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Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System

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**Water Law in a Democratic South Africa: A Country Case Study Examining the
Introduction of a Public Rights System**

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Notes for a panel presentation
at the conference on

“Allocating and Managing Water for a Sustainable Future:
Lessons from Around the World”

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Contents

1. Introduction.....	3
2. A Brief Introduction of the Context for Water Law Reform in a Democratic South Africa	3
3. The South African Doctrine of Public Trust in the Water Law Context.....	6
3.1. Understanding the Constitutional Mandate	6
3.2. National Government’s Role as Public Trustee of the Nation’s Water Resources.....	9
3.3. The Obligations of the Public Trustee	10
3.4. A Public System for Equitable Water Use Allocations	13
3.5. Protecting and Promoting Environmental Rights and Recognising International Obligations	17
4. Conclusion	19

“Amanzi Ayimpilo - Water is Life - It is indispensable to survival and there can be no livelihood, no growth, no economic development in its absence. In this drought prone, water scarce country, it is our responsibility to ensure water security for all time.”²

1. Introduction

The National Water Act³ has effected an essential and radical transformation of the regulatory regime governing water resource management in South Africa. It has abolished a private rights system of water allocation and has introduced a public rights system. It ensures that water is treated in an integrated fashion and, wherever it occurs in the hydrological cycle, is a resource common to all⁴.

This paper examines the South African national government’s public trusteeship role in relation to the nation’s water resources. The public trust doctrine forms the cornerstone of the public rights system introduced by the National Water Act. The doctrine has also provided a mechanism for the State to give effect to its certain constitutional obligations, such as its duties to provide -: equitable access to water; environmental protection and sustainable resource use; justifiable social and economic development; and effective recognition of the country’s international obligations.

2. A Brief Description of the Context for Water Law Reform in a Democratic South Africa⁵

The National Water Act governs integrated water resource management in South Africa. The Act is directed at regulating fresh water in its natural or raw state, wherever that water arises, falls or is found within the hydrological cycle⁶.

² Extract from the Budget Speech made by Minister of Water Affairs and Forestry, Mr R Kasrils MP, 15 May 2001.

³ Act 36 of 1998, as amended (“the National Water Act”).

⁴ Principle 2, Fundamental Principles and Objectives for a New Water Law in South Africa, Department of Water Affairs and Forestry, February 1997, p.4. South Africa’s Cabinet approved this document in November 1996.

⁵ See Stein R, South Africa’s New Democratic Water Legislation: National Government’s Role as Public Trustee in Dam Building and Management, 18J, *Energy, Natural Resources & Env’tl Law*, p.285 (2000).

⁶ In South Africa, government is established in 3 spheres: national, provincial and municipal. Sections 43 and 85 of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) determine the legislative and executive authorities of the three spheres of government. Executive and legislative

In October 1998, the National Water Act repealed and replaced a large body⁷ of water laws that were inherited from its colonial and apartheid past. Under the colonial and apartheid regimes the allocation of water use rights were determined on a racially discriminatory basis. This is primarily because the distribution of water use rights was inextricably linked to access to land. Aggressive and oppressive programmes of land dispossession gained momentum at the turn of the 1900's⁸ when legislation was introduced which aimed to prevent black South Africans from acquiring, holding or disposing of immovable property⁹. The inherited water legislation paid no attention, whatsoever, either to access to or the distribution of water for basic human needs¹⁰.

Consequently, upon the advent of democracy there were still approximately 8 million people without access to safe water and over 12 million without access to

powers in relation to the nation's fresh water resources, as they occur in their natural state, are not defined as either a shared national and provincial government executive and legislative competency (Schedule 4 of the Constitution) or an exclusive provincial executive and legislative competency (Schedule 5 of the Constitution). As such, the legislative and executive authorities in relation to those resources fall exclusively within national government's constitutional powers, functions and duties. The Water Services Act 108 of 1997 ("the Water Services Act") deals with reticulated water supply and sanitation services. It specifically provides for the rights of access to basic water supply and basic sanitation and the manner in which municipalities must fulfil their duty to provide water and sanitation services to their communities. Schedule 4B (read together with Section 155(6)(a) and (7)) of the Constitution allocates executive and original law making powers to municipalities in respect of: "*water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems*". Section 78 of the Water Services Act requires that the Water Services Act is read and interpreted subject to the National Water Act; more particularly, in the context of water use, abstraction and disposal.

⁷ The National Water Act has repealed approximately 92 water-related statutes.

⁸ During this period codification of the water law commenced with Act 32 of 1906 of the Cape Colony, continued in the former Transvaal by Act 27 of 1908 and was applied to the four provinces of the Union of South Africa by the Irrigation and Conservation of Waters Act 8 of 1912 ("the Irrigation and Conservation of Waters Act"). The Water Act 54 of 1956 ("the 1956 Water Act") replaced the latter.

⁹ See, for, example the Native Land Act 27 of 1913, the Development Trust and Land Act 18 of 1936, and the Group Areas Acts 41 of 1950, 77 of 1957, and 36 of 1966. The Abolition of Racially Based Land Measures Act 108 of 1991 abolished these statutes. See also M. Chaskalson, C. Lewis, Property, *Constitutional Law of South Africa*, Chaskalson et al (ed.), Juta & Co., pp.31-3.

¹⁰ The Irrigation and Conservation of Waters Act codified the existing common law and primarily regulated competing claims for water for agricultural use purposes. The Act is silent on prioritisation and allocation of water for basic human needs. Its conservation priorities are directed at resource availability for irrigation purposes. The 1956 Water Act replaced the 1912 statute at the height of the apartheid regime's industrial development drive. Although the 1956 Water Act paid attention to competing demands for water by the growing mining and industrial sectors and bulk distribution of water to the state-owned water utilities and local authorities in the expanding urban areas, it was silent on prioritisation and allocation of water for basic human needs.

adequate sanitation¹¹. The negative impacts of inequitable and inadequate access to safe water and sanitation were, and continue to be, borne by women and children in the country's rural areas. To this day water-borne diseases (such as cholera, infectious hepatitis and typhoid) present significant health risks to the country's rural population.¹² The reform of South Africa's water law was hence a matter of urgent national importance - a life and death matter – and may be said to have been mandated as long ago as June 1955, when at the Congress of the People, held at Kliptown near Soweto, Johannesburg, it was declared that “*all apartheid laws and practices shall be set aside*”¹³.

“*South Africa is an arid country where rain falls unevenly in both space and time*”¹⁴. A “water stressed” country classification by 2025 has been predicted¹⁵. The urgent development needs of South African society also demanded that management of the nation's scarce water resources should be re-examined taking cognisance of social, economic and environmental factors. Alternative conservation options required long overdue consideration. The inherited legislation did not make allowance for the implementation of such options. Supply-side management, designed to support particular sectors of white South African society, mainly large-scale irrigation in the agricultural sector, was the consequence of those laws and facilitated the implementation of capital intensive engineering projects (primarily dam building) which inevitably had, and in some cases still have, negative impacts on the environment, other water users and on human settlement patterns.

¹¹ White Paper on a National Water Policy for South Africa, Department of Water Affairs and Forestry, April 1997, p.9. On 14 February 2001, the South African Cabinet approved an implementation plan for 6000 litres of free water per household per month as part of government's integrated rural development strategy and urban renewal programme. The plan was implemented on 1 July 2001. Latest official statistics (available at the time of writing) indicate that 57% of the total South African population (i.e. 25,926,631), with and without infrastructure, currently have access to free basic water (Source: [www.dwaf.gov.za/Free Water/](http://www.dwaf.gov.za/FreeWater/)). In February 2002 an estimated 18 million South Africans still lack access to basic sanitation. Approximately 75.8% (or 13 314 000) of these people live in the country's rural areas (Source: Framework for a National Sanitation Strategy (February 2002): www.dwaf.gov.za/dir_ws/).

¹² In the Spring of 2000 the rural areas of the KwaZulu Natal province experienced the outbreak of a cholera epidemic which affected an estimated 100 000 people.

¹³ See The Freedom Charter, www.anc.org.za/ancdocs/history/charter/.

¹⁴ White Paper on a National Water Policy for South Africa, *supra*, p.2.

¹⁵ *Ibid*, p.9.

3. The South African Doctrine of Public Trust in the Water Law Context

3.1 Understanding the Constitutional Mandate

*“The water law shall be subject to and consistent with the Constitution in all matters including the determination of the public interest and the rights and obligations of all parties, public and private, with regards to water while taking cognisance of existing uses the water law will actively promote the values enshrined in the Bill of Rights.”*¹⁶

In South Africa, the Constitution is the supreme law of the land - law or conduct inconsistent with it is invalid¹⁷. The Constitution hence dictates the parameters of and minimum standards to be met by a proposed law.

South Africa’s Constitution is internally mechanised by a programmatic approach to the realisation of each of the fundamental rights enshrined in the Bill of Rights¹⁸. The founding provisions of the Constitution direct that the governing approach to the interpretation of the Constitution and the Bill of Rights is that they should be treated in an integrated rather than a piecemeal fashion. As such the Constitution’s clauses and sub-clauses should not be read in isolation from the overall structure of the document and the moral and political values that it is expressly designed to promote¹⁹. In this spirit, the Bill of Rights does not erect a hierarchy of rights and the socio-economic rights contained in the Bill of Rights enjoy equal status with all other fundamental rights. They are justiciable and at the very least they give rise to a negative obligation on the part of the state to desist from preventing or impairing the right²⁰.

Commensurate with the fundamental rights guaranteed and granted to all South Africans in the Bill of Rights, are positive duties placed on the State which oblige it to actively promote and fulfil those rights. A clear statement in this regard is to be found in the Constitution²¹ that enjoins the State to respect, protect, promote and fulfil the rights

¹⁶ Principle 1, Fundamental Principles and Objectives for a New Water Law in South Africa, *supra*, p.4.

¹⁷ Section 2 of the Constitution.

¹⁸ Chapter 2 of the Constitution.

¹⁹ See Stein R, *supra*, at p.285.

²⁰ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

²¹ Section 7(2) of the Constitution.

enshrined in the Bill of Rights. De Vos²² states that the obligation to ‘fulfil’ the rights in the Constitution indicates that both negative and positive action is required by the State to give effect to the rights. The Bill of Rights is therefore not only a constraint on government. The legislature and executive are obliged to develop policy and legislation designed to provide and fulfil the realisation of these rights.

In the celebrated decision of *Government of the Republic of South Africa and Others v Grootboom and Others*²³, the Constitutional Court made it clear that social and economic programmes designed to meet constitutional obligations cannot pass muster if they leave the poorest people and those in intolerable or crisis situations out of their purview. In reaching its decision the Court held that the right of access to adequate housing²⁴ could not be seen in isolation – a relationship exists between the housing right and other socio-economic rights. The implication of this is that the State is under a duty to deliver on all socio-economic rights, including the access to water and environmental rights, by - for example - providing access to sufficient potable water and sanitation for basic human needs. The State is also duty-bound to devise, fund, implement and supervise measures to provide relief to those in desperate need. A call for government action to give content to and fulfil fundamental socio-economic rights resounds from this judgement.

The Bill of Rights guarantees every South African the right to have access to sufficient water²⁵. The State is enjoined to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right²⁶. Furthermore, everyone is guaranteed a right to an environment that is not harmful to human health or well-being and to have the environment protected, for the benefit of present and future generations²⁷. Once again a positive obligation is imposed on the State to take reasonable legislative and other measures that prevent pollution, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

²² De Vos P, Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution, *South African Journal of Human Rights*, Vol 1, November 1997 at p.79.

²³ 2000 (11) BCLR 1169 (CC).

²⁴ Section 26 of the Constitution.

²⁵ Section 27(1)(b) of the Constitution.

²⁶ Section 27(2) of the Constitution.

²⁷ Section 24 of the Constitution.

The Constitution's property clause²⁸ does not expressly confer the right to acquire and hold rights in property²⁹. It provides that no provision of the property rights clause may impede the State from taking legislative and other measures in order to achieve land, water and related reform to address the results of past racial discrimination³⁰. This is subject to the proviso that legislation and other measures are in accordance with the requirements of the limitations clause³¹. The property rights clause sets minimum requirements in respect of deprivations (or regulation) of property rights and expropriation of those rights.

In order to promote the achievement of equality, the Bill of Rights specifically mandates that legislative and other measures should be taken in order to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

The right to life³², the right to have dignity respected and protected³³, and the right to equality that includes full and equal enjoyment of all rights and freedoms³⁴ all compliment the aforementioned fundamental rights.

The Bill of Rights programmatic approach to the achievement of social, economic and environmental justice is bolstered by guaranteed rights of just administrative action³⁵, access to information³⁶ and access to courts or, where appropriate, another independent and impartial tribunal or forum³⁷.

²⁸ Section 25 of the Constitution.

²⁹ Section 25(4)(b) of the Constitution provides that "property" is not limited to land. In the case of *Certification of the Constitution of the Republic of South Africa, supra*, the Constitutional Court rejected all challenges to the property clause of the final constitutional text. The Court appeared to recognise that the Constitution's property clause would have to be interpreted in the light of South Africa's particular history and conditions.

³⁰ Section 25(8) of the Constitution.

³¹ Section 36 of the Constitution.

³² Section 11 of the Constitution.

³³ Section 10 of the Constitution.

³⁴ Section 9 of the Constitution.

³⁵ Section 33 of the Constitution.

³⁶ Section 32 of the Constitution.

³⁷ Section 34 of the Constitution.

3.2 National Government's Role as Public Trustee of the Nation's Water Resources

The construction of the South African doctrine of public trust, as legislated under the National Water Act, entailed a the resurrection of certain Roman, Roman-Dutch and Indigenous and Customary Law principles which were lost as a result of statutory intervention by the colonial and apartheid regimes. Revival of those principles, however, had to be considered within the context of the Constitution's parameters and minimum requirements³⁸, in particular the positive obligation placed on the executive and legislature, among other organs of State, to "*respect, protect, promote and fulfil the rights in the Bill of Rights*"³⁹.

During the process of the development of new water policy and legislation, the public trust doctrine as applied in the United States of America ("the United States") was carefully researched and considered. In order to formulate a sound jurisprudential basis for South Africa's public trust doctrine certain basic tenets of the United States' public trust doctrine were researched and reviewed in order to ensure their appropriateness to South African circumstances. For example, the observation that an "*integrated system of preserving the continuing sovereign power of the state to protect public uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources*"⁴⁰ was considered to be useful to the formulation of a regulatory framework that would give effect to the constitutional obligations placed on national government. The value of the doctrine as "*a tool of general application for citizens seeking to develop a comprehensive approach to resource management problems*"⁴¹ was also relied upon⁴².

³⁸ See Section 2 of the Constitution – being the 'supremacy clause'.

³⁹ See Sections 7(2) and 39 of the Constitution.

⁴⁰ *National Audobon Society v Superior Court of Alpine County, Supreme Court of California*, 1983. 33 Cal.3d 419, 189 Cal.Rptr.346, C658 p.2d, in J.L. Sax (et al) Legal Control of Water Resources, Cases and Material (Second Edition), *American Case Book Series*, West Publishing Company, pp.573-596.

⁴¹ *Ibid.* at p.474.

⁴² See for example H.C. Dunning, The Public Trust: A Fundamental Doctrine of American Property Law, 19 *Environmental Law Journal*, 515, 1989 at p.516 and J.L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 *Michigan Law Review*, 471, January 1970 at p.485. Both writers advance the extension of the public trust doctrine to other arenas of natural resource management.

The South African public trust doctrine has a dual purpose⁴³:

“As custodian of the nation’s water resources, the National Government shall ensure that the development, apportionment, management and use of those resources is carried out using the criteria of public interest, sustainability, equity and efficiency of use in a manner which reflects its public trust obligations and the value of water to society while ensuring that basic domestic needs, the requirements of the environment and international obligations are met”

Hence, the South African public trust doctrine, as encapsulated in the National Water Act, has been designed to address -: (a) the “*responsibilities of national government in managing and protecting water resources*”⁴⁴; for (b) the “*benefit of all South Africans, in a way that takes into account the public nature of water resources and the need to make sure that there is fair access to those resources. The central part of this is to make sure that these scarce resources are beneficially used in the public interest*”⁴⁵. Underpinning this regulatory design is the necessity of ensuring the fulfilment of the State’s constitutional obligations.

3.3 The Obligations of the Public Trustee

The National Water Act defines national government, acting through the Minister of Water Affairs and Forestry (“the Minister”), as the “*public trustee*” of the nation’s water resources⁴⁶. The Minister is ultimately responsible for ensuring that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate. Executive responsibility is delegated to the Minister who must ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values⁴⁷.

In order to guide the implementation of measures designed to fulfil the public trust function the exercise of the Minister’s (or persons to whom the Minister has

⁴³ Succinctly described in Principle 13, Fundamental Principles and Objectives for a New Water Law for South Africa, *supra*, February 1999.

⁴⁴ White Paper on a National Water Policy for South Africa, *supra*, p.14.

⁴⁵ *Ibid.*

⁴⁶ Section 3(1) of the National Water Act.

⁴⁷ Section 3(2) of the National Water Act.

delegated powers, functions or duties under the Act⁴⁸) powers, functions and duties is bounded (or alternatively, can be tested or adjudged) by a set of criteria that form a veritable yardstick against which the Minister's performance of the public trust function can be tested.

The National Water Act requires the establishment of a national water resource strategy, which must provide the framework for the protection, use, development, conservation, management and control of water in the country as a whole.⁴⁹ The Minister, the Director-General, any organ of State and any water management institution (whether it be a catchment management agency with delegated licensing powers or the national Department of Water Affairs and Forestry) are all obliged to give effect to the national water resource strategy in exercising any power or performing any function or duty⁵⁰, for example, in licensing a water use, in determining the conditions of a particular licence or in decision-making on an appeal under the Act.

In permitting (or licensing) any use of water, the public trust doctrine, as established under the National Water Act, obliges all repositories of decision-making power to take into account and give effect to the fundamental principles and objectives of the Act⁵¹. These include -: meeting the basic human needs of present and future generations; promoting equitable access to water; redressing the results of past racial and gender discrimination; promoting efficient, sustainable and beneficial use of water in the public interest; facilitating social and economic development; providing for growing demands for water use; protecting aquatic and associated ecosystems and their biological diversity; reducing and preventing pollution and degradation of water resources⁵².

What lies behind this obligation is the fundamental constitutional requirement of democratic accountability⁵³. The principle of democratic accountability requires national government to ensure that all its functionaries, including catchment management agencies (which will manage water resources at a localised level), act in a fashion consistent with the Constitution as well as the core values and principles of the National Water Act. In this way the National Water Act (read together with the Constitution) will determine the backdrop against which decisions to allocate the country's water resources

⁴⁸ Section 63 read together with Section 169 of the National Water Act.

⁴⁹ Section 6 of the National Water Act.

⁵⁰ Section 8 of the National Water Act.

⁵¹ See Section 2 of the National Water Act.

⁵² *Ibid.*

⁵³ Section 33 of the Constitution read together with the Promotion of Administrative Justice Act 3 of 2000.

will be taken in the future. In accordance with the principles of natural justice, failure to fulfil the South African public trust obligations makes any resultant decision subject to administrative review by either the Water Tribunal⁵⁴ or the Courts.

In specifying the criteria which must be taken into account when making decisions or determining strategies (i.e. action plans), the National Water Act does not seek to restrict or limit the ambit of issues which must be considered by responsible authorities and in respect of which the public trustee is ultimately accountable. Having regard to the nation's history, the list of factors that must form the basis of informed decision-making is designed to ensure that certain fundamental aspects of water resource management in the new democracy cannot be ignored⁵⁵. For example, in carrying out its mandate to ensure a sustainable supply of water for equitable social and economic development, supply-side management principles (which traditionally have been used to advocate large dam building projects) cannot be entertained exclusively. The public trust doctrine, as captured in the National Water Act, obliges that alternative conservation options, including the principles of demand-side management, are considered.

The South African public trust doctrine also seeks to give effect to the development of a participatory democracy in South Africa. The National Water Act is replete with positive requirements for public comment and public consultation. For example, in establishing a national water resource strategy, the Minister must call for comments from the public and is obliged, in accordance with the principles of natural and administrative justice, to take those comments into account in the process of decision-making. By way of further example, licence applications for water storage by dam impoundment are also subject to public consultation at the discretion of responsible licensing authorities, which discretion must be exercised in a reasonable manner.

Openness and transparency in governance are also essential features of the South African public trust doctrine. Such openness and transparency obviously demand that information is easily accessible to the public. Access to water resource management information is ensured in the National Water Act through the establishment of a national monitoring network and national information systems.

The National Water Act acknowledges that monitoring, recording, assessing and disseminating information on water resources is critical to the achievement of the objects of the National Water Act and its core provisions. In addition, the Constitution guarantees access to information⁵⁶. The Act requires that any information contained in any national

⁵⁴ Established under Chapter 15 of the National Water Act.

⁵⁵ See *Certification of the Constitution of the Republic of South Africa, supra*.

⁵⁶ Section 32 of the Constitution read together with the Promotion of Access to Information Act 2 of 2000.

information system⁵⁷ must be made available to the public by the Minister subject to any limitations imposed by law and the payment of reasonable charges⁵⁸. Water management institutions (which include catchment management agencies and water user associations) are also obliged to make information at their disposal available to the public. This includes information pertaining to, among other things, flood warnings; drought warnings; any risks imposed by the quality of water to life, health or property; as well as any other matter that may be necessary to achieve the objects of the National Water Act⁵⁹.

3.4 A Public System for Equitable Water Use Allocations

“South Africa’s water law applied the rules of the well-watered colonising countries of Europe to the arid and variable climate of South Africa.”⁶⁰

Apartheid’s 1956 Water Act made a distinction between “*public water*”⁶¹ and “*private water*”⁶². Under certain conditions, the owner of land on which “*private water*” was found was granted sole and exclusive enjoyment of such water⁶³. The 1956 Water Act further divided the resource into further categories for allocation purposes. Each category was governed by a specific set of rules that disregarded the unified nature of the hydrological cycle⁶⁴. These distinctions are abolished in the National Water Act. Instead all water use is treated uniformly in the National Water Act that contains a comprehensive definition of the term “water use”⁶⁵. The National Water Act abolishes the riparian doctrine that emerged and developed in the South African common law largely as a result of the influence of the English Law.

⁵⁷ Established under Chapter 14 of the National Water Act.

⁵⁸ Section 142 of the National Water Act.

⁵⁹ Section 145 of the National Water Act.

⁶⁰ White Paper on a National Water Policy for South Africa, *supra*.

⁶¹ Section 1 of the 1956 Water Act. “*Private water*” was defined as: “*all water that rises or falls naturally on any land or naturally drains or is lead onto one or more pieces of land which are the subject of separate original grants, but is not capable of common use for irrigation purposes.*”

⁶² Section 1 of the 1956 Water Act. “*Public water*” was defined as: “*any water flowing or found in or derived from the bed of a public stream, whether visible or not.*”

⁶³ Section 5 of the 1956 Water Act.

⁶⁴ A. Gildenhuys, National Water Bill: Analysis of Contents, (unpublished), p.1.

⁶⁵ Section 21 of the National Water Act.

Unlike its 1956 predecessor⁶⁶, the National Water Act does not prioritise irrigation, commercial and mining water use above all other water uses. The National Water Act does not limit water use to the abstraction of fresh water from, for example, underground, river or impounded water sources. It also regulates an unlimited array of activities in relation to water use such as -: storing water; impeding or diverting the flow of water in a watercourse; disposing of waste in a manner that may detrimentally impact on the water resource concerned; the use of water for recreational purposes; and the disposal of water found in the course and scope of underground mining operations⁶⁷.

In essence, during the course of the water law reform process (and as expressed in the National Water Act), a water right was found to be characterised in the Roman⁶⁸, Roman Dutch and South African common law (as understood in the context of the Constitution) as a right to use water of a particular quantity or quality within a defined period of time, bounded by the concept of beneficial use, and subject to regulation by the State in the public interest⁶⁹. As such water resources are treated in the current South African water law “*not only as an ordinary property subject to the rules and assumptions of the private property system, but also as elements of the community’s capital stock, the use and protection of which could affect the fate of the community.*”⁷⁰”

The National Water Act now expressly characterises water use rights as being public in nature. The legal basis for this characterisation is found in the Roman and Roman-Dutch Law where free flowing water was classified as *res comunis omnium* – property that is common to all and is not capable of private ownership. As such, the National Water Act did not vest water rights in the State – the State is a mere custodian or trustee of legal title to water as public property⁷¹. As Sax argues, public use rights to

⁶⁶ That is the 1956 Water Act, *supra*.

⁶⁷ Section 21 of the National Water Act. This is not exhaustive under the South African law pertaining to the interpretation of statutes.

⁶⁸ See for example A.J. Van der Walt and G. Pienaar, Introduction to the Law of Property, 1996, at pp.21-25 for the classification of natural resources falling outside of legal commerce.

⁶⁹ See C.G. Van der Merwe, Sakereg, Butterworths, (2nd ed). Roman authorities classified air and free-flowing water as *res comunis omnium*, i.e. common property that is available to all. Roman Dutch authorities classified water in rivers as *res publicae* i.e. as waters belonging to the State but not in the private law sense. The public had a right to use such water but subject to government control. For further discussion on the latter see J. van der Vyver, The Etatisation of Public Property, in D.P. Visser. Essays on the History of Law, Juta & Co, 1989.

⁷⁰ J.L. Sax, The Constitution, Property Rights and the Future of Water Law, 61 *University of Colorado Law Review* 257 at p.276 (1990).

⁷¹ See J.L. Sax (1970), *supra*, at p.485.

water “*have no greater protection against state regulation than any other property rights. They are in no sense super-property*”⁷². South Africa’s Constitution⁷³ acknowledges national government’s right to regulate the use of property and all its incidents. This right of regulation is considered to be a ‘deprivation’ in the South African Constitution⁷⁴ or is recognised as a ‘police power’ in other jurisdictions⁷⁵. By characterising water use rights as public in nature, to be held in trust by national government as custodian of the nation’s water resources, the regulation of allocation to achieve the objectives of equity, environmental sustainability and efficiency (core values of the National Water Act) is enabled. Such regulation is commensurate with the powers, functions and duties of the public trustee of the nation’s water resources⁷⁶.

The National Water act regulates the use of South Africa’s water resources by means of a licensing system. That system makes allowance for allocation decisions that are sensitive to equity considerations and local and regional demands. All water use licences are subject to conditions and are issued either for a fixed period (which may not exceed 40 years) or for a limited extension period⁷⁷. In the interests of giving effect to the fundamental right of access to water for basic human needs, the National Water Act permits reasonable use of water for, among other things, domestic purposes, small gardening and animal watering without the need to obtain a licence and the payment of water use charges⁷⁸. All other water uses falling beyond this exclusion require licences unless those uses are permissible under the transitional provisions of the National Water Act.

In order to achieve a reasonable and justifiable balance between the protection of existing water rights and the constitutional imperative to achieve water reform necessary to ensure equitable and sustainable access to water by all⁷⁹, the National Water Act makes provision for compensation to be paid where existing entitlement to use of water is lost through the refusal of a licence application or the grant of a lesser use than the original entitlement⁸⁰. Compensation is only payable in those circumstances where the

⁷² J.L. Sax (1990), *supra*, at p.260.

⁷³ Section 25 of the Constitution.

⁷⁴ See Section 25(1) of the Constitution. It recognises that deprivation of property is permissible in South African law provided that such deprivation is undertaken “*in accordance with a law of general application which law may not permit the arbitrary deprivation of property*”.

⁷⁵ For example, the United States and Malaysia.

⁷⁶ As determined by Section 3 of the National Water Act.

⁷⁷ Section 28 of the National Water Act.

⁷⁸ Section 21 read together with Schedule 1 of the National Water Act.

refusal or lesser use constitutes the destruction of or severe prejudice to the economic viability of an undertaking in respect of which the water was or could have been beneficially used⁸¹. The amount of compensation must be determined in accordance with the formula set out in the Constitution and must disregard any reduction made in the original entitlement in order to, amongst other things, rectify any unfair or disproportionate water use.

In order to effect an efficient transition from the pre-existing water law regime to the new public rights system envisaged in the National Water Act, certain transitional provisions are incorporated which permit “*existing lawful water uses*”⁸² to continue under certain conditions. Generally speaking, existing lawful water uses are those which are authorised by the 1956 Water Act or which were permissible under any other law which was in force immediately before the commencement of the National Water Act; but, subject to the requirement that such water use took place at any time during the period of two years immediately before the commencement of the National Water Act.

General authorisations⁸³ are a particular category of licence provided for in the National Water Act. They constitute a flexible administrative measure, which permits the grant of general (as opposed to individual) permission to use water, subject to certain limitations, within a particular geographical area. The general authorisation, it is contemplated, will be used in areas which are not under significant water stress.

Compulsory licensing⁸⁴ may be implemented and may be called for by the responsible authority concerned in those areas of the country which are under water stress (for example, where demands for water exceed the available supply), or where it is necessary to achieve equity in access to water.

In order to ensure that equitable access to the nation’s resources is sustained, charges are applied under the National Water Act under a “*Pricing Strategy for Water Use Charges*” in order to support the implementation of the objectives of the Act,

⁷⁹ S. Liebenberg, The National Water Bill – Breathing Life into the Right to Water, *ESR Review*, Vol. 1, 1998, pp. 1-2.

⁸⁰ Essentially, this may only be achieved under the “*compulsory licensing*” contemplated under Sections 43 to 48 of the National Water Act.

⁸¹ Section 22(6) of the National Water Act.

⁸² Section 21 read together with Section 32 of the National Water Act.

⁸³ Section 39 of the National Water Act.

⁸⁴ Sections 43 to 48 of the National Water Act.

policies, water resource protection and conservation measures⁸⁵. The National Water Act enables differentiation in the application of water use charges. The Pricing Strategy may differentiate between different water users on the basis of the extent of their water use, the quantity of water returned by them to source or their economic circumstances⁸⁶. In determining the Pricing Strategy, the State is obliged to consider measures necessary for the establishment of water tariffs by the municipal councils including lifeline tariffs and block tariffs⁸⁷.

In order to redress the results of past racial and gender discrimination, the National Water Act enables the Minister to provide financial assistance to a successful applicant for such assistance in relation to a water use⁸⁸.

3.5 Protecting and Promoting Environmental Rights and Recognising International Obligations⁸⁹

The “Reserve”⁹⁰ is a formidable innovation of the National Water Act. It is an unallocated quantity of water and is not subject to competition with other water demands. The Reserve is made up of “*that quantity and quality of water required to (a) satisfy basic human needs for all people who are, or may be supplied from a relevant water resource; and (b) protect aquatic ecosystems in order to ensure ecologically sustainable water development and use*”⁹¹.

Water scarcity and unevenness in distribution in South Africa has demanded that a certain minimum amount of water is required in South Africa’s rivers to ensure that the ecological integrity of those river systems is protected for the benefit of present and future generations.

⁸⁵ Chapter 5 of the National Water Act.

⁸⁶ Section 56 of the National Water Act.

⁸⁷ Section 56(6)(c) of the National Water Act. Pursuant to Section 156, read together with Schedule 4 (Part B), of the Constitution and the Water Services Act, municipalities in South Africa bear the executive and administrative responsibility (including original law making powers) for: “*water and sanitation services limited to potable water supply systems and domestic waste water and sewerage disposal systems*”.

⁸⁸ Section 61 of the National Water Act.

⁸⁹ See Stein R, *supra*, at p.285.

⁹⁰ Section 1(xviii) of the National Water Act.

⁹¹ *Ibid.*

The Reserve is also designed to give effect to the constitutional imperatives of a right of access to sufficient water⁹² for basic human needs as well as the right to have the environment protected through legislative and other measures that secure ecologically sustainable development and the promotion of justifiable social and economic development⁹³.

In furtherance of the active promotion of the environmental right, the National Water Act introduces a comprehensive resource quality protection system. It requires the classification of all significant water resources⁹⁴ in the country and the setting of resource quality objectives for the protection and development of those resources. This must take place prior to any decision being made to allocate water use (this also includes decision-making to permit the discharge of waste to water and the impoundment or storage of water⁹⁵).

In fulfilment of the obligations to take legislative measures to prevent pollution, the National Water Act also contains relatively stringent pollution prevention measures and applies the ‘polluter pays principle’⁹⁶.

The Reserve is also a domestic legislative step that is designed to give effect to South Africa's international obligations for the protection and preservation of the ecosystems of international watercourses as well as to ensure the sustainable development and equitable utilisation of those watercourses. Among the factors that must be given effect to and taken into consideration in all aspects of decision-making under the National Water Act, is recognition of the country’s international obligations⁹⁷.

⁹² Section 27(1)(b) of the Constitution read together with the Water Services Act.

⁹³ Section 24 of the Constitution.

⁹⁴ A “water resource” is defined in Section 1(xxvii) of the National Water Act to include: “*a watercourse [as defined], surface water, estuary or aquifer*”. A “watercourse” is defined in Section 1(xxiv) of the National Water Act to mean: “*(a) a river or spring; (b) a natural channel in which water flows regularly or intermittently; (c) a wetland, lake or dam into which, or from which, water flows; and (d) any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse, and a reference to a watercourse includes, where relevant, its bed and banks*”.

⁹⁵ Section 15 of the National Water Act.

⁹⁶ Sections 19, 20, 151, 152 and 153 of the National Water Act.

⁹⁷ See Section 2 of the National Water Act.

South Africa has signed and its Parliament ratified the “*Protocol on Shared Water Course Systems in the Southern African Development Community*” (“the Protocol”)⁹⁸. Its borders are defined by and it shares many river systems with its neighbouring states. For example, the Orange River arises in Lesotho, runs through South Africa and is a contiguous river boundary between South Africa and Namibia; the Limpopo River is a contiguous boundary river between South Africa and Botswana and becomes a transboundary river as it flows into Mozambique. Decisions to allocate water or to build dams and weirs on either contiguous or transboundary rivers must now take into account any downstream or transboundary impacts. In accordance with the consensus-seeking principles of the Protocol, appropriate consultation with neighbouring States must take place.

4. Conclusion

The South African doctrine of public trust, as legislated in the National Water Act, determines the backdrop against which all decisions to allocate the country’s national water resources will be taken in the future.

In utilising the doctrine of public trust to bring about water resources law reform that effectively introduced a public rights system for integrated water resources management in South Africa, attention was explicitly paid to the fulfilment of a wide range of fundamental human rights that are guaranteed under the Constitution.

The National Water Act is representative of a democratic nation’s commitment to sustainable development and use of natural resources that are critical to life under a regulatory regime that explicitly acknowledges human life, health and well-being, the eradication of poverty and the improvement of the quality of life for all South Africans as its central focus.

⁹⁸ See Section 231 of the Constitution. That Section determines the legal basis upon which international agreements become binding on the Republic and are incorporated into the domestic body of law.