University Press Oxford 2010)

Register of South African Cases

Agri South Africa v Minister of Minerals and Energy and Another 2011 3 SA 296 (GNP)

Agri South Africa v Minister for Minerals and Energy 2013 4 SA 1 (CC)

Anderson & Murison v Colonial Government 1891 8 (SC)

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 1 SA 350 (T)

Beckenstrated v Sand River Irrigation Board 1964 4 SA 510 (T)

Bengewenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 3 BCLR 229 (CC)

BP Southern Africa (Ltd) v MEC for Agriculture, Conservation and Land Affairs 2004 5 SA 124 (WLD)

Butgereit & another v Transvaal Canoe Club 1988 1 SA 759 (SCA)

City of Johannesburg and Others v Lindiwe Mazibuko and Others Case No 489/08 2009 ZA (SCA)

Commissioner for Inland Revenue v Estate Crewe 1943 (AD)

Consolidated Diamond Mines v Administrator, SWA 1958 4 SA 572 (SCA)

De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and others 3215/06 2007 74 (ZAFSHC)

De Villiers v Cape Divisional Council 1874 5 Buch

De Wet v Cloete 1830 1 Men

Diepsloot Resident's and Landowners Association v Administrator, Transvaal 1993 1 SA 577 (T)

Divisional Council of the Cape Division v De Villiers 1877 2 (AC) 567

Du Toit v Minister of Transport 2006 1 SA 297 (CC)

DVB Behuising (Pty) Ltd v North West Provincial Government and others 2000 4 BCLR 347 (CC)

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)

Ex Parte Eloff 1953 1 SA 617 (T)

Ex Parte Geldenhuys 1926 (OPD) 155

Federation for Sustainable Environment and Others v Minister of Water Affairs 2012 (ZAGPPHC)

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 2002 7 BCLR 702 (CC)

Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others 2007 10 BCLR 1059 (CC)

Gien v Gien 1979 2 SA 1113 (T)

Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others 2011 8 BCLR 761 (CC)

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC)

Harksen v Lane NO 1998 1 SA 300 (CC)

Holland v Scott 1882 2 (EDC)

Hornby v Municipality of Roodepoort 1918 AD

Hough v Van der Merwe 1874 4 Buch 148

HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2006 5 SA 512 (T)

In re:KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; In re: Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995 1996 7 BCLR 903 (CC)

Jaftha v Schoeman and Others, Van Rooyen v Stolz and Others 2005 1 BCLR 78 (CC)

Johannesburg Municipal Council v Rand Townships Registrar 1910 TPD

Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International 2006 1 SA 144 (CC)

London and SA Exploration Company v Rouliot 1891 8 SC

Machele v Mailula 2009 8 BCLR 767 (CC)

Mazibuko v The City of Johannesburg Case No 13865/06

Mazibuko v The City of Johannesburg and Others 2010 3 BCLR 239 (CC)

Minister of Transport v Du Toit 2005 10 BCLR 964 (CC)

Minister van Waterwese v Mostert en Andere 1964 2 SA 656 (A)

Minister of Minerals and Energy v Agri SA 2012 5 SA 1 (SCA)

Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others 2005 1 SA 530 (CC)

Mostert Snr and Another v S 2010 2 All SA 482 (SCA)

Nokotyana v Ekurhuleni Metropolitan Municipality 2010 4 BCLR 312 (CC)

Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 1 SA 293 (CC)

Prinsloo v Shaw 1938 AD

Regal v African Superslate (Pty) Ltd 1963 1 SA 102 (A)

Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 6 BCLR 625 (W)

Retief v Louw 1874 4 Buch 165

Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others 2015 6 SA 125 (CC)

Steinberg v South Peninsula Municipality 2001 4 SA 1243 (SCA)

Stellenbosch Divisional Council v Shapiro 1953 3 SA 418 (C)

Surveyor-General (Cape) v Estate De Villiers 1923 AD

S v Makwanyane 1995 3 SA 391 (CC)

Tongaat Group Ltd v Minister of Agriculture 1977 2 SA 961 (SCA)

Tongoane v National Minister for Agriculture and Land Affairs 2010 8 BCLR 741 (CC)

Transkei Public Servants Association v Government of the Republic of South Africa 1995 9 BCLR 1235 (Tk)

Transvaal Canoe Union v Garbett 1993 4 SA 829 (SCA)

Transvaal Canoe Union v Butgereit & another 1986 4 SA 207 (T)

Union Government v Marais 1920 AD

Van der Walt v Rex 1939 GW 52

Van der Westhuizen v Du Toit 1912 CPD

Van Heerden v Wiese 1880 Buch AC 5

Van Rensburg v Taute 1975 1 SA 279 (SCA)

Vermaak v Palmer 1876 6 Buch 25

Webb & Co Ltd v Northern Rifles 1908 TS

Zondi v MEC for Traditional and Local Government Affairs 2004 5 BCLR 547 (N)

South African Legislation

Broad-Based Black Economic Empowerment Act 53 of 2003

Cape Act 32 of 1906

Bantu Homelands Citizenship Act 26 of 1970

Bantu Homelands Constitution Act 21 of 1971

Constitution of the Republic of South Africa, 1996

Deeds Registry Act 47 of 1937

Development Trust and Land Act 18 of 1936

Expropriation Act 63 of 1975

Expropriation Bill, 2015

Group Areas Act 41 of 1950

Group Areas Development Act 69 of 1955

Human Tissue Act 65 of 1983

Interim Constitution of the Republic of South Africa Act 200 of 1993

Irrigation Act 8 of 1877

Irrigation Act 26 of 1887

Irrigation Act 26 of 1891

Irrigation Act 11 of 1894

Irrigation and Conservation of Waters Act 8 of 1912

Mineral and Petroleum Resources Development Act 28 of 2002

National Environmental Management Act 107 of 1998

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Forest Amendment Bill, 2015

National Water Act 36 of 1998

Natives Land Act 27 of 1913

Nature Conservation Ordinance 8 of 1969

Nature and Environmental Conservation Ordinance 15 of 1974

Reservation of Separate Amenities Act 49 of 1953

Reservation of Separate Amenities Act 49 of 1953

Reservation of Separate Amenities Amendment Act 10 of 1960

Right of Passage of Water Act 24 of 1876

Right of Passage of Water Act 26 of 1882

Seashore Act 21 of 1935

South Africa Act of 1909

Transvaal Act 27 of 1908

Union of South Africa Act of 1909

Water Act 40 of 1899

Water Act 54 of 1956

Water Services Act 108 of 1997

State publications

GN 790 in GG of 17 June 1932

GN R509 in GG 22355 of 8 June 2001

GN 143 in GG 38533 of 13 March 2015

Proc of 11 October 1795

Policy Documents

Dolzer R 1976 *IUCN Environmental Policy and Law Paper* "Property and the Environment: The Social Obligation Inherent in Ownership: A Study of the German Constitutional Setting" (Switzerland International Union for Conservation of Nature and Natural Resources 1976)

Free Basic Water Programme of 2001

Free Basic Water Implementation Strategy of 2007

National Water Resources Strategy of 2004

National Water Resources Strategy of 2013

Report of the Natives Affairs Commission of 1905

White Paper on a National Water Policy for South Africa, 1997

Conference papers

Bromley DW "The commons, property, and common property regimes*"* (Unpublished conference paper delivered at Designing Sustainability on the Commons, the First Biennial Conference of the International Association for the Study of Common Property, held 27-30 September 1990 at Duke University)

Rose CM "Common Property, Regulatory Property, And Environmental Protection: Comparing Common Pool Resources To Tradable Environmental Allowances" (Unpublished conference paper delivered at Constituting the Commons: Crafting Sustainable Commons in the New Millennium, the Eighth Biennial Conference of the International Association for the Study of Common Property held 31 May-4 June 2004 at Bloomington)

Electronic Sources

Alchian AA 2008 *Property Rights The Concise Encyclopedia of Economics* http://econlib.org/library/Enc/PropertyRights.html [accessed 21 July 2015]

Anon 2008 *Access to Public Property* http://www.dmlp.org/legal-guide/access-public-property [accessed 14 July 2015]

Anon 2015 *Regime storm voort met onteiening* http://www.dievryburger.co.za/2015/05/regime-storm-voort-met-onteiening/ [date of use 7 July 2015]

African National Congress Constitutional Committee 1993 *A Bill of Rights for a New South Africa Preliminary Revised Text* http://www.anc.org.za/show.php?id=231 [accessed 15 January 2015]

Association for Drinking Water from Reservoirs *et al* 2015 *Profile of the German Water Sector* https://de.dwa.de/profile_of_the_german_water_Sector.html?file=tl_files/_media/content/PDFs/StOeP/WEB_brachenbild_ENGL_wasserwirtschaft_2015_a4_25062015.pdf [accessed 8 December 2015]

Blackstone 2014 *Commentaries on the Laws of England* Book 2, Chapter 1, http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-201/ [accessed 10 December 2014]

Bogumil J *et al* 2010 *Die Gestaltung kommunaler Daseinsvorsorge im Europäischen Binnenmarkt* www.sowi.ruhr-uni-bochum.de/.../gestaltung_kommunaler_daseinsvorsorge.pdf [accessed 2 February 2016]

Breakey H 2011 *Property Concepts* http://www.iep.utm.edu/prop-con/ [accessed 29 July 2015]

Comments by the Federal Republic of Germany 2007 *Human Rights and Access to Water* http://www.ohchr.org/Documents/Issues/Water/StudyContributions/States/Germany.pdf [accessed 11 December 2015]

De Waal MJ 1999 *Numerus Clausus and the Development of new Real Rights in South African Law* EJCL http://www.ejcl.org/33/art33-1.html [accessed 6 October 2014]

Duetscher Bundestag *Competencies of the German Federation and the Länder* https://www.bundestag.de/htdocs_e/bundestag/function/legislation/competencies/245700 [accessed 10 November 2015]

Encyclopaedia Britannica Online Academic Edition 2016 http://www.britannica.com/EBchecked/topic/96523/Carolingian-dynasty [accessed 3 March 2015]

Essa A 2015 *South Africa in midst of 'epic drought'* http://www.aljazeera.com/news/2015/11/south-africa-midst-epic-drought-151104070934236.html [accessed 15 December 2015].

Federal Ministry for Economic Affairs and Energy 2013 *Planning and Building* http://www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/The-legal-framework/planning-and-building.html [accessed10 November 2015]

Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (ed) 2003 *Hydrological Atlas of Germany* https://www.fona.de/mediathek/pdf/Water_Flows_in_Germany.pdf [accessed 7 December 2015]

German Embassy Harare *Human right to clean drinking water and sanitation* http://www.harare.diplo.de/Vertretung/harare/en/03-foreign-policy/03-human-rights/2-4-drinking-water.html [accessed 27 January 2016]

Gröpl C and Rupp M 2011 *State Assets (Public Ownership) in the Federal Republic of Germany* http://www.ius-publicum.com/repository/uploads/10_03_2011_16_33_Groepl.pdf [accessed 13 January 2016]

Havlan P and Janeček J *So-called public thing as an object of "Public Ownership"* https://is.muni.cz/do/law/shop/publikace/8474430/210-4842-Ukazka.pdf [accessed 14 January 2016]

Henrichsen C 2012 *Locke on Property: A Critique* www.patheos.com/blogs/faithpromotingrumor/2012/02/locke-on-property-a-critique [accessed 8 September 2015]

Hergehan J 2000 *German Federalism and European Integration* http://www.institutdelors.eu/media/pdf.php?file=Probl5-en.pdf [accessed 26 November 2015]

Hess C 2006 *Research on the Commons, Common-Pool Resources, and Common Property* http://dlc.dlib.indiana.edu/dlc/contentguidelines [accessed 13 April 2012]

Irmer U and Kirschbaum B (ed) *Water Resource Management in Germany Part 1* 2010 https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/3770.pdf [accessed 4 November 2015]

Irmer U, Huber D and Walter A (eds) *Water Resource Management in Germany Part 1* 2013 https://www.umweltbundesamt.de/.../wawi_teil_01_englisch_barrierefrei.pdf [accessed 8 March 2016]

Karodia H and Weston DR 2001 *South Africa's New Water Policy and Law* http://publications.iwmi.org/pdf/H029111.pdf [accessed 17 October 2015]

Locke J 1690 *Second Treatise on Civil Government* http://www.constitution.org/jl/2ndtr05.htm [accessed 22 January 2015]

Lundmark T 1997 *Principles and Instruments of German Environmental Law* http://eds.a.ebscohost.com.nwulib.nwu.ac.za/eds/detail/detail?vid=9&sid=44ff8106-84a1-47fc-b9ad-755af92bc588%40sessionmgr4007&hid=4211&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=9702075380&db=eih [accessed 8 August 2016]

McKean M and Ostrom E 1995 *Common property regimes in the forest: just a relic from the past?* http://www.fao.org/docrep/v3960e/v3960e03.htm#common%20property%20regimes%20in%20the%20forest:%20just%20a%20relic%20from%20the%20past [accessed 29 May 2015]

Merriam-Webster, Incorporated 2015 www.merriam-webster.com/dictionary/stewardship [accessed 28 August 2015]

Mostert H 2000 *South African Constitutional Property Protection between Libertarianism and Liberationism: Challenges for the Judiciary* 2000 www.zaoerv.de/60_2000_1_a_295_330.pdf [accessed 4 September 2015]

Office of the United Nations High Commissioner for Human Rights http://www.ohchr.org/Documents/Issues/Water/ContributionsPSP/GermanyII.pdf [accessed 11 December 2015].

Ojanen M *et al* 2014 *What are the environmental impacts of property rights regimes in forests, fisheries and rangelands? A systematic review protocol* http://www.environmentalevidencejournal.org/content/3/1/19 [accessed 21 July 2015]

Ostrom E 2008 *The Challenge of Common-Pool Resources Environment* http://www.environmentmagazine.org/Archives/Back%20Issues/July-August%202008/ostrom-full.html [accessed 15 March 2015]

Reinhardt M *Introduction and framework of the German and European Water Law* https://www.google.com/search?q=reinhardt+water+law+germany&ie=utf-8&oe=utf-8 [accessed 2 January 2016]

Schneider H *The Federal Republic of Germany* www.thomasfleiner.ch/files/categories/IntensivkursII/Germanyg2.pdf [accessed 9 December 2015]

Shavell S 2012 *Economic Analysis of Property Law* http://www.law.harvard.edu/programs/olin_center/papers/pdf/399.pdf [accessed 26 August 2016]

Solanes M and Gonzalez-Villarreal F 1999 http://www.tnmckc.org/upload/document/bdp/2/2.7/GWP/tac-3.pdf [accessed 22 January 2015]

Swedish Environmental Protection Agency 2015 *The Right of Public Access* http://www.swedishepa.se/Enjoying-nature/The-Right-of-Public-Access/ [accessed 28 May 2015]

Tiroch K and Kirschner A 2002 *Overview of the Water Law of the Federal Republic of Germany* http://webcache.googleusercontent.com/search?q=cache:VECYmRTvYsQJ:www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_German_Water_Law_English_2012.pdf+&cd=2&hl=en&ct=clnk [accessed 4 November 2015]

Tortia EC 2011 *The firm as a common. The case of accumulation and use of common resources in mutual benefit organizations* http://web.unitn.it/files/download/15312/1211tortia.pdf [accessed 16 June 2015]

Tschentscher A 2013 *The Basic Law (Grundgesetz) 2012: The Constitution of the Federal Republic of Germany (May 23rd, 1949) – Introduction and Translation* http://www.servat.unibe.ch/jurisprudentia/lit/The_Basic_Law_SSRN_2013.pdf [accessed 22 January 2016]

UNEP FI Chief Liquidity Series *Water sustainability of agribusiness activities in South Africa* http://www.unepfi.org/fileadmin/publications/water/chief_liquidity1_South_Africa.pdf [accessed 10 November 2015]

United Nations Human Rights Office of the High Commissioner 1996-2016 *Committee on Economic, Social and Cultural Rights* http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx [accessed 27 January 2016]

Vandermyde R 2015 *My Water, My Rights: Ethics and Implications of Water Privatisation* http://digitalcommons.augustana.edu/cgi/viewcontent.cgi?article=1001&context=ethicscontest [accessed 11 January 2016].

Watkins T *The Economic History of the Western Roman Empire* http://www.sjsu.edu/faculty/watkins/barbarians.htm [accessed 7 November 2018]

Winnegge R and Maurer T 2002 *Water Resources Management Country Profile Germany Report No. 27 A Contribution to the Global Water Information Network* http://www.bafg.de/GRDC/EN/02_srvcs/24_rprtsrs/report_27.pdf?__blob=publicationFile [accessed 26 November 2015]

Wollmann H 2013 *The recent reform of German federalism through constitutional amendment* http://www.uio.no/english/research/interfaculty-research-areas/democracy/news-and-events/events/conferences/2013/Programme/wollmann.-reform-of-german-federalism.-draft-dec.pdf [accessed 21 March 2016]

German Case Law

BVerfGE 1, 14

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BVerfGE 83, 201

BVerfGE 87, 114

BVerfGE 89, 1

BVerfGE 93, 319

BVerwGE 81, 347

NJW 1974, 2182

NJW 1978, 2290

Foreign Cases

Illinois Central Railroad Co v Illinois 1892 146 US 387

Shively v Bowlby 1894 152 US 1

German Legislation

Abwasserverordnung of 2004

Abwasserabgabengesetz of 2005

Allgemeines Bürgerliches Gesetzbuch of 1794

Bavarian Water Code of 1907

Berliner Wassergesetz of 2005

Bundes-Immissionsschutzgesetz of 1990

Bundesnaturschhutzgesetz of 2009

Bürgerliches Gesetzbuch of 1900

Das Allgemeine Landrecht für die Preußischen Staaten of 1794

Dikes and Embankments Act of 1964

Einführungsgesetz zum Bürgerlichen Gesetzbuch of 1898

Federal Forest Act of 1975

Hessisches Wassergesetz of 2010

Landeswassergesetz of *Rheinland-Pfalz* of 2004

Landesnaturschutzgesetz of 2010

Preußisches Wassergesetz of 1913

Saarländisches Wassergesetz of 1960

Statute on Public Waste-water Removal of the City of Heidelberg of 1980

Wasserhaushaltsgesetz of 1957

Wasserhaushaltsgesetz of 2009

Water Code of Baden-Württemberg of 1988

Wassergesetz für Baden-Württemberg of 2005

Wassergesetz des Landes Mecklenburg-Vorpommern of 1992

International Instruments

EU Water Framework Directive 2000/60/EC

International Covenant on Economic, Social and Cultural Rights, 1966

UN General Assembly Resolution 68/157 of 18 December 2013

United Nations Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 15 *The right to water (arts 11 & 12 of the Covenant)* (29th session, 2002 [UN Doc E/C 12/2002/11]