The regulation of water in Namibia in the context of property rights - a comparison with South African water legislation

By

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ABSTRACT

The *Water Resources Management Act* 24 of 2004 will change the water regime in Namibia dramatically. Section 4 of the *Water Resources Management Act* provides for this change by excluding private ownership of water from the new water law dispensation.

This study focused on section 4 of the *Water Resources Management Act* and the implication that this section will have on property rights in the Namibia. The dissertation firstly outlines the historical development of ownership of water in Namibia. It is indicated that private ownership of water was an established principle under Roman-Dutch law. A further examination of Roman-Dutch law reveals that surface water could be divided into private and public water. Public water belonged to the whole nation, while ownership of private rivers was vested in the land owner. Under South West Africa's water legislation, the *Irrigation and Water Conservation Act* 8 of 1912 and the *Water Act* 54 of 1956 maintained the distinction between public and private water. However, the *Water Act* of 1956 expanded the definitions of both public and private water, and acknowledged that the land owner where the water found its source or flowed over, could exercise the exclusive use rights of such water.

The *Water Resources Management Act* has been approved and published in the *Government Gazette*. However, it has not yet come into force as a date for commencement of the Act, as prescribed by section 138(1)(b), has not yet been determined by the Minister. Once the Act is in force, the *Water Act* will be repealed as a whole. Section 4 of the *Water Resources Management Act* will abolish the private ownership of water in Namibia. This is clearly in violation of article 16 of the Namibian *Constitution* of 1990, which provides for private ownership of water when read with article 100. Therefore, the research concludes that the *Water Resources Management Act* will dramatically affect property rights in Namibia. Under the *Water Resources Management Act* there will be no private ownership of water, and the affected person will have no recourse under the Act to claim compensation.

OPSOMMING

Die *Water Resources Management Act* 24 van 2004 sal die water bedeling in Namibië drasties verander. Artikel 4 van die *Water Resources Management Act* maak voorsiening vir hierdie verandering deur die uitsluiting van privaat eiendomsreg op water in die nuwe waterreg bedeling.

Hierdie studie fokus op artikel 4 van die *Water Resources Management Act* en die implikasie wat hierdie artikel op eiendomsreg in Namibië sal hê. Die skripsie ondersoek eerstens die historiese ontwikkeling van eiendomsreg op water in Namibië. Daar word aangetoon dat private eiendomsreg op water ‘n gevestigde beginsel ingevolge die Romeins-Hollandse reg was. ‘n Verdere studie van die Romeins-Hollandse reg onthul dat oppervlakwater in private en openbare water verdeel kon word. Openbare water het aan die hele volk behoort, terwyl eienaarskap van private riviere in die grondeienaar gesetel was. Onder Suid-Wes Afrika se water wetgewing het die *Irrigation and Water Conservation Act* 8 van 1912 en die *Water Act* 54 van 1956 die onderskeid tussen openbare en private water behou. Die *Water Act* het egter die definisies van beide publieke en private water uitgebrei, en erken dat die grondeienaar waar die water se bron geleë was of waar die water oor gevloei het, die eksklusiewe gebruiksregte oor sulke water kon beoefen.

Die *Water Resources Management Act* is goedgekeur en gepubliseer in die *Staatskoerant*. Dit het egter nog nie in werking getree nie, aangesien ‘n inwerkingtredingsdatum nog nie deur die Minister bepaal is nie, soos deur artikel 138(1)(b) voorgeskryf word. Sodra die Wet in werking tree, sal die *Water Act* in totaliteit herroep word. Artikel 4 van die *Water Resources Management Act* sal die privaat eiendomsreg op water in Namibië afskaf. Dit is duidelik ‘n skending van artikel 16 van die *Grondwet van Namibië* van 1990, wat voorsiening maak vir privaat eiendomsreg op water wanneer dit saamgelees word met artikel 100. Hierdie navorsing kom dus tot die gevolgtrekking dat die *Water Resources Management Act* eiendomsreg in Namibië dramaties sal beïnvloed. Onder die *Water Resources*

Management Act sal daar geen privaat eiendomsreg op water wees nie, en die benadeelde persone sal nie vergoeding kan eis nie.

Keywords

Water Resources Management Act 24 of 2004; *Water Act* 54 of 1956; regulation of water; property rights; ownership of water; private ownership of water; public trust; water use rights; deprivation; expropriation; constructive expropriation.

Sleutelwoorde

Water Resources Management Act 24 van 2004; *Water Act* 54 van 1956; regulering van water; eiendomsregte; eiendomsreg op water; privaat eiendomsreg op water; openbare trust; watergebruik regte; ontneming; onteiening; konstruktiewe onteiening.

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TABLE OF CONTENTS

1 Introduction

1.1 Problem statement

The *Constitution of the Republic of Namibia,* 1990 provides for property rights and clearly states in article 16 that every individual in Namibia has the right to obtain, own and dispose of all forms of immovable and movable property. This clearly provides for the private ownership of water and an individual can further dispose of the water if he or she so chooses.[1] Article 100 of the Namibian *Constitution* further upholds the above provision by stating that land, water and natural resources shall belong to the state unless otherwise lawfully owned. In other words the state can only own water if an individual or any other legal entity does not legally own it.[2]

This distinction between private and public water was also maintained in the *Water Act* 54 of 1956 (Namibian and South African). The *Water Act* did not explicitly determine who the owner of private water was, but confirmed that the exclusive use rights of private water could be exercised by the landowner of the land where it had its source or flowed over.[3]

The *Water Resources Management Act* 24 of 2004 has been approved and published in the *Government Gazette*.[4] It must, however, be noted that it has not yet come into force as a date of commencement has not yet been determined by the Minister. Once the Act is in force, the *Water Act* 54 of 1956 will be repealed as a whole.[5]

The *Water Resources Management Act* in section 4(a) provides that water resources both below and above the land shall belong to the state.[6] This clearly is in conflict with the provisions of the *Constitution*, which provide for the private ownership of

1 Section 5(1) of the *Water Act* 54 of 1956.
2 Legal Assistance Centre *Not Coming Up Dry* 12.
3 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 182.
4 GG 3357 of 23 December 2004 (Namibia).
5 See 2.5.2 for an explanation why South African legislation forms part of Namibian legislation.
6 This provision means that private ownership of water will no longer be recognised under the new water law dispensation.

water.[7] As all legislation must be in conformity with the *Constitution*, the enforcement of the *Water Resources Management Act* will lead to a violation of both articles 16 and 100 of the *Constitution*. Those who have pre-existing water rights will be the most affected, with no recourse as the *Water Resource Management Act* does not provide for this.[8]

The South African position will be used to provide some insight into the manner in which the above problem can be handled. Prior to the promulgation of the *National Water Act* 36 of 1998, water in South Africa was governed by the *Water Act* 54 of 1956, which recognised both public and private ownership of water resources. However, it was soon recognised that, in order to provide water to all citizens, the state would have to act as public trustee of all water on behalf of all the people of South Africa. This led to the *National Water Act* coming into force.

The *National Water Act* transformed South Africa's laws governing water resources. The Act abolished private ownership of water, ensuring all water resources were now in a public trust. The preamble of the Act sets the tone for the transformation that the Act brought about, by recognising that water is a natural resource that belongs to all people. Section 3 of the Act establishes public ownership and puts the state as trustee of the water resources within South Africa.

It will be imperative to analyse how the South African position can contribute to solving the dilemma that the Namibian authorities are faced with.

1.2 Research question

To what extent will the *Water Resources Management Act* 24 of 2004 affect property rights in Namibia? To what extent is the regulatory framework in respect of water comparable with the position in South Africa?

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7 The wording of art. 100 of the *Constitution of the Republic of Namibia*, 1990 provides for private ownership as it states that the state shall own all natural resources, unless otherwise lawfully owned. See 3.2.4 for an explanation of art. 100.

8 The *Water Resources Management Act* 24 of 2004 does not provide for the payment of compensation to those who will suffer significant loss due to the exclusion of private ownership of water in this Act. This is in contrast to the South African *National Water Act* 36 of 1998 that provides for such compensation.

1.3 Objectives of the study

The primary objective of this dissertation is to determine the implications of the *Water Resources Management Act* on property rights in Namibia. In order to achieve this, it is imperative to critically analyse the scope of private ownership of water in Namibia, as this will determine the effects of the *Water Resources Management Act* on Namibian property rights.

In order to determine the full effects of the *Water Resources Management Act* on Namibian property rights, the following secondary issues will need to be addressed:

1. the historical development of ownership of water in Namibian water law;
2. the scope of public and private ownership of water in Namibian water law;
3. the *Water Resources Management Act* provisions that are applicable;
4. the effect of applicable *Water Resources Management Act* provisions on property rights in Namibia.

1.4 Relevance of the dissertation

Water is central to physical and social development of a society. Without water one cannot promote development in any way. This paper will benefit both Namibia and South Africa by contributing to the development of water law in both countries. This will lead to better alignment in terms of transboundary protection of water. Furthermore, Namibia will benefit by observing the manner in which South Africa has dealt with the issue of property rights and ownership of water. South Africa will also benefit, as this will be a good opportunity to analyse how effective the water legislation has been in addressing property rights and the ownership of water. It must also be noted that better laws lead to better environmental protection and in turn the sustainable use of water resources.

1.5 Research methodology

This study will be based on an analytical research. The topic is of such a nature that there is a wide variety of textbooks, journals, articles, as well as internet sources from which relevant information can be drawn. Further, a comparative study will be carried out in order to assess the manner in which South Africa has dealt with water legislation and property rights.

1.6 Format of dissertation

The dissertation is organised into 5 chapters. Chapter 1 provides the reader with a background that underpins the research question and gives an overview of the dissertation.

Chapter 2 examines the legislative and policy framework that makes up Namibian water law. This chapter aims to trace Namibian water law from the Roman era to the colonial era, and subsequently to the present day position. By doing this an understandable and clear-cut evolution of Namibian water legislation can be traced.

Chapter 3 examines the relevant constitutional and *Water Resources Management Act* provisions that are applicable to ownership of water and the effects thereof. It aims at answering the questions regarding the ownership of water in Namibia, should the *Water Resources Management Act* come into force.

Chapter 4 examines the relevant South African constitutional and *National Water Act* provisions that are applicable to the custodianship of water in the South African context, and the effects thereof. It aims at providing insight as to how South Africa dealt with the departure from a mixed public/private system of ownership of water to a full state custodianship of water.

Chapter 5 is the final chapter, and concludes the dissertation by providing a summary of the findings attained through this study, and provides recommendations that might aid in the application of the *Water Resources Management Act*.

2 Overview of Namibian water legislation

2.1 Introduction

This chapter will examine the legislative and policy framework that makes up Namibian water law. Due to the unclear nature of water ownership in Namibia, there remain unanswered questions as to the position of the legislation and policies regarding ownership of water. This chapter therefore aims to trace Namibian water law from the Roman era to the colonial era, and subsequently to the present day position. By doing this an understandable and clear-cut evolution of Namibian water legislation can be traced.

2.2 Background to the evolution of Namibian water legislation

Due to the fact that former South West Africa was colonised by South Africa, there can never be a distinct separation between the two systems of law; many of South Africa's laws found application in Namibia. It is for this reason that this chapter will start by examining Roman law, which formed in part the foundation of South African water law.

2.3 Roman law

During the Roman era water was fairly scarce and was used mainly for agriculture, navigation and fishing.[9] Due to the scarceness of the water, the allocation of water was regulated by the Romans. Such regulations will now be examined.

2.3.1 Ownership and control of surface water

Surface water was divided into flowing water, water in lakes and water in ponds. The Romans called flowing water either *aqua profluens* or *flumina*[10] although there was no apparent difference, as both names referred to natural streams of water.[11]

9 Thompson *Water Law* 17; Van der Walt *Concept 'Beneficial Use'* 15.
10 Marcianus called this water *aqua profluens* and Gaius called it *flumina*.
11 Thompson *Water Law* 17.

Flowing water was regarded as *res publicae* according to Gaius[12] and as *res omnium communes* according to Marcianus.[13] Both jurists regarded surface water excluding flowing water, water in lakes and ponds as *res singulorum* or *res privatae*, in other words the private property of the land owner.[14]

The extent of entitlement of surface water was unclear. It belonged to the state[15] or the community[16] and was to be used by the whole world,[17] as long as such a use did not infringe on another individual's equal right of use.[18] Some examples of entitlement were as follows:[19]

- An individual had the right to remove or divert water from a public stream, unless the river was in public use or was a navigable river and the removal or diversion of such water would make the river less navigable.
- An individual has the right to lay pipes to divert the water as long as it did not infringe on the entitlements of others.
- An individual could not be prohibited from fishing in any public river, lake or pond.

However, where private streams flowed over the owners property, the owner was not obligated to consider the needs of downstream users. As long as the water was on the owner's property, the owner could dispose of the water at will.[20]

2.3.2 Ownership and control of groundwater

At the foundation of Roman property law lies the doctrine of *cuius est solum eius est usque ad coelum et ad inferos*, which stated that an owner of land also owned what

12 Gaius argued that these things belonged to no one in ownership, but were those of the whole world. See Thompson *Water Law* 17.
13 According to Marcianus rivers where available for public use. As such no individual who was in need of that resource could be prohibited from utilising it, because this would be in violation of the universal principle of justice. See Thompson *Water Law* 18; Van der Walt *Concept 'Beneficial Use'* 19.
14 Thompson *Water Law* 18.
15 *Res publicae* as propounded by Gaius; see Viljoen *Public Trust Doctrine* 9.
16 *Res omnium* communes as propounded by Marcianus; see Viljoen *The Public Trust Doctrine* 9.
17 This implied that it was not just meant for the Roman citizens but could be used by all.
18 Thompson *Water Law* 21; See Van der Walt *Concept 'Beneficial Use'* 18.
19 Thompson *Water Law* 21.
20 Thompson *Water Law* 22; see Viljoen *Public Trust Doctrine* 18.

was above and beneath the surface of the land.[21] However, Thompson[22] states that if groundwater is flowing or running, then it will not be regarded as private but as public. This also applied to water from a spring.

The private owner was entitled to search for the groundwater, draw from such groundwater, use such groundwater and grant servitudes to others for such water. This could all be done even if the groundwater was hydrologically linked to the surface water and such use could lead to the termination of supply to another.[23]

2.4 Roman-Dutch water law

Between the 15th and 16th centuries Roman law was absorbed in the Netherlands. However, due to the fact that the Netherlands had an abundance of water, many aspects of the Roman water law did not find application.[24] This law was brought to the Cape in 1652 when the Dutch conquered the Cape and founded a settlement there. It was subsequently referred to as the Roman-Dutch law.

2.4.1 Ownership and control of surface water

Thompson[25] states that the majority of Roman-Dutch authors classified all water as *res publicae*.[26] However, some authors classified running water as *res omnium communes,*[27] and all other water was *res privatae*.[28]

Van der Walt[29] refers to Voet and the distinction Voet makes between private and public water as developed and applied to South African water law. Voet defines public water as water that flows perennially. According to Voet public water belonged

21 Thompson *Water Law* 19; see Viljoen *Public Trust Doctrine* 19.
22 Thompson *Water Law* 19.
23 Thompson *Water Law* 22.
24 Van der Walt *Concept 'Beneficial Use'* 31; see Burger *Study of Roman Water Law* 10.
25 Thompson *Water Law* 25.
26 Meaning that the water belonged to the state.
27 Meaning that the water was there for public use.
28 Meaning that the water was privately owned.
29 Van der Walt *Concept 'Beneficial Use'* 33; see Thompson *Water Law* 26.

to the whole nation, while ownership of private rivers was to be vested in the land owner.[30]

2.4.2 Ownership and control of groundwater

Thompson[31] states that it is vague whether the Roman doctrine of *cuius est solum eius est usque ad coelum et ad inferos*, which means that an owner of land owns what is above and beneath the surface of the land, found application in Roman-Dutch law.

Voet, who is quoted in Thompson,[32] was of the opinion that natural springs that occurred on an owner's land belonged to that specific owner, and the owner had the right to divert such water by digging on his land unless such a diversion was done with the intention to harm his neighbours' property. Voet further stated that water that surfaced on to the land of an owner, belonged to such an owner and could be disposed of at will.

2.5 South West African water law

In 1919 former South West Africa was declared a Class C mandate by the League of Nations and came under the British administration. Due to logical reasons the British administration handed over control of South West Africa to the Union of South Africa. With this handing-over came a reception of South African laws into South West Africa. The following pieces of legislation are the key laws that were transported to South West Africa with regard to water:

2.5.1 Irrigation and Water Conservation Act 8 of 1912

Pienaar and Van der Schyff[33] point out that, in terms of South African legislation, the *Irrigation and Water Conservation Act* of 1912 is the origin of the distinction between

30 Voet states that private rivers could be used by private persons, however, they were still to be regarded as common to all as far as the classification of things are concerned.
31 Thompson *Water Law* 27.
32 Thompson *Water Law* 27.
33 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 182.

public and private water. Vos[34] also points out that the 1912 Act is important, as it gave a definition to the term "public stream". Section 2 of the Act defines the term "public stream" as a natural stream of water that flows in an identified and distinct channel which provided water for common use, specifically for irrigation.

2.5.1.1 Public water

Section 9 of the 1912 Act stated that all water that converged in a public stream belonged to all, and was therefore classified as public water. As pointed out by Pienaar and Van der Schyff,[35] it must be noted that in the case of public streams, the riparian owner did not obtain ownership rights over the water. At most the riparian owner was permitted to reasonably use the normal flow of a public stream, as long as due consideration was paid to existing rights.[36] This was also re-affirmed by the Appellate Division in the case of *De Villiers v Barnard*,[37] where the court held that, in terms of the *Irrigation and Water Conservation Act*,[38] a riparian owner is permitted to use the surplus water of a stream to which his land is adjacent. However, he has no ownership over that water, only the use thereof. It is correctly pointed out that the riparian system shown above had shortcomings.[39] The first shortcoming is that all riparian owners could claim a reasonable share of the water of the stream at any time. This meant that a newcomer could at any time commence irrigation upon his land and all prior irrigators would have to reduce their consumption of water to accommodate this newcomer. This therefore leads to insecurity of water use rights. The second shortcoming is that the use of the water was limited to riparian land. Therefore, even if non-riparian land has a better quality of soil, the riparian owner cannot use the water from the stream to irrigate such land unless permission has been granted from all other riparian owners. This means that riparian owners are allowed to stop the use of water on non-riparian land, even if such water will not be utilised. The third shortcoming is that it is practically impossible to divide and allocate water according to the riparian principle on a long river.

34 Vos *Elements of South African Water Law* 5.
35 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 182.
36 Van der Walt *Concept 'Beneficial Use'* 59. Such rights in all probability referred to rights arising out of contracts, prescription, inheritance etc.
37 *De Villiers v Barnard* 1958 3 SA 167 (A) 217 A-B.
38 *Irrigation and Water Conservation Act* 8 of 1912.
39 Burger *Study of Roman Water Law* 4-5; Van der Walt *Concept 'Beneficial Use'* 60.

It must be noted that other users were authorised to make secondary use of the normal flow, on condition that it did not obstruct the primary rights of downstream owners. Further tertiary use of the normal flow was also permitted, on condition that it did not obstruct the secondary rights of downstream owners.[40]

2.5.1.2 Private water

Sections 15 to 20(b) stated that a land owner was entitled to full use and enjoyment of any water originating on that private owner's land. Pienaar and Van der Schyff[41] point out that this is based on the principle that spring water, as well as water flowing over a private piece of land, could be utilised and was regarded as the property of the owner. This could, however, only be carried out if such use and enjoyment did not infringe on the same rights of lower lying owners.

2.5.2 Water Act 54 of 1956

The *Water Act* was passed by the South African parliament and has been applied since 1956. It was a South African Act, however, it was selectively applied to the then South West Africa by virtue of section 180 of the same Act.[42] Due to the fact that the *Water Resources Management Act* 24 of 2004 has been promulgated, but has not been put into operation in Namibia, the *Water Act* remains in effect to this date.

As per the *Irrigation and Water Conservation Act* the distinction between public and private water was maintained. Section 1 of the *Water Act* describes them as follows:

Public water is defined as:

> ...any water flowing or found in or derived from the bed of a public stream, whether visible or not.

40 Van der Walt *Concept 'Beneficial Use'* 59.
41 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 182.
42 See Legal Assistance Centre *Not Coming Up Dry* 14.

Private water is defined as:

> All water that rises or falls naturally on any land or naturally drains or is led onto more pieces of land which are subject of separate original grants, but not capable of common use for irrigation purposes.

It is clear that the *Water Act* expanded the definitions of both public and private water, however, as Pienaar and Van der Schyff[43] pointed out, the Act failed to define explicitly who the owner of private water was. The Act went so far as to acknowledge that the land owner where the water found its source or flowed over, could exercise the exclusive use rights over such water.

2.5.2.1 Public water

Section 6(1) states that no person shall have the right of property in terms of public water. This reiterates the common law principle that no person can obtain ownership over things that are owned by the public.[44]

Section 7(1)(a) entitles any individual who is lawfully at a public stream to remove and use such water for the following purposes: watering or dipping of live stock, drinking, washing or cooking, use in a vehicle which is located at the public stream, water born sanitation and for the irrigation of crops, provided that the land is not more than one hectare in size.

Section 7(1)(Aa) provides that an owner of private land may only extract water from a public stream for the irrigation of such land after receiving a permit to do so, if the land exceeds more than one hectare in size.

Section 9A provides the Minister with the discretion to control, limit or prohibit the extraction and use of water from a public stream by notice in a *Government Gazette* whenever he is of the opinion that a water shortage exists or is likely to exist.

43 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 182.
44 See Van der Walt *Concept 'Beneficial Use'* 205.

Section 9B prohibits any person from constructing, altering or enlarging any water work on any land if such enlargement, construction or alteration provides more than 20 000 cubic meters of water.[45]

2.5.2.2 Private water

Section 5(1) provides that the use and enjoyment of private water shall be the sole and exclusive right of the owner of the land on which the water is found.[46] Section 6(2) provides that if an owner of land obtains water from a source that is not a public stream, then it shall be deemed to be private water. However, it must be noted that this does not derogate from the right of land owners who share the same water source downstream and have been doing so for no less than 30 years.[47]

This section did not alter the common law position as was seen in the old case of *Van Heerden v Wiese*,[48] where the court held that water which arises or flows over private land and forms part of a public stream was subject to the rights of other riparian owners.

Section 5(2)(a) prohibits private owners from selling, giving or disposing of such private water, or passing on such water over their boundaries without a permit.

2.5.2.3 Subterranean water

Section 27 defines this water as water that naturally exists underground. Section 28 further provides that the President may by proclamation in the *Government Gazette* declare any area a subterranean water control area if the Minister is of the opinion that it is in the public's best interest, or the area is a dolomite or artesian area, or if the extraction of such water will deplete the underground resource.

45 If such quantities of water are obtained, then such water may be impounded.
46 See Van der Walt *Concept 'Beneficial Use'* 205.
47 This places an obligation on land owners to use the water in such a manner that does not infringe on the rights of users downstream to the use of such water.
48 Vos *Elements of South African Water Law* 2.

Section 30 entitles any owner of the land to use any subterranean water for his own use on the land he owns.[49] Section 30(4)(a) goes further and entitles mine owners who are lawfully mining to abstract any amount of subterranean water which will be sufficient for such mining operation or for the safety of the mines employees, and may under a permit issued by the Minister sell, dispose or give away such water.

2.5.2.4 Criticism of the Act

According to Namibia's 2000 *Water Policy White Paper*, the Act's origin allowed the South African regime to channel "the considerable technical expertise" of the agencies charged with implementation "towards servicing the water needs of the Apartheid State".[50] This resulted in a noticeable inequality in the distribution of water resources, which was controlled by an "inaccessible centralised bureaucracy in which the needs of the people on the ground, particularly the black majority, were not taken into account".[51]

It is argued that the central error of the Act is that it ignores the hydrological reality of Namibia, in other words, it ignores the fact that water is a scarce resource.[52] Further it is argued that the system of riparian water rights and the private ownership of water resources are inconsistent with article 100 of the Namibian *Constitution*.[53] This is questionable, as article 100 of the *Constitution* clearly provides that the state shall own all natural resources, unless otherwise lawfully owned. The qualification to state ownership provides the right for private ownership of natural resources. This will be further discussed in Chapter 3.

49 One of the flaws with the *Water Act* 54 of 1956, is that it creates a legal right for land owners to use uncapped amounts of underground water for their own use. In the case of underground water resources on commercial farms this provision causes a distinct probability for over-utilisation of the water resources on such land.
50 See Legal Assistance Centre *Not Coming Up Dry* 14.
51 *White Paper on a National Water Policy for Namibia*, 2000 19.
52 Legal Assistance Centre *Not Coming Up Dry* 14.
53 Benthune and Ruppel 2007 www.ramsar.org.

2.5.3 Water Research Act 34 of 1971

Although this South African Act, which provides for water related research through the establishment of a water research commission and fund, remains applicable to Namibia, neither the commission nor the fund were ever established in Namibia. Accordingly, it is of no help in determining water ownership in Namibia.

2.6 The Namibian constitutional dispensation

2.6.1 The Constitution of Namibia

Namibia gained independence from the South African administration on 21 March 1990 after a long liberation struggle. With this independence came the birth of a new *Constitution* which is considered to be one of the most modern constitutions in the world with a Bill of Rights based on the Universal Declaration of Human Rights.[54]

The Namibian *Constitution* of 1990, however, does not contain a provision that pertains specifically to water. It only contains a general provision pertaining to natural resources, its ownership and management.

In order to understand the transformation in water legislation after the new constitutional dispensation, a discussion will follow of all relevant provisions of the *Constitution* which might not necessarily pertain to water, but which guided government's policies towards the promulgation of the *Water Resources Management Act*,[55] which excludes private ownership of water from Namibian water legislation.

54 Horn and Bosl 2008 www.kas.de.
55 *Water Resources Management Act* 24 of 2004.

2.6.1.1 Provisions of the *Constitution*

Article 1

The *Constitution* states:[56]

> All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the state.

This article establishes a standard that, whenever government acts, it is under the power of the people of Namibia. Therefore it ought to act in the best interest of each and every person it represents. Thus, by implication, the laws governing the ownership and distribution of water should benefit all.

Further this article also provides for constitutional supremacy to govern all law in Namibia. This is fundamental as the existing legislation on ownership should conform to the *Constitution*, and any statute that is in violation of the *Constitution* shall be invalid.[57]

Article 16

Article 16 provides for property rights and clearly states that every individual in Namibia has the right to obtain, own and dispose of all forms of immovable and movable property. The article further provides that the state may only prohibit the right to property of those who are not Namibian citizens.[58]

This further provides for the right to private ownership and, read in conjunction with article 100, it can be argued that a real right to own private water is established. This will be discussed further in Chapter 3.

56 Art. 1(2) of the *Constitution of the Republic of Namibia*, 1990.
57 Art. 1(6) of the *Constitution of the Republic of Namibia*, 1990.
58 Ruppel "Environmental Rights and Justice" 335.

Article 18

Article 18 states that administrative bodies and officials must act fairly and reasonably, and must further comply with the common law and legislation. Aggrieved persons have the right to approach a competent court for redress.

This is the only article that provides for judicial review of administrative action, and is therefore vital, because if an administrative body or official does not comply with the above, then the affected party has the right to approach a competent court.[59] This will be discussed in Chapter 3.

Article 25

This article provides that Parliament or any subordinate legislative authority shall not make any law, and the executive and agencies of government shall not take any action that violates fundamental rights and freedoms contained in Chapter 3 of the *Constitution*.[60]

It must be noted that article 16 is contained in Chapter 3 of the *Constitution* and therefore article 25 applies. This will also be discussed in Chapter 3 of this dissertation.

Article 95

Article 95 obligates the state to actively promote and maintain the welfare of the Namibian population by adopting policies which lead to the maintenance of ecosystems, ecological processes, and biodiversity for the benefit of current and future generations. With this particular article, the government of Namibia is obliged to protect its environment and to promote a sustainable use of its natural resources. Thus the government is obligated to adopt policies that will lead to conservation of water resources for the future generations. This article has led to different policies

59 See Amoo *Introduction to Namibian Law* 318-323 for a thorough explanation.
60 Bangamwabo "Constitutional Supremacy" 252; see Ruppel "Environmental Rights and Justice" 341-342.

regarding the use and management of water which will be discussed later in this chapter.

Article 100

Article 100 of the Namibian *Constitution* has brought about confusion regarding the ownership of water. It provides that land, water and natural resources below and above the surface of land, within the territorial waters and exclusive economic zone of Namibia shall belong to the state. However, the article goes on further to give a proviso that it can only belong to the state if it is not lawfully owned by another.[61]

The interpretation of this provision has created legal problems. In *S v Redondo*[62] the Namibian Supreme Court tried in vain to give the proper interpretation of this provision. In admitting the difficulty of interpreting this provision Ackermann, J conceded: "This is somewhat an unusual provision...".

Such a difficulty has not brought clarity to the ownership of water in Namibia. This will be discussed further in Chapter 3.

Article 144

Article 144 enforces the general rules of public international law and international agreements binding upon Namibia, determining that it shall form part of the law of Namibia.[63]

In the case of *Minister of Defence v Mwandinghi*,[64] the court stated that the Namibian *Constitution* contains a Declaration of Human Rights which must be upheld and protected. The court went on to say that these rights are international of nature and therefore, in their interpretation, international rules and norms must be followed.

61 Ruppel "Environmental Rights and Justice" 349-350.
62 *S v Redondo* 1993 1 SACR 343 NmS.
63 This means that international law does not need to be transformed by an Act of Parliament as is the case in South Africa; see Dausab "International Law vis-a-vis Municipal Law" 267.
64 *Minister of Defence v Mwandinghi* 1993 NR 63 (SC).

This decision is a clear indication that the courts will use article 144 in order to enforce rights, especially when they are not directly provided for in domestic laws. It implies that the right to water can be based on international norms, and this is one of the arguments in favour of excluding private ownership of water from the law. It must be accessible to all.

This was shown in the case of *Kauesa v Minister of Home Affairs.*[65] The Supreme Court made it abundantly clear that, by virtue of Article 144, international human rights shall apply. This is of vital importance, especially with the right to access of water, since there is not a sufficient domestic authority to enforce this right.[66]

2.6.2 Traditional Authorities Act 25 of 2000

The traditional authorities in Namibia determine how their communities are administered. The authorities benefit from section 3(2)(c) of the Act that enables them to regulate ownership of water in their communities.

This adds another complication, as to who owns water in the communal areas. The current position does not clarify this point, hence the ownership of water in the rural areas remains a penumbral area in Namibian law.

2.6.3 Water policies

The new constitutional dispensation introduced obligations on the state, especially with regards to human rights. Water has progressed to be considered indispensible in the realisation of human rights. From this notion policies regarding water were drafted and passed, and, as will be seen, many of the policies excluded the private ownership of water.

65 *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC).

66 See Dausab "International Law vis-a-vis Municipal Law" 276-283 for a thorough exposition on the application of art. 144 through case law.

2.6.3.1 Water Supply and Sanitation Policy, 1993

This policy established the Directorate of Rural Water Supply, which was mandated to oversee a community based management system. It grants the community the rights to plan, maintain and manage their own water. In granting such a right, the policy does not give the community ownership of the water, but basically allows for community participation, which is in line with public ownership of water.

2.6.3.2 National Water Policy, 2002

This policy is based on the National Water Policy White Paper of 2000 and forms the foundation for the *Water Resources Management Act*. The policy established that water is a pre-requisite to life, and that each person should have access to safe water. It further established that Namibia is a dry country and water is necessary to preserve the natural ecosystem found within the borders of Namibia and beyond.

The policy, with regard to ownership of water, states that the state is entrusted with ownership of water on behalf of the Namibian people. Further it bases water rights on the principle of equity which, by its very nature, will exclude private ownership.

2.6.3.3 Namibian Wetland Policy, 2004

This policy adopted many of the principles laid down in the National Water Policy stated above. It vests ownership of water in the state on behalf of the Namibian people.

2.7 Conclusion

This chapter set forth the history, development and evolution of Namibian water legislation. It has also established the uncertainty that is currently prevailing with regards to the ownership of water in Namibia.

Chapter 3 will examine the provisions of the *Water Resources Management Act* and the extent to which the Act will affect property rights as they presently stand.

3 Constitutional and *Water Resources Management Act* provisions applicable to property rights

3.1 Introduction

This chapter examines the relevant constitutional and *Water Resources Management Act*[67] provisions that are applicable to ownership of water and the effects thereof. It aims at answering the questions regarding the ownership of water in Namibia, should the *Water Resources Management Act* come into force. In order to achieve this, the chapter will examine relevant constitutional provisions regarding ownership of water, and provisions from the *Water Resources Management Act* that are relevant to the ownership of water. This approach will endeavour to discuss the effects that the *Water Resources Management Act* will have on the ownership of water in Namibia, and the implications thereof on ownership rights.

3.2 Constitutional provisions applicable to ownership of water

3.2.1 Article 16(1)

Article 16(1) provides that every individual has the right to acquire, own and dispose of all forms of immovable and movable property in any part of Namibia, unless Parliament, by way of legislation, prohibits individuals who are not Namibian citizens from acquiring, owning or disposing of such property.[68]

The scope of the property clause in article 16(1) refers to all forms of immovable and movable property, which can be interpreted widely to include both tangible and intangible property, as well as rights and interests in property.[69] In the *Cultura 2000 v Government of the Republic of Namibia*,[70] the court confirmed that article 16 includes both tangible and intangible property.

67 *Water Resources Management Act* 24 of 2004.
68 The right to own property is recognised in international law as can be seen in art. 17 of the *Universal Declaration of Human Rights*, 1948, which states that every individual has the right to own property in his/her personal capacity, as well as in association with others, and no individual can be arbitrarily deprived of such a right.
69 Van der Walt *Constitutional Property Clauses* 316.
70 *Cultura 2000 v Government of the Republic of Namibia* 1993 2 SA 12 (NHC).

Pienaar and Van der Schyff further argue the following with regard to the South African property clause:[71]

> .....the property concept will in the first instance be interpreted to include all rights and objects that have been recognised as such during the pre-constitutional era.

The argument of Pienaar and Van der Schyff can find application in the Namibian context. This means that private ownership of water would find protection under article 16(1) by virtue of private ownership of water being recognised and protected in the colonial era.[72] It therefore establishes a right for all individuals to acquire, own or dispose of privately owned water as was recognised prior to the inception of the *Constitution* in 1990.

Article 22 provides for the limitation of fundamental rights and freedoms, and states that a limitation of any right or freedom contained in chapter 3 must be authorised by the *Constitution*, and further the law providing for such limitation must be of general application, must not negate the essence of the right, and must specify the extent of such a limitation. If article 16(1) is read with article 22, then it is clear that the only limitation upon the acquiring, owning or disposing of property concerns those individuals who are not Namibian citizens.[73] It means that the Namibian *Constitution* does not provide explicitly for deprivation of property as is provided for in other constitutions around the world.[74] This creates a legal problem with the exclusion of private ownership of water from the *Water Resources Management Act*.[75] If the *Constitution* provided for deprivation, then such exclusion would be authorised and therefore legal. This leads one to conclude that, if private ownership of water is to be excluded, then the state can only do so through the procedure of expropriation which will be discussed below.

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71 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 188.
72 This can be seen in the provisions of the *Water Act* 54 of 1956.
73 See Amoo "Exercise of the Rights of Sovereignty" 262-263.
74 An example of this can be seen in the *Constitution of the Republic of South Africa*, 1996, which provides the following in section 25: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". It must be noted that although the *Constitution of the Republic of Namibia*, 1990 does not explicitly provide for deprivation, there are regulations on property that can amount to "deprivation".
75 *Water Resources Management Act* 24 of 2004.

3.2.2 Article 16(2)

Article 16(2) provides that the state or a competent body or organ authorised by law may expropriate property in the public's interest. However, just compensation must be paid. It has, however, been argued that if article 16(2) is read with article 22, then it is possible to provide for regulatory deprivation[76] of property, which does not constitute compensatable expropriation in terms of article 16(2).[77] This argument will create a disparity in the law, especially due to the fact that article 22 is only effective if a limitation is authorised by the provision itself. In the case of article 16(2), there is no limitation on the payment of compensation. It is a mechanism that is used to protect the rights of individuals, and therefore to infer regulatory deprivation, will be questionable.[78]

It is essential to discuss two concepts under this article, the first being expropriation and the second being constructive expropriation.

3.2.2.1 Expropriation

According to article 16(2) expropriation can only take place in the public's interest, with a proviso that just compensation must be paid. As such this section will examine what constitutes public interest, followed by the requirements of just compensation.

3.2.2.1.1 Public interest

The Namibian *Constitution* does not provide a definition of the term "public interest". Therefore case law must provide an interpretation as to the nature and scope of "public interest".

76 This refers to powers that allow the state to develop laws and take actions that limit or control the use of a person's property in order to protect the rights of others and that of the public. See Van der Walt *Constitutional Property Clauses* 313.
77 Van der Walt *Constitutional Property Clauses* 313.
78 See Amoo "Exercise of the Rights of Sovereignty" 265-266.

The case of *Gunther Kessl v Ministry of Lands and Resettlements*[79] discussed expropriation at length. The court re-affirmed the importance of "public interest" as a requirement for expropriation. The court considered foreign authorities[80] in order to determine the nature and scope of the requirement and came to the conclusion that:[81]

> the furtherance of public interest requires the striking of a fair balance between the demands of the general interest and the requirements of the individual's fundamental rights.

As can be seen from the above, the court did not come up with a clear cut definition as to what the nature and scope of "public interest" is. Therefore, it will have to be determined on a case-by-case basis.

3.2.2.1.2 Just compensation

The Namibian *Constitution* does not provide a formula for the calculation of compensation as the South African *Constitution* does.[82] Instead, article 16(2) provides that Parliament may determine requirements and procedures to deal with compensation by way of an Act.[83]

However, by virtue of article 144 of the Namibian *Constitution*,[84] the international standard of compensation applies. This standard is based on the "Hull formula", which requires that compensation must be prompt, adequate and effective. This means that the payment should reflect the full value of the property, in a currency

79 *Gunther Kessl v Ministry of Lands and Resettlements* Case No (P) A 27/2006.

80 *Gunther Kessl v Ministry of Lands and Resettlements* Case No (P) A 27/2006 55 made reference to the following case law: *Sporrong v Lonnrof v Sweden* 1982 5 EHRR 35; *Tre Traktorer AB v Sweden* 1989 ECHR series A, vol 159; *Permanent Court of International Justice in the case concerning certain German interests in Polish Upper Silesia* 1926 PCIJ series A, No 7, 22.

81 Harring and Odendaal *Kessl* 65.

82 Section 25(3) of the *Constitution of the Republic of South Africa*, 1996.

83 An example of this is s 25 of the *Agricultural (Commercial) Land Reform Act* 6 of 1995 which provides that in the case of agricultural land, the amount of compensation shall not exceed the aggregate of the amount which the land would have realised if sold on the date of notice on the open market on a willing-seller, willing-buyer basis.

84 Art. 144 states that, unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia shall form part of the law of Namibia.

that can be readily used, and such payment should be handed over by a reasonable time after the expropriation, failing which interest should be paid.[85]

What the above provisions entail is that, because the *Constitution* does not provide for a set formula by which compensation will be calculated, such decisions will be made by bodies or officials of government with the necessary mandate to do so. As can be expected, some decisions by organs of state may be arbitrarily and unjustly considered. To this end, the *Constitution* in article 18 allows any person aggrieved by such a decision to approach a competent court in order to seek redress for the decision that was unfairly taken. In the case of *Sikunda v Government of the Republic of Namibia*,[86] the court held the following with regard to the reasonableness of a decision taken by an organ or official of state:[87]

> The traditional common law approach regarding unreasonableness as a reasonable ground for review, was that the Courts will not interfere with the exercise of a discretion on the mere ground of its unreasonableness, art 18 constitutes a departure from the traditional common law grounds of review. A Court of law will examine the discretionary power to determine whether it is fair and reasonable. If he does not need those requirements the Court will strike down the discretionary power as repugnant to the Constitution.

The South African case of *Bato Star Fishing v Minister of Environmental Affairs*,[88] brought further clarity to the requirement of reasonableness and gained an authoritative position in Namibian case law.[89] O'Regan J stated the following:[90]

> What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

85 *Anglo-Iranian Oil Co Case* 1952 ICJ Report 93 100.
86 *Sikunda v Government of the Republic of Namibia* 3 2001 NR 181 (HC).
87 *Sikunda v Government of the Republic of Namibia* 3 2001 NR 181 (HC) 191J-192B.
88 *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC).
89 *Gunther Kessl v Ministry of Lands and Resettlements* Case No (P) A 27/2006.
90 *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC) 513 para 43.

O'Regan J clearly states that the court must determine on a case by case basis whether the decision taken was reasonable or not. If the court is of the opinion that the decision taken was unreasonable, then the court must not make the decision for the administrator, as this will be a usurpation of its powers. Instead the court must compel the administrator to make a decision in conformity with the law.

3.2.2.2 Constructive expropriation

Van der Walt[91] points out that the traditional idea of expropriation involves the idea that, if the state acquires property based on the assumption that state limitation of property always includes either non-acquisitive regulatory deprivation or acquisitive expropriation, then no space is created for either an overlap of the two assumptions or grey areas between the two assumptions. However, once it is recognised that grey areas indeed exist, then it becomes necessary to judge whether or not some regulatory state actions, which result in loss to property owners, qualify for compensation, even if the state did not have the intention to acquire such property. This third category has been recognised in many jurisdictions, where it is referred to as either "inverse condemnation", "regulatory taking" or "constructive expropriation".[92]

Van der Walt describes constructive expropriation as follows:[93]

> The notion of constructive expropriation in these cases is premised on the argument that, when regulation of the use and enjoyment of property causes excessive and unfair loss for the owner, even to the extent that the property becomes worthless, the owner should receive compensation even though the state does not acquire the property for public use.

This definition is re-affirmed by Van der Schyff,[94] who states that the doctrine of constructive expropriation arises in instances where the regulatory acts of the state exert such an enormous restriction on the rights in property of a person, that the holder of the right is deprived of the ability to exercise the right or parts of the right.

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91 Van der Walt *Constitutional Property Law* 347.
92 See Van der Walt *Constitutional Property Law* 350, 354-376 for a thorough explanation.
93 Van der Walt *Constiutional Property Law* 351.
94 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 169.

From the above it becomes clear that constructive expropriation creates a middle ground upon which a claim for compensation can be made. This is very important in the Namibian context due to the Namibian *Constitution* not providing for deprivation. Therefore constructive expropriation creates an alternative to the extensive requirements required under normal expropriation.

The Namibian courts have remained silent on the inclusion or exclusion of constructive expropriation, therefore this paper will turn to the arguments of South African authorities in order to gain such insight.

In the *Steinberg v South Peninsula Municipality*[95] case, the court made very interesting rulings on the constructive expropriation principle. The court firstly held that the principle of constructive expropriation creates a middle ground that blurs the distinction between deprivation and expropriation, and this has the effect that in certain circumstances an obligation to pay compensation will arise even though the body effecting such a deprivation will assume no rights.[96] Secondly, the court held that, although there is a clear distinction between deprivation and expropriation provided for by the South African *Constitution*, there may be room for the development of a doctrine similar to that of constructive expropriation, especially where a public body uses regulatory power in such a manner that amounts to deprivation and not expropriation, but which also has the effect of transferring the rights in the property to the public body.[97] Van der Walt is of the opinion that the ruling of the court creates the idea that the courts must protect common law from confusion that might be brought about by the inclusion of foreign constitutional ideas. Surely this cannot be the case, as the purposive approach of interpretation demands the courts to take a flexible, context-sensitive interpretation and not an abstract, definitional approach.[98] The opinion of Van der Walt reiterates the very essence of the purposive approach of interpretation placed upon the Namibian courts and therefore the arguments given by the court in the above case cannot find application in the Namibian context, especially due to the fact that the Namibian *Constitution*

95 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).
96 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1246G-1247A para 6.
97 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1247G-H para 8.
98 Van der Walt *Constitutional Property Law* 379.

does not provide for deprivation. Therefore, the inclusion of constructive expropriation cannot blur the distinction between deprivation and expropriation as this distinction is not provided for in the Namibian context.

Van der Walt,[99] however, concludes that, taking into account the case of *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,*[100] it becomes impossible to provide for the inclusion of the constructive expropriation principles. In this case the court explained the distinction between deprivation and expropriation in hierarchical terms so that no clear distinction was formed, but rather the two formed a wider and smaller category which made them interdependent. The court went further to rule that a review in terms of section 25 of the South African *Constitution* must first start with the wider concept of deprivation and if the requirements of deprivation are not met, then the review would scope into the smaller concept of expropriation. This method automatically excludes the constructive expropriation principle from most, if not all, cases.

Due to the Namibian courts being silent on the inclusion or exclusion of constructive expropriation, and the Namibian *Constitution* providing only for expropriation, it can be concluded that this principle could be introduced in Namibian law to exclude private ownership of water from the *Water Resources Management Act.*[101]

3.2.3 Article 25

Article 25 compels parliament or any subordinate legislative authority not to make any law, and the executive and agencies of government not to take any action, that violates fundamental rights and freedoms contained in chapter 3 of the *Constitution*. Article 16 (the Namibian property clause) is contained in chapter 3 of the *Constitution* and therefore article 25 applies to the property clause, which has the implication that the legislature cannot make any law that deprives private owners of water of the right of ownership.

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99 Van der Walt *Constitutional Property Law* 383.

100 *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 4 SA 768 (CC).

101 *Water Resources Management Act* 24 of 2004.

Article 25(2) enables a person who feels that his fundamental rights have been violated to seek judicial protection from such a violation or request that the country's ombudsman investigate such a violation. Article 25(3) empowers the courts to make any orders that are necessary and appropriate in order to secure such victims the enjoyment of the rights and freedoms conferred on them under the provisions of the *Constitution*.

If we apply this article to the provisions of the *Water Resources Management Act*[102] that exclude the right of private ownership of water, it becomes apparent that affected parties can apply to the court to declare such provisions as unconstitutional by virtue of the fact that they violate the right to property.

3.2.4 Article 100

Article 100 has created the confusion regarding the ownership of water in Namibia. It provides that the state owns land, water and natural resources, unless it is otherwise lawfully owned. This is in line with the provisions of the *Water Act*,[103] which provides for some of Namibia's water resources to be privately owned. However, this article creates confusion if the *Water Resources Management Act*[104] is to be enforced, due to the fact that the *Constitution* will provide for private ownership of water while the Act will exclude private ownership of water.[105]

Some authors[106] point out that article 100 is contained within chapter 11 of the *Constitution*, which provides for principles that guide state policy. However, even though this article has been placed within the guiding principles, the courts and policy makers have treated it as an enforceable right. In the case of *Namibia Grape Growers and Exporters Association v Ministry of Mines and Energy*,[107] the Supreme

102 *Water Resources Management Act* 24 of 2004.
103 *Water Act* 54 of 1956.
104 *Water Resources Management Act* 24 of 2004.
105 It has been argued that, due to this contradiction, policy makers must act quickly to clarify the ownership of water in Namibia. See Legal Assistance Centre *Not Coming Up Dry* 12.
106 Legal Assistance Centre *Not Coming Up Dry* 11-12.
107 *Namibia Grape Growers and Exporters Association v Ministry of Mines and Energy* 2004 NR 194 (SC).

Court re-affirmed that the parties both agreed that article 100 vested mineral rights in the state as long as they were not privately owned, and therefore article 100 was enforceable.[108]

3.3 Water Resources Management Act 24 of 2004

3.3.1 Introduction

The *Water Resources Management Act* has been approved and published in the *Government Gazette*.[109] However, it has not yet come into force as a date for commencement of the Act as prescribed by section 138(1)(b) has not yet been determined by the Minister. Once the Act is in force, the *Water Act* will be repealed as a whole. The Act is based on the National Water Policy and provides for the management, development, protection, conservation, and the use of water resources.[110] The objective of this Act is to ensure that Namibia's water resources are managed, developed, protected, conserved and used in a way that is consistent with, or conducive to, the equal ownership of water as a natural resource.[111] This Act has, however, failed to provide for the transition from a mixed private/public ownership of water to a full state ownership of water, having the effect of rendering some of its provisions unconstitutional. Below are some of the provisions that are in violation of the Namibian *Constitution*.

3.3.2 Applicable provisions

Section 1 of the *Water Resources Management Act* does not define the terms "public water" or "private water" as is provided for in section 1 of the *Water Act*.[112] This is because the *Water Resources Management Act* does not provide for private ownership of water and therefore the distinction between the two does not exist.

108 *Namibia Grape Growers and Exporters Association v Ministry of Mines and Energy* 2004 NR 194 (SC) 209.
109 GG 3357 of 23 December 2004 (Namibia).
110 Legal Assistance Centre *Not Coming Up Dry* 21.
111 Section 2 of the *Water Resources Management Act* 24 of 2004.
112 *Water Act* 54 of 1956.

Section 4 provides for the ownership of water, and states that all water resources below and above the surface of the land shall belong to the state, and the state must ensure that the water resources are managed and used to benefit all people. Section 4 is clearly in violation of article 16 of the Namibian *Constitution*, which provides for private ownership of water. It is also a clear departure from section 5 and section 30 of the *Water Act*,[113] which provides for private ownership of water and private use of subterranean water respectively. By virtue of article 25, affected parties may approach the court to declare the *Water Resources Management Act* as unconstitutional as it is in direct violation of a chapter 3 right.

Section 32 goes further to eliminate private ownership of water resources by providing that water may only be abstracted if such a person applies for a licence to abstract such water, and such a licence is granted. This licence will contain conditions[114] as to the amount of water that can be abstracted, and the duration for which an abstraction can be performed. In some cases this can be seen as constructive expropriation as was explained above, due to the fact that the conditions of the licence can render the right of private ownership of water useless to such a licence holder.

Section 126 provides that the Minister may expropriate any private property in the public's interest, subject to the laws on expropriation. This section refers to private property and not private ownership of water, as the Act does not acknowledge private ownership of water. Therefore, according to the Act, no compensation will be paid to private owners of water who have lost their rights of ownership in accordance with the *Water Resources Management Act*.

3.4 Conclusion

From the above it is clear that the *Water Resources Management Act* has clear constitutional violations within its provisions. It can be suggested that these unconstitutional provisions have lead to the Act not being put into operation to this date. In order to gain perspective on how best to bring the Act in line with the

113 *Water Act* 54 of 1956.
114 Section 37 of the *Water Act* 54 of 1956.

Constitution, chapter 4 will examine the South African position, to gain insight as to how South Africa has dealt with the transition from a mixture of private and public ownership, to full state ownership. It will enable this dissertation to suggest possible recommendations that might bring some clarity as to the way Namibia can implement the Act.

4 The South African position regarding ownership of water

4.1 Introduction

This chapter examines the relevant constitutional[115] and *National Water Act*[116] provisions that are applicable to the custodianship of water in the South African context, and the effects thereof. It aims at providing insight as to how South Africa dealt with the departure from a mixed public/private system of ownership of water, to a full state custodianship of water. In order to achieve this, the chapter will examine relevant constitutional provisions regarding custodianship of water, and provisions from the *National Water Act* that are relevant to the ownership of water. This approach will endeavour to provide possible recommendations that will aid Namibia in coming up with solutions to the dilemma that it currently finds itself in.

4.2 Background

South Africa's constitutional regime changed in 1994. With this change came the birth of a new constitutional dispensation which established a comprehensive bill of rights. Prior to the promulgation of the *National Water Act*, water was governed by the *Water Act*,[117] which recognised both public and private ownership of water resources. It was soon recognised that human rights could not fully exist without necessities like water. Therefore, in order to provide water to all citizens, the state would have to act as public trustee of all water on behalf of all the people of South Africa. This notion led to the *National Water Act*[118] coming into force, which abolished private ownership of water and established the state as trustee of such water for the benefit of all. This chapter will look at the constitutional provisions and *National Water Act* provisions which made this transition possible.

115 *Constitution of the Republic of South Africa*, 1996.
116 *National Water Act* 36 of 1998.
117 *Water Act* 54 of 1956.
118 *National Water Act* 36 of 1998.

4.3 Applicable constitutional provisions[119]

4.3.1 Section 2

Section 2 provides that the *Constitution* shall be the supreme law of South Africa, and all laws and conduct must be in conformity with the *Constitution* or they shall be invalid. It goes further to state that all obligations imposed by the *Constitution* must be fulfilled. This means that, like Namibia, constitutional principles guide the manner in which all other laws are formed and enforced.

4.3.2 Section 25

Section 25 provides for the right to property, and is contained in chapter 2 of the *Constitution*, which is the Bill of Rights.[120] In order to fully examine the South African property clause in its full extent, this dissertation will deal with the sub-sections of section 25 separately.

4.3.2.1 Section 25(1)

Section 25(1) states that no individual may be deprived of property, except in terms of law of general application, and no law may permit arbitrary deprivation of property. Unlike the Namibian property clause, the South African property clause provides for deprivation as long as it is done under a law of general application, and is not arbitrary in nature.

4.3.2.1.1 Deprivation

In order to dissect section 25(1), it is imperative to understand what is meant by the term “deprivation”. The literal meaning of the term “deprivation” is that a person does not have things or conditions that are considered necessary for a pleasant life.[121] It is also likened to concepts such dispossession, to divest an individual of something, to

119 *Constitution of the Republic of South Africa*, 1996.
120 By virtue of s 8, the Bill of Rights shall apply to all law, and be binding upon the legislature, the executive, the judiciary and all organs of state.
121 Walter and Woodford *Cambridge Advanced Learner’s Dictionary* 334.

strip something from someone and expropriation.[122] Van der Walt points out that the term "deprivation" may lead to confusion, because it creates the mistaken impression that the property is taken away.[123] However, in the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA t/a Wesbank v Minister of Finance*[124] (hereafter the *FNB* case), Judge Ackermann resolved the confusion regarding the term "deprivation" and stated that deprivation includes any interference with the use, enjoyment or exploitation of private property.[125]

In the recent Constitutional Court case of *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* (hereafter the *Mkontwana* case),[126] Judge Yaccob stated: [127]

> Whether there has been a deprivation depends on the extent of the interference with, or limitation of use, enjoyment or exploitation of property. At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.

In the more recent case of *Agri South Africa v Minister of Minerals and Energy*[128] (hereafter the *Agri* case), Judge Du Plessis re-affirmed the definition given by Judge Yacoob, however he added that deprivation should:[129]

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122 Spooner *Oxford Thesaurus of Current English*.

123 Van der Walt *Constitutional Property Law* 121.

124 *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 4 SA 768 (CC) (hereafter *FNB* case).

125 *FNB* case para 57.

126 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Exective Council for Local Governemnt and Housing, Gauteng* 2005 1 SA 530 (CC) (hereafter *Mkontwana* case).

127 *Mkontwana* case para 32.

128 *Agri South Africa v Minister of Minerals and Energy* 2011 3 All SA 296 (GNP) (hereafter *Agri* case).

129 *Agri* case para 64. In the Constitutional Court *Agri* case (*Agri South Africa v Minister of Minerals and Energy* Case No CCT 51/12 [2013] ZACC 9) 48 the court stated the following with regard to deprivation and expropriation: "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."

> not be given too limited a meaning. It should be emphasised however, that there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute 'deprivations' for the purpose of section 25(1).

Therefore, in view of the above, the definition given by Judge Yacoob will suffice as the working definition for the term "deprivation".

It must however be pointed out that, although expropriation is a specific form of deprivation, the courts have made it very clear that there is a distinction between the two. In the case of *Harkson v Lane*,[130] the court re-affirmed the distinction and held the following:[131]

> The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which falls short of compulsory acquisition has long been recognised in our law.

The court, however, in the *FNB* case stated that expropriation is a form of deprivation. The court distinguished the two by stating that "deprivation" would encompass all species of interference, where expropriation would encompass only narrower species of interference.[132] The court went further to state that if a deprivation amounts to expropriation, then it must be subject to compensation.[133]

In the case of *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*,[134] the court re-affirmed the distinction by way of the payment of compensation, and stated that the purpose of the distinction between expropriation and deprivation is to enable the state to regulate the use of property for public good without having to incur liability to affected owners of such a property.[135]

130 *Harksen v Lane* 1998 1 SA 300 (CC).
131 *Harksen v Lane* 1998 1 SA 300 (CC) para 33.
132 *FNB* case para 57.
133 *FNB* case para 59.
134 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).
135 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 63.

From the above it is clear to see that section 25(1) provides a means by which the state may regulate property, and such regulation does not impose liabilities on the state as would be the case if the state expropriated such property. This is one of the major differences that exist between the Namibian property clause and the South African property clause. If the Namibian government would like to regulate property rights, it can only be done by way of expropriation. It will now be beneficial to examine what is meant by the term "law of general application", in order to understand the application of the deprivation principle.

4.3.2.1.1.1 Law of general application

Van der Walt[136] is of the view that, although most laws affect some individuals but not others, a law that provides for deprivation that is targeted at certain individuals or groups of individuals, may fall foul of section 25(1). In other words Van der Walt acknowledges that most laws will affect some individuals in a society, but not others. However, if the laws are created in a way that targets certain individuals but not others, then it will be in violation of section 25(1).

Pienaar and Van der Schyff[137] point to case law[138] and go further to define the scope and meaning of "law of general application". They state that:[139]

> The phrase 'law of general application' has been held not only to include legislation that does not single out certain people or groups of people for discriminatory treatment but also the common law, equally applicable to all.

Van der Walt[140] re-affirms this position and states that "law of general application" does not just refer to legislation, but goes further to include common law, which must apply equally to all.

136 Van der Walt *Constitutional Property Law* 232-233.
137 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 191.
138 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) para 29 G-H; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) paras 44, 136.
139 Pienaar and Van der Schyff 2007 *Law, Environmental and Development Journal* 191.
140 Van der Walt *Constitutional Property Law* 233.

4.3.2.1.1.2 Arbitrariness

Van der Walt[141] points out that the term "arbitrary" in section 25(1) creates interpretation problems, due to the fact that section 25(1) already establishes that deprivation cannot be arbitrary by targeting specific individuals. Therefore Van der Walt asks the question: what does this requirement entail?

In answering the above question Van der Walt[142] provides two views as to what the term arbitrary in section 25(1) refers to. The first view is that the provision ensures formal procedural justice, which is referred to as the "thin" test, which ensures that regulatory deprivation is qualified by a legitimate government reason. The "thin" test does not investigate if there is proportionality between the means and the ends. In other words, this test is limited to an enquiry into the legitimacy of the reason for the deprivation. It does not enquire whether the means used or the outcome of such a deprivation is justified.

The second view is referred to as the "thicker" interpretation, which provides that deprivation should not impose an unacceptably heavy burden or sacrifice upon specific individuals on behalf of the general public at large. Van der Walt states:[143]

> This interpretation means that any law that authorises deprivation of property must establish sufficient reason for the deprivation in the sense that it is not only rationally linked to a legitimate government purpose but also justified. In that sense, non-arbitrariness means that the law authorising the deprivation establishes a proper balance between the ends it serves and means it employs to reach them. Consequently, a law that authorises an excessive burden being placed unfairly on one individual or a small group of individuals could be arbitrary and invalid even though it serves a legitimate and important public purpose.

From the above, it is clear that the "thicker" interpretation does not merely make an enquiry into the legitimacy of the reason as is done by the "thin" test. The "thicker" interpretation further requires that the burden and results of such a deprivation must be justified. If the burden is too excessive, then the deprivation could be invalid due to it being arbitrary.

141 Van der Walt *Constitutional Property Law* 236.
142 Van der Walt *Constiutional Property Law* 237-238.
143 Van der Walt *Constitutional Property Law* 238.

Preceding the *FNB case*,[144] it was unclear whether the "thin" or "thicker" interpretation of the non-arbitrary rule would apply.[145] The Constitutional Court, in the above case by way of a substantive element, introduced a "thick" interpretation of the non-arbitrary requirement of section 25(1).[146] The court stated that deprivation of property would be considered as arbitrary if the law that provides for such a deprivation does not provide a sufficient reason for the deprivation.[147] Judge Ackermann went further to provide that, in order to establish sufficient reasons, eight factors must be considered. These factors include:

- evaluating the connection between the means employed, and the results required, considering a complexity of relationships;
- considering the connection between the purpose and the person whose property is being affected;
- considering the connection between the purpose and the nature of the property, as well as the extent of the deprivation;
- where the property being deprived is ownership of land, a more compelling purpose must be established;
- where the deprivation encompasses all the incidents of ownership, a more compelling purpose must be established;
- sufficient reason will be established by either a mere rational relationship or by a proportionality evaluation, depending on the interaction between the variable means and the ends, the nature of the property and extent of the deprivation; and
- lastly all relevant factors of each case before the court must be decided.[148]

From the above it is clear that the court introduced the "thicker" interpretation of the non-arbitrary requirement. In other words, in order to decide whether there is sufficient reason for the deprivation, one must look at the means employed and the ends brought about. One must consider the complexity of relationships, and the

144 *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 4 SA 768 (CC).
145 Van der Walt *Constitutional Property Law* 238.
146 Van der Walt *Constitutional Property Law* 245.
147 *FNB* case para 100.
148 *FNB* case para 100.

relationship between the purpose for the deprivation and the affected party. One must look at the relationship between the purpose of the deprivation, the nature of the property and extent of the deprivation. The court went further to hold that a more compelling reason must be given when the deprivation affects ownership of land, and when the deprivation embraces all incidents of ownership.

Roux,[149] however, criticised this test and stated that it "turns out to be chimera, promising more than it delivers". He argues that the court has a wide scope of discretion to decide cases as it sees fit, and therefore the test as formulated in the *FNB* case would ultimately be subject to the interpretation of the courts.[150] Roux's views were confirmed as the Constitutional Court departed from the formulation of the test.

The first case to apply the test in the *FNB* case was the case of *Mkontwana* case.[151] Van der Walt[152] is of the opinion that, on the surface, it looks as though the court merely applied the test laid down in the *FNB* case. However, this is not the case as the subtle rephrasing of the test made significant changes to it. The court in the *Mkontwana* case made two significant changes:

Firstly, the court placed less emphasis on the "contextual" factors and more emphasis on the extent of the deprivation by stating:[153]

> A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.

Secondly, the court adjusted the "complexity" test which looked at the interaction between various factors of each case, and replaced it with the following:[154]

149 Roux "Arbitrary Deprivation Vortex" 5.
150 Roux "Arbitrary Deprivation Vortex" 5.
151 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Exective Council for Local Governemnt and Housing, Gauteng* 2005 1 SA 530 (CC).
152 Van der Walt *Constitutional Property Law* 249.
153 *Mkontwana* case para 35.
154 *Mkontwana* case para 51.

> In my view, there would be sufficient reason for the deprivation if the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment.

Van der Walt[155] criticises the decision in the *Mkontwana* case, due to the fact that the court accepted the purpose of the deprivation too easily and gave it too much weight. He goes further and states the following:[156]

> The court's thin rationality-style analysis in this decision arguably underlines the necessity of developing a more sophisticated view of the public purpose requirement for deprivation.

Van der Walt's critic of the decision is correct, in that the very purpose of the non-arbitrary clause in section 25(1) is to protect property rights from unfair limitations. By the court placing a greater importance on the purpose of the deprivation, and overlooking other factors, it undermines the very essence of section 25(1). As per Van der Walt's suggestion, the development of a more sophisticated view of the public purpose requirement for deprivation is essential, especially if the rights of the property owner are to be taken into account.

4.3.2.2 Section 25(2)

Section 25(2) states that property may be expropriated in terms of law of general application, for public purpose or public interest, subject to compensation. The amount of compensation, time of payment and manner of such payment must be agreed upon by the parties, or must be decided or approved by a court of law.

4.3.2.2.1 Expropriation

Although the *Constitution of the Republic of South Africa,* 1996 sets out the legal requirements for expropriation, the concept of expropriation is not outlined or defined.[157] Pienaar[158] and Van der Schyff[159] point out that when dealing with the

155 Van der Walt *Constitutional Property Law* 251.
156 Van der Walt *Constitutional Property Law* 251.
157 Van der Schyff 2007 *CILSA* 307.
158 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 192.
159 Van der Schyff 2007 *CILSA* 307.

concept of expropriation, commentators and judges refer to well-known cases[160] that were decided before the new constitutional dispensation. Pienaar[161] and Van der Schyff[162] go further to state that these cases emphasised that the concept of expropriation entailed more than the ordinary meaning of the word "expropriate", which was the dispossession of ownership or deprivation of property. The concept entailed the indispensible accompanying requirement of "appropriation" of the particular property by the expropriator, and this gave rise to the legally defined expropriation accompanied by compensation. It must, however, be noted that in the *Agri* case, the court stated that, in terms of the *Constitution*, the content of property rights that are expropriated need not always be acquired by the state. It would be sufficient if the property is expropriated in the interest of the public and is acquired by a third party.[163]

4.3.2.2.1.1 Law of general application

Section 25(2) also contains the requirement of section 25(1), that the law must be of general application. Van der Walt[164] points out that there are only two differences between the requirement of "law of general application" contained in section 25(1) and section 25(2). The first difference is that, in terms of expropriation, the requirement of "law of general application" will not include common law, as there is no common law authority for expropriation in South Africa. The second difference is that, in terms of expropriation, the "law of general application" has to authorise a specific state action, in other words the law of general application must authorise, for example, the expropriation of private land for a public purpose. It must be noted that Currie and De Waal[165] are of the view that the law of general application is unlikely to have much of a role to play in terms of section 25 cases.

160 *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T); *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A); *Apex Mines Ltd v Administrator, Transvaal* 1988 3 SA 1 (A).
161 Pienaar and Van der Schyff 2007 *Law, Environmental and Development Journal* 192.
162 Van der Schyff 2007 *CILSA* 307.
163 *Agri* case para 83. In the Constitutional Court *Agri* case 59, the court moved away from this argument and stated that there can be no expropriation in circumstances where deprivation does not result in property being acquired by the state. In other words, there can only be expropriation if the state acquires the property being expropriated.
164 Van der Walt *Constitutional Property Law* 453-454.
165 Currie and De Waal *Bill of Rights Handbook* 542.

4.3.2.2.1.2 Public purpose or public interest

Another requirement of section 25(2) is that property may be expropriated for a public purpose, or in the interest of the public. Section 25(4)(a) sheds light on what is defined as public interest, and states that 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". Van der Walt[166] is of the opinion that it is very unlikely that the public purpose requirement in section 25(2) can be interpreted as narrowly, due to the definition given in section 25(4)(a). Since the *Constitution* does not adequately define public purpose or public interest, a discussion must be undertaken in order to establish its meaning.

A simple definition of "public purpose" is anything that is carried out by an organ of state which will benefit the public at large, or will benefit the community as a whole.[167] Nginase[168] points out that the term "public interest" is a broad concept that is hard to define, therefore to date there exists no definition of "public interest" in terms of section 25(2)(a). As such, the most constructive explanation of the term "public interest" was stated by Judge Smalberger in the case of *Administrator, Transvaal v Van Streepen (Kempton Park) Pty Ltd*[169] where he highlighted the difference between "public purpose" and "public interest" as follows:[170]

> The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. It does not appear that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case. One can conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of a portion of his land to relocate the services of B, who would otherwise have to be paid massive compensation, could be justified on the basis of it being in the public interest.

From the above it is clear that the court will have to determine on a case-by-case basis whether expropriation is done either for public purpose or in the interest of the public. It is argued that the legislature is vested with the right of deciding what is in

166 Van der Walt *Constitutional Property Law* 458.
167 Currie and De Waal *Bill of Rights Handbook* 554.
168 Nginase *Meaning of 'Public Purpose' and 'Public Interest'* 61.
169 *Administrator, Transvaal v Van Streepen (Kempton Park) Pty Ltd* 1990 2 All SA 526 (A).
170 *Administrator, Transvaal v Van Streepen (Kempton Park) Pty Ltd* 1990 2 All SA 526 (A) para 47-48.

the public's interest.[171] As such the courts, in determining whether an expropriation is done for either public purpose or public interest, should respect the choice of the legislature. This, however, does not mean that the court is obligated to allow the unconstitutional application of this requirement.

The purpose for this requirement is to prohibit the unlawful expropriation of property and to limit the exercise of power by organs of state. Therefore, if the purpose of this requirement is approached in a wide sense, it can be argued that the terms "public purpose" and "public interest" can be interchangeable with reference to expropriation.[172]

Van der Walt[173] brings clarity to the uncertainty created by the inability to give neither "public purpose" nor "public interest" an exact definition, and states that expropriation and deprivation will always be in the interest of the public or for public purpose, unless it is arbitrary, capricious or for an improper purpose.

4.3.2.3 Compensation

Section 25(3) is very progressive in that it sets out the calculation of compensation, and the manner and time in which such compensation must be paid.[174] This is commendable in that the Namibian *Constitution* does not set out the calculation for compensation within its property clause. In Namibia the "Hull formula", which is founded upon international law, is used in order to determine the amount of compensation, on a willing-buyer willing-seller basis.[175]

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171 Mostert and Pope (eds) *Principles of the Law of Property* 126.

172 Erasmus *Protection of Landowner's Rights* 23; see Mostert and Pope (eds) *Principles of the Law of Property* 126.

173 Van der Walt *Constitutional Property Law* 269.

174 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) (hereafter *Du Toit* case) para 28. The Constitutional Court stated that the payment of compensation is peremptory.

175 In the Namibian context the *Agricultural (Commercial) Land Reform Act* 6 of 1995 provides for expropriation. This Act established a legal framework for the acquisition of commercial farms by the state for resettlement purposes, following the willing buyer-willing seller principle. According to the willing buyer-willing seller principle, the owners of commercial farms who wanted to sell their farms would offer them to the state. After the offer was made, an official commission would visit the farm and assess whether it was profitable to buy the farm, depending on the quality and suitability of the farm for resettlement purposes. Due to the failure of the willing buyer-willing seller principle, the Namibian government passed a land tax in 2001 which aimed to penalise unproductive farmers, thereby forcing them to sell vacant portions of their farms. This land tax has been ineffective and has not been collected to date. It is clear that the willing buyer-willing

In the South African context expropriation is governed by both the *Constitution* and the *Expropriation Act*.[176] Section 25(3) of the *Constitution* stipulates the factors that must be considered in the determination of the amount of compensation that must be paid.[177] The *Expropriation Act* also provides for the calculation of compensation and is based on the market value of the property.[178] However, in the *Du Toit* case, Judge Langa in the minority judgement, held that it is unacceptable to reconcile section 25(3) of the *Constitution* with that of section 12 of the *Expropriation Act*.[179] This implies that the formulation given by the *Constitution* is the primary source of calculating compensation. As such section 12 of the *Expropriation Act* is secondary and must comply with the formulation given in section 25(3) of the *Constitution*.

This gives the court a clear cut formula, when faced with the decision as to whether or not the compensation paid is just and equitable. This section provides that the time and manner of payment of compensation should be just and equitable, taking into account the circumstances of each case.

4.3.3 General limitation clause

Section 36 of the *Constitution* provides for a limitation on the rights provided for in the Bill of Rights and stipulates that such a limitation can only occur in terms of law of general application, as long as the limitation is reasonable and justifiable in an

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seller principle has delayed the land reform process in Namibia, and has failed to bring about the urgently needed land reform. The South African application of the willing buyer-willing seller principle has not brought about much success either. In a nutshell even if the "landless" people are willing to buy the land, there is no guarantee that they will be able to secure the land that they want to buy. This is because the people in need of land are dependent on the co-operation of landowners, and the willingness of the state to approve their application for such land and provide the necessary funding. Further the concept of "willing seller" fully protects the interest of the land owner, as they can chose whether or not to sell their land, and they can determine the price at which they will sell it. See Dlamini *Taking Land Reform Seriously* 38-56.

176 *Expropriation Act* 63 of 1975.

177 Section 25(3) of the *Constitution* states the relevant factors that must be taken into account in the determination of compensation as follows:

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.

178 Section 12 of the *Expropriation Act* 63 of 1975.

179 *Du Toit* case para 83.

open and democratic society based on human dignity, equality and freedom. In essence this provision states that there must be a balanced relationship between the limitation, and the benefit that is actually acquired from the limitation. If the requirements for limitations of section 25 are taken into account, it is clear that section 36 calls for the same requirements to be met before a valid limitation is achieved. It must, however, be noted that, in terms of section 25, it is very unlikely that section 36 will find application, except in very abnormal cases.[180]

4.4 The National Water Act 36 of 1998

The different categories of ownership of water that were previously recognised under the *Water Act*,[181] no longer exist under the *National Water Act*. The preamble of the Act recognises that water is a scarce, unevenly distributed national resource that belongs to all people. This is re-affirmed by the wording of section 3, which provides that national government shall be the public trustee of the nation's water resources.

In the South African context, the transition from a mixed public/private form of ownership to a fully public trusteeship was made possible by section 25(1) of the South African *Constitution*, which allows for deprivation of property by way of a law of general application that is not arbitrary. The following discussion seeks to examine the relevant provisions of the Act, with an in-depth analysis of the "public trust" doctrine.

4.4.1 Section 3

Section 3(1) provides that the national government shall be the public trustee of the nation's water resources, and should thus ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons, in accordance with its constitutional mandate. This dissertation will trace the history of the public trust doctrine, and its implementation into the South African water law regime.

180 Badenhorst, Pienaar and Mostert *Law of Property* 55.
181 *Water Act* 54 of 1956.

4.4.1.1 The public trust doctrine

From the onset it must be pointed out that different assumptions exist as to the meaning and full implication of the public trust doctrine in the new constitutional dispensation.[182] Terminology can be very misleading in trying to ascertain the meaning and scope of the term "public trust".[183] Authors have further warned that the public trust doctrine is complicated due to there being no universal or fixed law on its application, therefore states have dealt with land under public trust as they see fit.[184] In order to determine the scope and extent of the doctrine's application into the South African legal context, it is necessary to study the history and content thereof.

4.4.1.1.1 Roman law formation of the public trust doctrine

As explained in chapter 2, in the Roman era water was divided into *res communes*[185] and *res publicae.*[186] Pienaar and Van der Schyff[187] explains that, under Roman law, water that was classified as *res publicae* was placed under the custodianship of the state, and as such the state had the right to control and regulate such water. This was explained in the case of *Shively v Bowlby*,[188] where Justice Gray discussed the common law perspective of the doctrine with specific reference to navigable water and the sea as follows:[189]

> Such waters, and land which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature....Therefore the title, jus privatum, in such lands....belongs to the king, as the sovereign; and the dominium thereof, jus publicum, is vested in him, as the representative of the nation for the public benefit.

182 Viljoen *Public Trust Doctrine* 34; Thompson *Water Law* 279; Kidd *Environmental Law* 70.
183 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 106.
184 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 107 makes reference to the following case law in order to illustrate this point: see *Shively v Bowlby* 152 US 1 (1984) 26; see also *Washington State Geoduck Harvest Association v Washington State Department of Natural Resources* 124 Wn App 441 (2004) 451.
185 Things used by everybody, such as water.
186 Things that were owned by the state, such as a river.
187 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 182.
188 *Shively v Bowlby* 152 US 1 (1894).
189 *Shively v Bowlby* 152 US 1 (1894) 11-12; see Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 107-114.

Van der Schyff[190] points out that the South African public trust doctrine shares characteristics with the common law principle of custodianship stated above which shall be for the benefit of all South Africans. Further the common law doctrine requires that states may only exercise their dominium in such a way that would allow freedom of use by the public.[191]

4.4.1.1.2 Anglo-American public trust doctrine

Glazewski[192] points out that, although the modern "public trust" doctrine is founded upon the American legal regime, it is not an American notion. It originates from the Roman law, which classified certain property as not being capable of private ownership. It has been suggested that the American legal system adopted the trust equivalent in order to fulfil the need to identify an owner of public trust property, or at the very least, to identify the legal title to such public trust property.[193] Huffman,[194] however, opposed this view and stated that the use of the word "trust" is very misleading. Furthermore, the American application of the public trust doctrine does not meet the tripartite nature of the creation and operation of a trust. It is correctly argued that, in the American context, the term "trust" refers to the fiduciary duties of the state imposed by the doctrine.[195]

Pienaar and Van der Schyff[196] explains the Anglo-American public trust doctrine as follows:

> Research of the Anglo-American public trust doctrine indicates that the title in public trust property vests in the state as trustee, with the nation as beneficiary.

190 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 79-80; see Viljoen *Public Trust Doctrine* 37.
191 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 111.
192 Glazewski *Environmental Law* 17.
193 Stevens 1980 *UC Davis LR* 195; see Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 115.
194 Huffman 1989 *Environmental Law* 534; see Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 115.
195 Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 116.
196 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 184.

This exposition by them indicates that the state is vested with the right of title. However, this right is not the same as the right that would be vested in state owned land. In this case the state holds the resource for the benefit of all.

4.4.1.1.3 South African application

The public trust doctrine first found its application in South African law in the preamble of the *Water Services Act*,[197] which re-affirms the national government's role as custodian of water resources.[198] It was then echoed in section 3 of the *National Water Act*, which described in broader detail what the duty of the national government was, in their role as custodian. The public trust doctrine is also found in section 2(4)(o) of the *National Environmental Management Act*,[199] which states that the environment must be held in trust for the South African people, the beneficial use of the environment must serve public interest and must be protected as the people's common heritage.

The White Paper on a National Water Policy[200] explained the application of the public trust doctrine in South Africa perfectly:[201]

> The main idea of the public trust is that the national government has a duty to regulate water use for the benefit of all South African's, 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's interest.

From the above it is clear that, in the South African context, the public trust doctrine contains four key elements.[202] The first is that the state has a duty to regulate the use of water. The second element is that water is seen as public in nature. The third element is that the state is under an obligation to regulate water so that access to water will be equally distributed. The fourth element is that this scarce resource should be beneficially used for the benefit of all. An exposition will only be taken into the duty of the state to regulate water, and the beneficial use of water.

197 *Water Services Act* 108 of 1997.
198 Viljoen *Public Trust Doctrine* 41.
199 *Water Services Act* 108 of 1997.
200 *White Paper on a National Water Policy for South Africa*, 1997.
201 *White Paper on a National Water Policy for South Africa*, 1997 5.1.2.
202 See Viljoen *Public Trust Doctrine* 43 for a thorough exposition on this aspect.

(a) Duty to regulate the use of water

As a point of departure, it is important to note that the requirement of the public trust doctrine empowers the custodian or regulator of a water resource to set restrictions within which the user must exercise the right of use.[203]

Montague[204] quoted a legal scholar named Peter Manus, who explained the duty placed upon the state to regulate perfectly. Manus stated that the government has a duty to promote and maintain a healthy environment for the benefit of present and future generations. He went further to state that this duty is not voluntary, but is mandatory and the state cannot deny, repudiate, or alienate this duty.[205] If this quote is applied to the South African context, it means that the state is obligated to protect the nation's common heritage for present and future generations. This would mean that, in the context of water, the Minister, who is acting on behalf of the state, is obligated to protect not just the water resource, but also the established water uses that are linked to that resource.[206]

(b) Beneficial use

The requirement of beneficial use places an obligation upon the Minister, who is acting on behalf of the state, to ensure that the resource, in this case water, is allocated and used beneficially by all, taking into account the promotion of environmental values.[207] The question has been posed as to whether everyone has a basic right to exhaust all the water resources. It has been answered negatively due to the fact that this is not an unqualified obligation placed upon the state.[208] In fulfilling its obligation, the state must promote environmental values, one of them

203 Van der Walt *Concept 'Beneficial Use'* 173.
204 Montague "Government has a Public Trust Duty" 5.
205 See Viljoen *Public Trust Doctrine* 45.
206 See Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* 148; Van der Walt *Concept 'Beneficial Use'* 173.
207 Van der Walt *Concept 'Beneficial Use'* 173.
208 Viljeon *Public Trust Doctrine* 51.

being sustainable development, which is based upon the use of resources for the benefit of present and future generations.[209]

From the above it is clear that the public trust doctrine has found its application in the South African legal system. The statutory inclusion of the public trust doctrine has changed ownership rights of water completely. If the *Water Resources Management Act*[210] comes into force in Namibia, the application of the "public trust" doctrine will more than likely have the same application as was found in the South African context.

4.4.2 Section 4

From the onset it must be understood that the right to use water is no longer attached to the possession of land. *The National Water Act* re-affirms that an entitlement to water is vested in an individual and not in the land.[211] It is suggested that the system of water use licences represents a redefinition in the regulation of water uses, and not its extinction. In other words, water use licences have not done away with the right to use water, it has simply regulated the right to use water.[212]

Section 4 provides for the "use of water" and states that water may only be used in the following circumstances:

The first use is set out under Schedule 1 of the Act, which states that an individual is permitted to use water for reasonable household purposes from any water source that he/she is lawfully permitted to use. The person may further take water for use on land either owned or occupied by that person, for reasonable domestic use, small gardening but not for commercial purposes, watering of animals on the land to the extent of the grazing capacity of the land, provided that such a use is within the carrying capacity of such a water source and does not affect the rights of other

209 See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 75.
210 *Water Resources Management Act* 24 of 2004.
211 Van der Walt *Concept 'Beneficial Use'* 169.
212 Soltau 1999 *Acta Juridica* 247; Van der Walt *Concept 'Beneficial Use'* 172.

users.[213] All individuals are further authorised to store and use run-off water from roofs,[214] and in emergency circumstances water from any source may be used for human consumption or fire fighting.[215] Water may also be used for recreational purposes by all individuals who are lawfully permitted to access such a water source and a person may carry a boat or canoe over riparian land in order to continue a boat trip on the original water course which he/she was lawfully permitted to use.[216]

The second use is in terms of an existing lawful water use in accordance with section 34 of the Act.[217] However, this use is subject to any obligations or conditions imposed by the previous Act, as well as the replacement "old water uses" by new licensing procedures, or any other obligations imposed by the *National Water Act*. It also provides that an authority may request the registration of existing lawful water uses.

The third use is in terms of a general authorisation or licence under the Act.[218]

Section 4 is a clear indication of the national government as custodians of water resources, controlling the use of such a water resource for the benefit of all. If the private ownership of water still existed, it would be impossible to implement section 4 as this would be seen as a violation of the right to property.

4.4.3 Section 39

Section 4 provides that one of the circumstances in which water may be used is either in terms of a general authorisation, or in terms of a licence. Section 39 provides for general authorisations, and states that a responsible authority may, by way of Government Notice, authorise all persons or a specific category of persons to use water, either generally within a specific water source or within a specified area.

213 See Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 186.
214 Schedule 1 1(c) of the *National Water Act* 36 of 1998.
215 Schedule 1 1(d) of the *National Water Act* 36 of 1998.
216 See Piennar and Van der Schyff 2007 *Law, Environment and Development Journal* 186.
217 Section 34 allows for the continuation of existing water uses, however these are subject to conditions and obligations imposed by the Act, and further they may be replaced by a licence which is subject to limitations or prohibitions under the Act.
218 See para 4.4.3.

4.4.4 Section 40

If a water use does not fall within the ambits of section 39, then the applicant must apply for a water use licence in terms of section 40. When an application is processed then the considerations stated with section 27 must be taken into account. It must be noted that section 27 can be subject to appeal before the Water Tribunal.[219] In the case of *Komatipoort Golf Club v Chief Director: Water Use and Conservation*,[220] the golf club developer successfully appealed the decision of the Chief Director, who had granted a lesser amount of water than what had been applied for, on the grounds that the water was not being beneficially used.[221]

4.4.5 Section 22(6)-(10)

This section is very progressive in that it goes further than the *Constitution*, and provides for compensation where an application for a licence is refused,[222] or where it is granted but for a lesser use than an existing lawful water use.[223] Glazewski[224] argues that this section provides for compensation for deprivation of property as contemplated in terms of section 25(1) of the *Constitution*. Glazewski[225] goes further to explain that compensation can only be paid if two criteria are present, the first being that the deprivation should result in "severe prejudice", and secondly that the water being deprived must have been used "beneficially".

Section 22(7) provides that compensation must be in accordance with section 25(3) of the *Constitution*. This means that the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances. However, Glazewski[226] points out that, although the

219 Glazewski *Environmental Law* 438.
220 *Komatipoort Golf Club v Chief Director: Water Use and Conservation* (Water Tribunal WTI8/K3 31 Jan 2003, unreported)..
221 Glazewski *Environmental Law* 438.
222 Section 22(6) *National Water Act* 36 of 1998.
223 Section 22(6) *National Water Act* 36 of 1998.
224 Glazewski *Environmental Law* 439.
225 Glazewski *Environmental Law* 439-440.
226 Glazewski *Environmental Law* 440.

Constitution provides criteria for the calculation of compensation, the Act goes further by stating that quantification of compensation is to disregard any reduction in the existing water use made for certain reasons, including to provide for the Reserve.[227]

Section 22(6)–(10) is commendable in that it provides for compensation if the deprivation amounts to a "severe prejudice", unlike the *Water Resources Management Act*,[228] which does not provide for any sort of compensation. This leaves unanswered questions as to how the *Water Resources Management Act* can abolish private ownership of water, set in place a licensing system for the use of water, and then offer no compensation for the "severe prejudice" of any rights.

4.5 Comparative analysis of Namibian and South African law

4.5.1 Constitutional property rights provisions

Article 16(1) of the Namibian *Constitution* provides for the right to property and states that the only limitation that may be placed upon such a right is in terms of individuals who are not Namibian citizens. This means that, as long as an individual is a Namibian citizen, then his/her right to property cannot be limited. The only manner in which a Namibian citizen's property can be limited, is by way of expropriation; in other words, the Namibian *Constitution* does not make provision for deprivation. This is unlike the South African *Constitution* that provides in section 25(1) that no individual may be deprived of property, except in terms of law of general application, and further no law may permit arbitrary deprivation of property. As such the South African property clause provides for deprivation as long as it done under a law of general application, and is not arbitrary in nature. This explains why the *Water Resources Management Act*[229] has failed to be enforced in Namibia, yet the *National Water Act*[230] found a smooth application in the South African context. Pienaar and Van der Schyff[231] correctly point out that, in the South African context, the smooth

227 Section 22(7) *National Water Act* 36 of 1998.
228 *Water Resources Management Act* 24 of 2004.
229 *Water Resources Management Act* 24 of 2004.
230 *National Water Act* 36 of 1998.
231 Pienaar and Van der Schyff 2007 *Law, Environment and Development Journal* 193.

application of the *National Water Act* was aided by section 22(6) of the Act that provided for the payment of compensation to affected parties who have suffered severe prejudice. Such a provision does not exist in the *Water Resources Management Act*.

Article 16(2) of the Namibian *Constitution* provides that the state or a competent body or organ authorised by law may expropriate property in the public's interest. However, just compensation must be paid. In other words, the state may expropriate property, as long as it is in the public's interest, subject to the payment of compensation. Section 25(2) of the South African *Constitution* states that property may be expropriated in terms of law of general application, for public purpose or public interest, subject to compensation. This echoes the Namibian clause on expropriation; however, the South African *Constitution* goes further in section 25(3) to provide a formula for the calculation of compensation. This formula would especially aid Namibia in the transition from a mixed public/private form of water ownership to full public trusteeship, as Namibia can only expropriate water rights due to the Namibian *Constitution* not providing for deprivation.

4.5.2 Water Resources Management Act *24 of 2004 and* National Water Act *36 of 1998 provisions*

Section 4 of the *Water Resources Management Act* provides for the ownership of water, and states that all water resources below and above the surface of the land shall belong to the state, and the state must ensure that the water resources are managed and used to benefit all people. On the other hand, section 3(1) of the *National Water Act* provides that the national government shall be the public trustee of the nation's water resources, and should thus ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons, in accordance with its constitutional mandate. Immediately it is clear that there is an obvious difference in the wording between the two provisions. On the one hand the *Water Resources Management Act* vests ownership of water in the state, and on the other hand the *National Water Act* assigns the state as a public trustee. It must be noted, however, that despite the differences in the wording of the two provisions, both are based on the "public trust"

doctrine. The main difference is contained in their constitutionality. In the case of section 3(1) of the *National Water Act*, the South African *Constitution* allows for deprivation and therefore it is constitutional. However, in the case of section 4 of the *Water Resources Management Act*, the Namibian *Constitution* does not provide for deprivation, therefore in order for section 4 to be constitutionally sound, the requirements of expropriation must be met and satisfied.

Section 22(6)–(10) of the *National Water Act* provides for compensation where an application for a licence is refused,[232] or where it is granted, but for a lesser use than an existing lawful water use.[233] Van der Walt[234] explains that there must be a prejudice to the economic viability of an undertaking in respect of which the water was used in order to receive compensation. In other words, if the water was used, for example, to irrigate maize, and the refusal of the licence makes it impossible to grow maize due to lack of water, then the affected party may claim compensation for the lost economic benefit.[235] This is in complete contrast to the *Water Resources Management Act*, which does not provide for the payment of compensation in any form. Especially when the Namibian *Constitution* only provides for expropriation and not deprivation, compensation then becomes an essential requirement of expropriation which is enforced by the *Constitution* of Namibia.

4.6 Conclusion

The South African water law context has exposed massive flaws in the *Water Resources Management Act*. Therefore, in order to implement the *Water Resources Management Act* effectively, major amendments need to be made to the Act. These amendments need to provide for the right to property as provided for by article 16 of the Namibian *Constitution*. Chapter 5 will examine possible recommendations that can be implemented in order to bring about the realisation of a water resource that is available to all, without the violation of individual property rights.

232 Section 22(6) *National Water Act* 36 of 1998.
233 Section 22(6) *National Water Act* 36 of 1998.
234 Van der Walt *Concept 'Beneficial Use'* 176-177.
235 See Van der Walt *Concept 'Beneficial Use'* para 4.4.2.4.

5 Conclusion

5.1 Revisiting the research question and objectives of the study

The research question that guided this study was to what extent will the *Water Resources Management Act* affect property rights in Namibia, and further to what extent is the regulatory framework in respect of water comparable with the position in South Africa. In order to answer the research question, this study examined section 4 of the *Water Resources Management Act* and the impact that this provision will have on the private ownership of water in Namibia. Therefore the primary objective of this dissertation was to ascertain the implication of the abolition of private ownership of water within Namibian water law.

In order to realise this objective, the following secondary objectives were pursued:

1. the historical development of ownership of water in Namibian water law;[236]
2. the scope of public and private ownership in Namibian water law;[237]
3. the *Water Resources Management Act* provisions that are applicable;[238] and
4. the effect of applicable *Water Resources Management Act* provisions on property rights in Namibia.[239]

A tertiary objective of this dissertation was to compare the Namibian water law system with the South African water law system. This comparison was not a thorough legal comparison; however, it was taken in order to ascertain the manner in which South Africa has dealt with the issue of property rights and ownership of water.[240]

236 Chapter 2.
237 Chapter 2.
238 Chapter 3.
239 Chapter 3.
240 Chapter 4.

5.2 Secondary objectives as foundation for the realisation of the primary objective

In this dissertation, conclusions were reached with regard to the research of the individual components that constituted the secondary objectives as provided for in 5.1 *supra*. These conclusions, added together, provide an overarching perspective regarding the constitutionality of section 4 of the *Water Resources Management Act* and its ensuing implications. Therefore, before the research question can be answered, it will be necessary to take a retrospective view of the research that has been undertaken.

5.2.1 The historical development of ownership of water in Namibian water law[241]

The history and development of ownership of water in Namibian water law was examined in order to fully understand the implications of section 4 of the *Water Resources Management Act*. The historical development was done with the purpose of determining:

- whether private ownership of water was an established principle under Roman-Dutch law;[242] and
- whether private ownership of water was established in South West Africa's water legislation.[243]

From the research done it can be confirmed that private ownership of water was an established principle under Roman-Dutch law. A further examination of Roman-Dutch law reveals that surface water could be divided into private and public water. Public water belonged to the whole nation, while ownership of private rivers was vested in the land owner.[244]

Under South West Africa's water legislation, the *Irrigation and Water Conservation Act* maintained the distinction between public and private water. The *Water Act*, as

241 Chapter 2.
242 Chapter 2 para 2.4.
243 Chapter 2 para 2.5.
244 Chapter 2 para 2.4.1.

per the *Irrigation and Water Conservation Act*, maintained the distinction between public and private water. However, the *Water Act* expanded the definitions of both public and private water, and acknowledged that the land owner where the water found its source or flowed over, could exercise the exclusive use rights of such water.[245]

The research as such confirmed that the private ownership of water is established both in Roman-Dutch law and in South West Africa's water legislation.

5.2.2 The scope of public and private ownership of water in Namibian water law

As stated above, water in Namibia is still governed by the *Water Act*. Section 1 of the *Water Act* defines public water as any water flowing or found in or derived from the bed of a public stream, whether visible or not. Public water is further governed by section 6(1) of the *Water Act* that states that no person has the right of property in terms of public water. On the other hand, private water is defined by the *Water Act* as all water that rises or falls naturally on any land or naturally drains, or is led onto, more pieces of land which are subject to original grants, but not capable of common use for irrigation purposes. Private water is further governed in terms of section 5(1) of the *Water Act* that states that the use and enjoyment of private water shall be the sole and exclusive right of the owner of the land on which the water is found.[246]

From the above research it is clear that Namibian water law still recognises public and private ownership of water resources.

5.2.3 Water Resources Management Act *provisions that are applicable*

The *Water Resources Management Act* has been approved and published in the *Government Gazette*. However, it has not yet come into force as a date for commencement of the Act as prescribed by section 138(1)(b) has not yet been

245 Chapter 2 para 2.5.
246 Chapter 2 para 2.5.2.

determined by the Minister. Once the Act is in force, the *Water Act* will be repealed as a whole.[247]

Section 4 provides for the ownership of water, and states that all water resources below and above the surface of the land shall belong to the state, and the state must ensure that the water resources are managed and used to benefit all people.[248]

Section 32 requires a licence if any person wishes to abstract water from any source. This licence will contain certain conditions with regards to the amount of water that can be abstracted, and the duration for which an abstraction can be performed.[249]

5.2.4 The effect of applicable Water Resources Management Act *provisions on property rights in Namibia*

Section 4 of the *Water Resources Management Act* will abolish the private ownership of water in Namibia. This is clearly in violation of article 16 of the Namibian *Constitution*, which provides for private ownership of water when read with article 100 of the Namibian *Constitution*. Section 32 goes further to eliminate private ownership of water resources by providing that water may only be abstracted if such a person applies for a licence to abstract such water.[250]

5.3 Answering the research question and attaining the primary objective of this dissertation

The research question that guided this study was to what extent will the *Water Resources Management Act* affect property rights in Namibia, and further to what extent is the regulatory framework in respect of water comparable with the position in South Africa.

In conclusion, a succinct answer to the above research question would be that the *Water Resources Management Act* will dramatically affect property rights in Namibia.

247 Chapter 3 para 3.3.
248 Chapter 3 para 3.3.2.
249 Chapter 3 para 3.3.2.
250 Chapter 3 para 3.3.2.

Under the *Water Resources Management Act* there will be no private ownership of water and the affected person will have no recourse under the Act to claim compensation. Further the concept of public trusteeship will be established in terms of water resources, which means that a fiduciary responsibility will be attributed to the national government to regulate Namibia's limited water resources for the benefit of the entire Namibian population.

The South African position can provide insight as to how the Namibian *Water Resources Management Act* can be implemented. However, due to the fact that the Namibian *Constitution* does not provide for "deprivation" within its property clause, as the South African property clause does, the implementation of the *Water Resources Management Act* will still meet resistance.

5.4 Recommendations

As a result of this research, it is recommended that:

- In accordance with article 16 of the Namibian *Constitution*, private ownership of water may only be abolished by way of expropriation. Therefore the *Water Resources Management Act* should not abolish private ownership of water, but regulate the amount of water the private owners can use by way of a water use licence.
- The *Water Resources Management Act* must be amended to include the payment of compensation for all private owners of water that will suffer an economic prejudice from the regulation of use provided for in the water use licence.
- The amount of compensation to be paid above must be determined by an appointed compensation court. Members of this court must be independently appointed and must be qualified in accessing economic loss.
- The constructive expropriation doctrine must be developed and recognised by Namibian courts, in order for it to extend the scope of expropriation.

Water is a scarce resource that should be guarded in order to preserve it for present and future generations. However, the Namibian *Constitution* provides for private

ownership of water, and to change this regime would require the state to expropriate such private water and pay just compensation. Therefore, regulation of the use of the private water will achieve the required results without the Namibian government having to expropriate such water.

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List of abbreviations

CILSA	Comparative and International Law Journal of Southern Africa
UC Davis LR	University of California Davies Law Review