THE PUBLIC TRUST DOCTRINE IN SOUTH AFRICAN WATER LAW

by

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ABSTRACT

The legal principles pertaining to the water law dispensation of South Africa changed dramatically with the promulgation of the *National Water Act* 36 of 1998 (NWA). Section 3 of the NWA articulates the core of the new water law dispensation through the concept of public trusteeship.

The study focused on section 3 of the NWA and the implications ensuing from its incorporation in the South African water law dispensation. Consequently, the dissertation's outline is based on the historical development of South Africa's water law regime. It was indicated that the previous distinction between public and private water and South Africa's political history of Apartheid gravely impacted on the people's access to water resources. The legislature introduced the concept of public trusteeship to the South African water law with the promulgation of the NWA. Through the statutory incorporation of the concept of public trusteeship, the state is given the mandate, responsibility and mechanism to ensure that the country's water resources is protected, used, developed, conserved, managed and controlled in an equitable manner, for the benefit of all South Africans in accordance with the constitutional mandate.

The concept of public trusteeship and its implication for water management was thoroughly scrutinised. The research indicated that the concept of public trusteeship emphasises the state's fiduciary responsibility to deal with the country's water resources and simultaneously separates legal and beneficial entitlements to water. It was further indicated that the public trustee introduced the concept of Integrated Water Resources Management (IWRM) as a legal framework through which water management can be executed. The research also focused on the impact of IWRM on the citizens of South Africa, especially the poor. It has been found that, through IWRM, the livelihoods of South Africans can be approved, water conservation can be pursued, social equity can be

promoted, sustainable development can be realised and economic efficiency can be reached.

OPSOMMING

Die regsbeginsels met betrekking tot die waterregbedeling van Suid-Afrika het met die promulgering van die *Nasionale Waterwet* 36 van 1998 (NW) drastiese veranderinge ondergaan. Artikel 3 van die NW verwoord die kern van die nuwe waterregbedeling deur die konsep van die voogdyskap van die staat.

Die fokus van hierdie studie het op artikel 3 van die NW en die gevolge wat voortvloei uit die implementering van die artikel, geval. Gevolglik is die struktuur van die verhandeling in breëtrekke gebaseer op die historiese ontwikkeling van die Suid-Afrikaanse waterregbedeling. Sodanige oorsig het aangetoon dat die vorige onderskeid tussen publieke en privaat water, sowel as Suid-Afrika se Apartheid's geskiedenis, talle Suid Afrikaners se toegang tot waterhulpbronne negatief beïnvloed het. Die wetgewer het die konsep van voogdyskap tot die Suid-Afrikaanse waterreg gevoeg met die promulgering van die NW. Deur die statutêre inkorporering van die konsep van voogdyskap van die staat, word die mandaat, verantwoordelikheid en 'n meganisme aan die staat verleen ten einde te verseker dat die land se waterhulpbronne beskerm, gebruik, ontwikkel, bewaar, bestuur en beheer word op 'n billike grondslag, tot die voordeel van alle Suid Afrikaners ooreenkomstig die konstitusionele mandaat.

Die daadwerklike implikasie van die konsep van voogdyskap van die staat vir waterbestuur is deeglik ondersoek. Die navorsing toon dat die konsep van voogdyskap van die staat, die staat se fidusiêre verantwoordelikheid ten opsigte van die land se waterhulpbronne beklemtoon. 'n Onderskeid word ook nou getref tussen regsaansprake en voordelige aansprake ten aansien van water. Verder is aangedui dat die publieke trustee die konsep van Geïntegreerde Waterhulpbronne Bestuur (GWB) gebruik as regsraamwerk waardeur waterhulpbronbestuur sal geskied. Nog 'n afsonderlike deel van die navorsing is gerig op die daadwerklike impak van GWB op die inwoners van Suid-Afrika, veral die armes. Daar is tot die gevolgtrekking gekom dat, deur die aanwending van

GWB, die lewensomstandighede van Suid Afrikaners verbeter kan word, die bewaring van waterhulpbronne effektief nagestreef kan word, sosiale billikheid bevorder kan word, volhoubare ontwikkeling verwesenlik kan word en ekonomiese doeltreffenheid bereik kan word.

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LIST OF ABBREVIATIONS

CILSA	The Comparative and International Law Journal of South Africa
Constitution	*Constitution of the Republic of South* Africa,1996
CMA	Catchment Management Agency
DWAF	Department of Water Affairs and Forestry
ECA	*Environmental Conservation Act* 73 of 1989
IWRM	Integrated Water Resources Management
NEMA	*National Environmental Management Act* 107 of 1998
NWA	*National Water Act* 36 of 1998
NWRS	*National Water Resources Strategy*
PAJA	*Promotion of Administrative Justice Act* 3 of 2000
PER	Potchefstroomse Elektroniese Regstydskrif
SALJ	South African Law Journal
WSA	*Water Services Act* 108 of 1997

Chapter 1

Introduction

1.1 Problem statement

Many consider poverty in South Africa as one of the harsh legacies of Apartheid. According to Statistics South Africa the poverty line in South Africa was set at R800 per month or less per household in 1996.[1] In 2007 it was documented that 22,5 million South Africans (5,4 million more people than in 1996) lived in poverty, with a monthly income less than R871.[2] The country's pre-1998 water law dispensation contributed to this sorry state by linking access to water to land access.[3] Kirsten, Perret and van Zyl[4] emphasise that the correction of this problem lies in addressing both access to water and access to land when they state:

> South Africa is a lower middle-income country, in which approximately half of the population lives in poverty. Poverty rates are highest outside urban areas (incidence of about 70%), and many rural people live under conditions of deprivation as harsh as elsewhere in poorer countries of Africa. With the fall of the Apartheid regime, the government undertook a commitment to reduce rural poverty, and adopted programs of land reform, redistribution of water rights and improved service delivery in rural areas.

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1 Statistics South Africa & World Bank 2008 www.poverMap.pdf.

2 Hope and Gowing 2003 http://www.brad.ac.uk/acad/bcid/GTP/HopeGowing.pdf; Marais 2007 www.news24.com/Sake-Rapport; Mokoena, Kitonsa and Lekalakala *The Right to a Healthy Environment*, South African Human Rights Commission 5th Economic and Social Rights Report Series 2002/2003 21 June 2004; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 339-340.

3 Francis 2005 *The Georgetown Int'l Envtl. Law Review* 153-155; S 5(1) of the *Water Act* 54 of 1956; Pienaar and Van der Schyff 2003 *Obiter* 133; Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265; *Retief v Louw* 1874 4 Buch 165; Stein 2005 *Texas Law Review* 2168; Thompson *Water Law* 19; Vos *Principles of South African Water Law* 10, 24, 84.

4 Kirsten, Perret and Van Zyl "Land Reform and the New Water Management Context in South Africa: Principles, Progress, and Issues" 1. See par 2.2.2.3.5 *infra*.

The legislature attempted to address the issues of the redistribution of water rights with the promulgation of the *National Water Act* 36 of 1998[5] on 26 August 1998.[6]

The importance of the NWA is found in its purpose, for it aims for the nation's water resources to be protected, used, developed, managed and controlled in ways that will meet basic human needs of present and future generations; promote equitable access to water; redress results of past racial discrimination; promote efficient, sustainable and beneficial use of water in the public interest, and facilitate social and economic development.[7]

Section 3 of the NWA should be seen as the central point through which the act aims to concretise the said objectives. In this section it is determined that:

> 3(1) As the public trustee of the nation's water resources the national government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.
> (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.
> (3) The national government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

Through this section of the NWA the concept of public trusteeship is introduced into the South African water law. As indicated by the research

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5 Henceforth referred to as the NWA.
6 GN 1091 in GG 19182 of 26 August 1998; The commencement date of the NWA was 1 October 1998.
7 S 2 of the NWA.

question and the objectives of this dissertation, the study is primarily aimed at determining the impact of the concept of public trusteeship on the South African water law regime.

1.2 Research question

The question that constitutes both the foundation and centre of this study is: To what extent does the statutory incorporation and practical application of the concept of public trusteeship impact on the South African water law regime?

1.3 Objectives of the study

The primary objective of this dissertation is to determine the implications of the statutory incorporated concept of public trusteeship within the South African water law. In particular, it is important to critically analyse the concept of public trusteeship, for it will determine the extent of the concept's impact on the South African water law regime.

In order to gain a complete overview of the concept of public trusteeship within the South African water law dispensation, the following secondary issues need to be addressed specifically:

1) the historical development of the South African water law;
2) the legal nature of the concept of public trusteeship;
3) the public trustee's legal framework for water management;
4) the impact of the effective execution of public trusteeship.

1.4 Relevance of the dissertation

It is important to note that the concept of public trusteeship, as statutorily incorporated by the NWA, is a novel mechanism introduced into the South African jurisprudence. The courts of the country have yet to interpret the notion. Commentators further hold different views on the consequences of its application. Due to these uncertainties, it is necessary to assess the legal attributes of the concept of public trusteeship as well as the changes it brought to the water law dispensation of South Africa. Only then can the impact of the concept of public trusteeship on the water law be assessed.

1.5 Research methodology

The research will done by the way of an analytical literature study of relevant case law, text books, legislation and scientific contributions published in national and international law journals regarding the legal aspects as mentioned above. Although no formal comparative study will be undertaken, the researcher will focus on aspects of the Anglo-American public trust doctrine to gain insight in the application of the doctrine.

1.6 Format of dissertation

The dissertation is organised into 6 chapters. Chapter 1 provides the reader with a background underlying the research question and gives an overview of the dissertation.

Chapter 2 briefly endows the historical development of the South African water law.

Chapter 3 provides insight into the concept of public trusteeship by assessing the legal attributes as well as the constructive attributes by *inter alia* providing a comparative insight into it as encapsulated in the Anglo-American public trust doctrine.

Chapter 4 reflects on the public trustee's legal framework for water resources management.

Chapter 5 assesses the concept of public trusteeship as a mechanism that will aid in the redistribution of water rights to alleviate poverty in South Africa and analyses the concepts of the use of water for livelihoods, water conservation, social equity, sustainable development, efficiency and its relation to poverty alleviation and its outcome through the application of the public trust doctrine.

The final chapter, chapter 6, concludes this dissertation by providing a summary of the insights attained through this study while answering the research question that forms the foundation of this study.

Chapter 2

History and development of South African water law

2.1 Introduction

In order to gain a full understanding of the dramatic implications brought about by the incorporation of the concept of public trusteeship within the South African water law, it is necessary to have a brief understanding of the history of South African water law. This chapter will focus on the historical development of the South African water law dispensation, which changed in totality as a result of the principles laid down by the Constitution.[1] In addition, this change was followed by an extensive process of developing a new water framework.[2]

The structure that will steer the line of discussion naturally divides into two main periods: the water law dispensation of South Africa preceding the Constitution, and the water law dispensation following the Constitution. Consequently, the chapter will follow this division by falling into two parts. Pienaar and van der Schyff[3] draw attention to the fact that the history and development of the South African water law before the Constitution can be further divided into two significant phases in history. As a result of the Dutch occupation of the Cape, the Roman-Dutch law was applied from 1652 onwards. However, in 1873 this system changed, and the post-1873 application of the English law led to the introduction of water use regulations.[4] The first part of the chapter will scrutinise these Roman-Dutch

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1 *Constitution of the Republic of South Africa*, 1996. Henceforth referred to as the Constitution.

2 The new water law dispensation of South Africa was only promulgated on 26 August 1998 by the *National Water Act 36* of 1998, henceforth referred to as the NWA; Thompson *Water Law* 1, 161-162.

3 Pienaar and Van der Schyff 2007 *LEAD* 182.

4 This chapter focuses on the historical development of the regulation of the use of water in South Africa. The legal status of water will only be referred to where

and English law principles. These "foreign" English-law principles were, although inappropriate for South Africa,[5] ultimately incorporated into the legislation that was still in force before the reformation brought about by the Constitution.

The second part of the chapter, dealing with the water law dispensation that followed the Constitutional reformation, can also be separated into two separate phases. In 1996 the Constitution established a legal framework that provided parameters within which all legal directives in South Africa must be performed.[6] The second phase of the water law dispensation that followed the Constitution was steered by the NWA. The chapter will conclude with a study regarding developments in the law relating to water resources since the NWA to date.

2.2 The history and development of the South African water law before 1996

Badenhorst, Pienaar and Mostert[7] indicate a point of departure based on their process of delving into the historical development of water use regulations in South Africa. They followed the elucidation of Hall[8] and stated that the rights relating to water *before* the current post-Constitutional water law dispensation were dealt with in accordance with the South African common law:[9]

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relevant and no thorough discussion on this aspect will be entertained in this dissertation.

5 The injustices or the inappropriate results of the disproportional history and development of the South African water law necessitates an investigation into aspects like the precedent control over or regulation of water resources and the equitable access to or use of water.

6 Currie and De Waal *The New Constitutional & Administrative Law* 37.

7 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 717.

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

9 The common law of South Africa consists of the Roman law, Roman-Dutch law as well as law principles derived from England. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 717.

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

In order to follow this advice, it is necessary to give an introductory exposition of relevant Roman law principles. In terms of the Roman law, anything that could be of use to a legal subject (a person) has to be classified into certain legal categories of things, also called *res*.[10] The Romans classified water[11] under the legal category of *res extra commercium,* or non-negotiable things.[12] When the classification of non-negotiable things is studied to its very core, one notes that surface water could further be sub-categorised under the categories of *res omnium communes*[13] and *res publicae*.[14] Although there are different assumptions

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10 Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

11 Notably, a *res* was not limited to land only, water was also incorporated as being a *res*. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 121-122; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The law of Property* 720. The reason for water being incorporated into the definition of *res* lays in the fact that water is a corporeal object, external to the human body and of use and value to its owner. Van der Walt and Pienaar *Inleiding tot die Sakereg* 8, 13-15.

12 The most celebrated differentiation between "things" in the Roman law were the *res extra nostrum patrimoniom* or non-negotiable things (*res extra commercium*) and *res in nostro patrimonio* (*res in commercio*). Things classified as *res extra commercium* were not appropriate for private ownership, while *res in commercio* (negotiable things) were. *Res extra commercium* in its turn divided into *res divini iuris* and *res humani iuris*. The first sub-category detained all things that were owned or protected by the gods. *Res humani iuris* were all the things that belonged to all people collectively, thus not appropriate for private ownership. These things further divided into three groups, namely *res communes omnium*, *res publicae* and *res universitatis*. The relevance of this distinction lays in the fact that the Romans not only classified water as being *res extra commercium*, but they further distinguished between perennial rivers and the temporary flow of water. Perennial rivers were classified as *res publicae*, while temporary flow of water after rain was classified as *res communes omniums*. Burger 2007 *Journal of South African Law* 320; Pienaar and Van der Schyff 2007 *LEAD* 182; Hall *The Origin and Development of Water Rights in South Africa* 5; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 121-122. Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 7-9.

13 Things that everyone can use, such as the air, seashore and flowing water. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

14 Things under the legal category of *res publicae* was regarded state property, such as rivers or harbours and public ways. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

regarding which of the two categories running or flowing water should fall into, it was accepted to fall into the non-negotiable category of *res omnium communes*.[15] Contradictory to this, perennial rivers or *flumina perennia* were categorised as *res publicae*.[16]

Consequently, certain categories of surface water were available for everyone to use, while others were the property of the state.[17] As water was categorised under non-negotiable things, the obvious consequence was that surface water was not available for private ownership.[18] In other words, whereas a riparian owner privately owned the water passing or running through his land, the Roman law made provision for the granting of entitlements for everyone to use water according to their needs.[19] The Romans therefore obtained entitlements to different water uses, such as taking water, diverting it for irrigation or human consumption, or fishing in the stream.[20] Although this principle of running water "not belonging to a riparian owner", but "belonging to all that were in need thereof" seems simple, a more complex aspect emerged as these waters had to be controlled in some consistent way.

In an attempt to consistently control the running water that was available to all that were in need of it, the Roman government was regarded as *dominus*

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15 Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 9. According to the author Gaius, flowing and running water fell under the category of *Res Publicae*, Marcianus (the more authoritative author) classified flowing or running water under *res omnium communes*. Thompson *Water Law* 17-18. Hall explains that running water was classified under the category of *res communes omnium*. However, in the exceptional case where the water stream was very small or intermittent in flow, it could be subject to private ownership. Hall *The Origin and Development of Water Rights in South Africa* 5.

16 Kaser *Roman Private Law* 81; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

17 Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.

18 Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 9.

19 Thompson *Water Law* 20.

20 The real extent of the entitlements were not always clear, but owners on whose property water originated, had preferential rights to the use of water. Thompson *Water Law* 20; Hall *The Origin and Development of Water Rights in South Africa* 5.

fluminis, or the custodian[21] of all the running or flowing water.[22] In terms of this principle the government's *praetor*[23] had the right and duty to regulate, control, limit or prohibit various uses (or entitlements) of the nation's water.[24]

However, to conclude the introductory remarks on the Roman water law, Hall[25] states:

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

Thompson indicates that the aforesaid principles of the Roman water law were slowly absorbed into the primitive Germanic law of Western Europe.[26] Such gradual absorption of the Roman law can also be detected in the Netherlands.[27] It was this "hybrid bloom"[28] of the Roman-Dutch law that

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21 It is stated that the surface and bed of a public stream were public property and subject to State control. Hall *The Origin and Development of Water Rights In South Africa* 5; Pienaar and Van der Schyff 2007 *LEAD* 182. Montague "Government Has a Public Trust Duty to Take Precautionary Action to Achieve Environmental Justice" 6.

22 This principle of the government being *dominus fluminis* has been resurrected in the NWA as the public trust doctrine. Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 266; Soltau 1999 *Acta Juridica* 241.

23 The Emperor (with legislative functions) or the Senate had the rights to forbid certain water diversions, to lay down general rules on water diversions and to legally recognise old-established water practises. Hall *The Origin and Development of Water Rights in South Africa* 6.

24 Thompson *Water law* 20.

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

26 Thompson *Water Law* 24.

27 Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 10.

was introduced to South Africa when a settlement was founded in the Cape by the *Nederlandse Oos-Indiese Kompanjie* (hereafter the Company) in the year 1652.[29]

2.2.1 Dutch occupation of the Cape of Good Hope (1652)

As indicated above, principles of the Roman-Dutch law were incorporated into the South African system of water regulation after the Dutch occupation of the Cape in 1652.[30] It should be kept in mind that with the Dutch occupation the seed of the Dutch's water law regime was planted in a region where the quantity of available water differed radically from the water-rich region of Holland.[31] The Roman-Dutch law principles therefore had to be enforced in a somewhat different form in South Africa. This section consequently investigates the applied Roman-Dutch principles within the South African water law.[32]

In terms of the applied Roman-Dutch law in South Africa, water was classified according to the classification system of the Roman law, although not in the exact same form.[33] The Roman-Dutch law clearly distinguished

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28 The Roman-Dutch law recognised and applied the Roman law principle that the state was still the owner of all water. Flowing water was available for the use of the public. Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 10.

29 Hall *The Origin and Development of Water Rights in South Africa* 11; Lewis *Water law Its Development in the Union of South Africa* 1; Soltau 1999 *Acta Juridica* 236; Thompson *Water law 24.*

30 Lewis *Water Law Its Development in the Union of South Africa* 2, 5.

31 Hall *The Origin and Development of Water Rights in South Africa* 7.

32 Key principles that have been enforced in the South African water law after the year 1652 included the distinction of water as public- or running streams, as well as the governing of public *water* by the state as *dominus fluminis*.

33 However, different assumptions existed regarding the classification of water under the said categories of things, for it was not always clear what the criteria were for the different forms of water. For a complete discussion regarding the forms of water (Surface- and Groundwater) as well as the different opinions, see Thompson *Water Law* 25-27; Pienaar and Van der Schyff 2007 *LEAD* 182. The Roman law differentiated flowing or running water under the categories of *res omnium communes* or *res publicae*. Thompson *Water Law* 18. See par 2.2 *supra*.

between the categories of running water and *res publicae.*[34] Water in non-navigable streams[35] and spring water on land[36] manifested as a restriction on the Roman law category of *res omnium communes,* and was regarded as running water that was available for the sole use of the landowner on whose land the water occurred. Water in navigable streams was regarded as *res publicae*,[37] and belonged to the nation as a whole.

The implementation of this classification in South Africa had an unfortunate outcome since it is an arid country[38] without any navigable streams. From 1652 onwards most of South Africa's water resources were restricted for the use of private landowners on whose land the water occurred. Due to the classification of water into categories - some at the disposal[39] of the landowner, and some available to the public as a whole - the Roman law principle that water is available for all that are in need of it, was exercised in a somewhat different form.

Entitlements[40] to water were only available to all[41] if these persons had access to the stream.[42] Through this approach of accessibility, members of the public only had the right to use the fruits of *public* or navigable waters.[43]

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34 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 717.

35 Non-boatable rivers.

36 Hall *The Origin and Development of Water Rights in South Africa* 2-3; Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 264.

37 Not all the Roman-Dutch authors mentioned the term public waters, see Thompson *Water law* 25-26 for a discussion regarding the use of the term *res publicae.*

38 *White Paper on a National Water Policy for South Africa of* 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf at 14.

39 The owner could do anything as he pleased with water rising on his land. This right was not exclusive. Thompson *Water law* 29.

40 Entitlements to water included the drinking and navigation of water.

41 Thompson *Water law* 28.

42 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 264.

43 Such as for fishing in the water.

Hall[44] drew attention to the fact that the government at the Cape early on applied the Roman law principle of the state being *dominus fluminus*,[45] for it exercised control over its navigable or *public water* resources. The first proclamation with regard to the control of water (which was only directed against persons in the Company's service)[46] saw the light on the 10th of April 1655. The proclamation, in the form of the *Placaet of van Riebeeck*, prohibited some actions such as washing people and clothes in the streams of Table Valley.[47]

In 1687, an expansion of state control over water resources manifested with the proclamation of a new *Placaet*, for this *Placaet* was not only relevant to persons in the Company's service, but also to free *burgers*. The *Placaet* of 2nd January 1687 held that no one is allowed to cross the watercourse that runs between the castle and Table Mountain with their wagons or animals.[48]

Since 1687 further developments took place regarding the state's role as *dominus fluminis*. On the 15th of December 1761 the first signs appeared regarding the consideration of the rights of free individuals as riparian landowners, and not only as free *burgers*.[49] The 21st of March 1763 marked

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44 Hall *The Origin and Development of Water Rights in South Africa* 11-12.

45 Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 10.

46 The reason why the proclamation was only applicable to this specific group was because there were no free individuals who exercised rights of ownership with regard to land against the Company.

47 This prohibition was introduced because a number of sailors became ill drinking dirty water in which washing took place. This prohibition was repeated in a General placaet in 1657, which laid down penalties in the case where the proclamation was disobeyed. Hall *The Origin and Development of Water Rights in South Africa* 11.

48 Except by means of for example bridges. This prohibition repeated in all the General Placaaten up to 1740. Further, a number of other *placaaten* saw the light, for example, the *placaat* of 16th December 1661 relates to the use of water for irrigation of gardens. Hall *The Origin and Development of Water Rights in South Africa* 12.

49 Hall *The Origin and Development of Water Rights in South Africa* 12:

> It is in the second half of the eighteenth century that there is to be found for the first time a number of resolutions of the Council of Policy from which it appears quite

a triumph in the development of the state's role as *dominus fluminis*, for regulations were initiated concerning the use of water by riparian owners.[50]

Hall[51] concludes this section of the exposition of the Roman-Dutch water law with the words:

> It was not only in theory that the State, in person of the Company, adopted the attitude that it was *dominus fluminis*, but it continuously applied that principle to actual cases and it did not hesitate to declare that to be its policy.

2.2.2 British occupation of the Cape (1806 and 1813)[52]

The British Government introduced a new set of water law principles, rooted in the English common law,[53] after their occupation of the Cape of Good Hope in 1806.[54] However, it was only after 1873 that the Roman-Dutch system of water regulation finally had to make way for the English law regime.[55]

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clearly that the Company exercised its rights as *dominus fluminis*, as against *individual landowners.*

50 Riparian owners were only entitled to use the water from 5 to 7 each morning and evening. Hall *The Origin and Development of Water Rights in South Africa* 13.

51 A clear example of the Company's right as *dominus fluminis* is shown by the fact that the individuals were granted permission to use running water, not as a right, but as a privilege. This privilege granted the Company the authority to withdraw any entitlement as they pleased. Hall *The Origin and Development of Water Rights in South Africa* 15, 16.

52 First and second British occupations of the Cape.

53 With the British occupation, many water law principles were derived from foreign law, especially from the English- and American law. The collective term for these English- and American laws, is the Anglo-American law. Thompson *Water law* 30. Pienaar and Van der Schyff 2007 *LEAD* 182. The reason for the relevance of American law lays in the fact that England colonised the eastern coastline of North America, and the English legal order was in that time equally accepted and applied in America. Dunning "Antiquity of the Public Right" 8.

54 Hall states that since the British occupation, twenty years of chaotic affairs in the field of water rights existed. Hall *The Origin and Development of Water Rights in South Africa* 2.

55 Pienaar and Van der Schyff 2007 *LEAD* 182; Van der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* 8. Thompson states that after the British occupation of the Cape, many of the water law principles that were enforced in South Africa were derived from foreign legal systems. The English law

Prior to the British occupation of the Cape in 1806, the Roman-Dutch law regime recognised two forms of land tenure. These two forms were the *freehold farms* as well as *leningsplase*, both given to the inhabitants by the Dutch administration, but still owned by the government.[56]

Hall[57] states that:

> At the time of the first English occupation the position was that, except for the...Cape Western Province, the *land was in law the property of the Government*, which was legally entitled to resume occupation of it, but hardly ever did so...[E]ven where the land itself had been granted in full ownership, that grant did not *ipso jure* include a right to divert and use the water of a permanent stream which flowed through the freehold land, for the government remained *dominus fluminis* and controlled the use of all such water.

It is therefore clear that the state remained *dominus fluminis* over water within its territory, even after the first occupation of England. However, after the second English occupation in 1813, there was a new attempt to promote agricultural- and farming systems in South Africa. This started the gradual deterioration of the *dominus fluminis* principle.[58] The *leningsplaas* system was gradually abolished when the *full ownership* of land (for the purposes of farming) was introduced by the second English governor, Sir John Cradock.[59] Hall[60] explains that full ownership of land undeniably "implied the grant of all the rights which accompanied the ownership of land."

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and American law (collectively known as the Anglo-American law) thereafter played a major role in the South African water law. Thompson *Water Law* 30.

56 Hall explains the system of *leningsplase* as the right of an inhabitant to let his stock graze on a certain piece of land. Early indications show that this right was free of charge, but later in time, payment was prescribed to emphasise that the ownership of this land lay with the Government. Freehold farms were not very common. Hall *The Origin and Development of Water Rights in South Africa* 27; Thompson *Water Law* 36.

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

58 Thompson *Water Law* 37.

59 Hall *The Origin and Development of Water Rights in South Africa* 28.

60 Hall *The Origin and Development of Water Rights in South Africa* 29.

According to the English law, these grants also included riparian rights to water.

Where the uses and rights to water were challenged in a court of law, water regulations regarding the control of the water were based only on legislative powers and "not upon the authority which was vested in the State as *dominus fluminis*".[61] The consequence was that:

> [T]he court dealt with the dispute as to water rights in exactly the same manner as it would have dealt with any other disputed rights between the owners of land.[62]

Hall[63] concludes the exposition of the English law influence on the South African water law with the words:

> The new ideas which the administrative changes had introduced, and probably to some extent the new land policy, resulted in the disappearance of the State's control as *dominus fluminis* of all the water courses.
>
> [T]he doctrine of the State as *dominus fluminis* had disappeared from the cognisance of the courts by 1856.[64]

However, despite the fact that the English water law regime influenced the *dominus fluminis*-principle so that it ceased to be applied, the Roman-Dutch law (with its *dominus fluminis*-principle) revived in the South African law regime.

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61 *Retief v Louw* 1874 4 Buch 165; Lewis *Water Law Its Development in the Union of South Africa* 19; Hall *The Origin and Development of Water Rights in South Africa* 29.

62 *Retief v Louw* 1874 4 Buch 165; Hall *The Origin and Development of Water Rights in South Africa* 30.

63 Hall *The Origin and Development of Water Rights in South Africa* 30.

64 Wessels *Waterreg in 'n nuwe Konstitutionele Bedeling* 10; Hall *The Origin and Development of Water Rights in South Africa* 32; Soltau 1999 *Acta Juridica* 236.

2.2.2.1 Renaissance of the Roman-Dutch law

The revival of the Roman-Dutch law in the history of the South African water law came about due to the employment of two Dutch lawyers to the Supreme Court in 1855 after the British occupation of the Cape. Both Henry Cloete and Egidius B Watermeyer occupied the positions of judges for twelve consecutive years.[65] During this time the decisions of the Dutch judges were based on the principles of the Roman-Dutch law and not on the principles of the English law. This can be seen in *Retief v Louw*,[66] for Cloete J made no secret of the court's law system of preference:

> ...[I am] confining myself entirely to the principles of the Roman-Dutch law, which are to govern the decisions of this Court.

Hall states that although water disputes were heard between 1856 and 1866, no records of judgment were kept.[67] With the retirement of Cloete J and the death of Watermeyer J in 1866 and 1867 respectively, it is interesting to note that the application of the Roman-Dutch law survived for several years.[68]

2.2.2.2 A local development

The Roman-Dutch law regime had to make way for the English law regime. By the year 1873,[69] and the year thereafter, 1874, de Villiers CJ took the first steps in laying down new principles with regard to water rights that are more applicable to South Africa's water situation. The quantity of water and the climate of Holland (the home of the Roman-Dutch law), was totally

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65 Hall *The Origin and Development of Water Rights in South Africa* 39.
66 In *Retief v Louw* 1874 4 Buch 165 at page 184.
67 Hall *The Origin and Development of Water Rights in South Africa* 39.
68 Hall *The Origin and Development of Water Rights in South Africa* 43.
69 See section 2.2.2 *supra*.

different from the situation in South Africa.[70] The development of water rights a little more relevant to South Africa found its form in the appointment of the new Chief Justice. De Villiers CJ dismissed all the previous decisions of Cloete and Watermeyer JJ, and acknowledged the English water law categorisation to be of assistance in water regulation or control. In terms of the English law, as applied in England; streams were divided into public and private streams.[71]

Thompson[72] explains the differentiation of water resources as follows:

> Private streams were private in ownership although certain private streams were available for public use. Public streams were public in ownership and available for public use.

2.2.2.2.1 Private streams

An investigation of the streams that were in private ownership revealed that these streams could have been divided between streams that were in private use and streams in public use. Differentiation between private and public use depended on the stream's navigability. Uses of non-navigable private rivers were linked to the ownership of the land (the riparian doctrine).[73] Since South Africa only has non-navigable streams, the landowners owned the river and could use it in any way they pleased.[74]

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70 In South Africa, irrigation enjoyed much more attention than the draining of land. Hall *The Origin and Development of Water Rights in South Africa* 42-43.

71 It was the size and navigability of a stream that were the criteria for classifying a stream. Thompson *Water law* 30. *Irrigation and Water Conservation Act* 8 of 1912 and *Water Act* 54 of 1956.

72 Therefore, streams were divided into: Streams in private ownership (which were non-navigable and in private use; or navigable and in public use) and streams in public ownership, (which were navigable and in public use). Thompson *Water law* 30.

73 Burger 2007 *Journal of South African Law* 318.

74 *Retief v Louw* 1874 4 Buch 165. In spite of the private ownership of certain rivers it is stated that water problems (ex. disputes as a result of the use of stream water under the ownership of others) were rare in England. The reason for the scarcity of problems was the plentiful availability of water for all in need of it. It was for this reason that the concept of public rights has easily been recognised into the Anglo-

The absolute ownership of this non-navigable private stream was based on two grounds. Firstly, it was acknowledged that the land, which is a real right of the owner, and the water, was inseparable. Secondly, the principle of *cuius est solum eius est usque ad coelum et ad inferos*,[75] emphasised the extent[76] of the owners' use of the water.[77]

The principles pertaining to private rivers that were in public use differed from the said rivers in private use. Private rivers that were in public use belonged to "riparian owners in proprietary rights", because of the *cuius est solum eius est usque ad coelum et ad inferos*-principle.[78] This principle was considered in *Retief v Louw*:[79]

> A...stream...flowing through but rising above private land, does not belong absolutely to the proprietor of the land through which it flows, but all the proprietors of land throughout its course have each a common right in the use of the water. This use, at every stage of its exercise by any one of the proprietors, is limited by a consideration of the rights of the other proprietors.

The above exposition makes it clear that the owner over whose land the private waters in public use flowed, did not have an exclusive right to the use of the water. This limitation of exclusivity is clear from the fact that the

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American system, as it will be explained in par 3.3.3.3.1 *infra*. Dunning "Antiquity of the Public Right" 9.

75 Land titles in early England were in most cases grants from the Crown. Titles to the seashore lands also reverted back to similar grants from the Crown. Dunning "Antiquity of the Public Right" 8. These land titles gave the grantee of the property extended rights into the sea. This is a clear example of the common law principle, rooted in the English law, regarding ownership of land under water. Dunning "Antiquity of the Public Right" 7. The principle of *cuius est solum eius est usque ad coelum et ad inferos* thus means that an owner of land also owned everything above and beneath the land. Thompson *Water law* 30.

76 Firstly by recognising the rights of lower- en upper riparian owners. This is seen in the fact that lower- and upper owners started to litigate when an infringement of their rights occurred due to an unjustified enrichment of the respondent riparian owner. Hall *The Origin and Development of Water Rights in South Africa* 32.

77 On the other hand it should be kept in mind that this principle of *cuius est solum eius est usque ad coelum et ad inferos* was incorporated into the South African water law in a somewhat different form.

78 Thompson *Water law* 32.

79 *Retief v Louw* 1874 4 Buch 165.

public had "public rights", which included the right of navigation, fishing or other legitimate uses of the water, without the necessity of the registration of servitudes.[80]

2.2.2.2.2 Public streams

De Villiers CJ stated the principles pertaining to public water in the case of *Hough v van der* Merwe.[81] The position regarding public water was decidedly that "a river may be considered as the common property of the whole nation". Every individual of the nation were entitled to the use[82] of such water according to their own personal needs[83] or according to their reasonable share of water usage.[84]

As a result of a sequence of judgments, the above-mentioned English law principles[85] were laid down. The most important of these, from which all the other principles were derived, was the fact that water was categorised as either public or private water.[86] However, although these principles where established by the court, different legal opinions still existed regarding its application.[87] This fact necessitated codification.

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80 The public right of use of the property of riparian owners was *de jure* a servitude in favour of the public at large. Thompson *Water law* 32.

81 *Hough v van der Merwe* 1874 4 Buch 148.

82 There is a distinction between ordinary or primary uses and extraordinary or secondary uses of water. *Hough v van der Merwe* 1874 4 Buch 148 at page 148 and 153. In *Baillie v Hendriks, Hoffman, & Browne* 1877-1881 K at page 211 the different uses of water are explained. The ordinary use of water is that which is required for domestic purposes and the support of animal life. The extraordinary use consists of the application of the water for agricultural purposes, the driving of machinery.

83 *Hough v van der Merwe* 1874 4 Buch 148 at page 153.

84 *Olivier v Fourie* 1899 16 SC 304 at page 304.

85 Hall *The Origin and Development of Water Rights in South Africa* 47-48.

86 Important consequences resulted from categorising water, for example, a limitation on the use of private water was instituted if the private water was a source of a public stream. Hall *The Origin and Development of Water Rights in South Africa* 47-48.

87 Thompson *Water Law* 50-51.

2.2.2.3 Codification of the South African water law

Thornpson[88] indicated that as a result of all the above explained foreign legal principles, the personal opinions of judges and factual disputes restricted courts from creating a water law dispensation suitable for South Africa. In an attempt to create an unambiguous new water law framework for South Africa, legislation was indispensable.

Thompson[89] discussed the codification of the water law in the four colonies of South Africa in great depth. It is therefore, for the purpose of this dissertation, only necessary to indicate the most important landmarks in the process of the South African water law codification as it related to the regulation of water uses.

2.2.2.3.1 *Right of Passage Water Act* 24 of 1876

The very first codification from the Legislature in the Cape colony was the *Right of Passage Water Act* 24 of 1876. This Act is significant for its presentation of a person's right of way over another landowner's land. This right of way was instituted for the use of water in any water source, such as dams or springs.

2.2.2.3.2 *Irrigation Act* 11 of 1894

The legislature in Zuid-Afrikaanse Republiek (Transvaal) also promulgated legislation to regulate water use. The *Irrigation Act* 11 of 1894 was the first

88 Thompson *Water Law* 50-51.
89 Thompson *Water Law* 50-54.

Act to give meaning to the different categories of public- and private water, as well as the entitlements related to each of these categories.[90]

2.2.2.3.3 *Water Act* 40 of 1899

Another first for the South African water law was the *Water Act* 40 of 1899. This Act was the very first step in regulating entitlements to water.[91] This Act even allowed for the establishment of water courts, each with its own jurisdiction to solve water entitlement disputes effectively.

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

In 1910, the Cape and Natal colonies, the Zuid-Afrikaanse Republic and the Republic of the Orange Free State were constituted as a Union. The codification of the water law of these four regions was promulgated as the *Irrigation and Conservation of Water Act* 8 of 1912.[92]

In order to assist the regulation of the waters of South Africa, the *Irrigation and Conservation Act* 8 of 1912 defined the concept of 'public water'.[93] Although 'private water' was not defined in the Act, a distinction was drawn between these two forms of water,[94] for it was accepted that all water that

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90 A public stream was a stream that flowed in a defined channel. A stream was categorised as being private if it was a spring or a course which was not perennial. See ss 2,4 and 5 of the *Irrigation Act* 11 of 1894.

91 Thompson *Water Law* 51.

92 Lewis *Water Law Its Development in the Union of South Africa* 71; Thompson *Water Law* 55.

93 Lewis *Water Law Its Development in the Union of South Africa* 72; Thompson *Water Law* 55; S 2 of the Act defined a public stream as:

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

94 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

did not meet the requirements of public water, was private in nature. The Act regulated the use of public waters and no private ownership could be vested therein. Only riparian owners were entitled to public water. Special legislation was required for non-riparian owners.[95]

The regulation of private water was somewhat different. Water that rose on a landowner's land was available for the owner's exclusive use. However, this unlimited enjoyment was subject to the cognition of the rights of use of downstream owners.[96]

Thompson[97] states that:

> The *Irrigation and Conservation Act* 8 of 1912 became inadequate to cope with social and industrial progress. A commission of enquiry into water law under chairmanship of Judge Hall was appointed in 1950, whose investigation led to the promulgation of the *Water Act* 54 of 1956.

2.2.2.3.5 *Water Act* 54 of 1956

The *Water Act* 54 of 1956 was promulgated to consolidate and amend the laws in of the Republic of South Africa that relates to the control, conservation and use of the water.[98]

Kidd[99] indicates that although the enactment of the Water Act provided for the essential change of "water supply for agriculture to the burgeoning mining and industry sector", two central entrenchments still inhibited the Act to ensemble South Africa's water dispensation better than the Roman-

95 Thompson *Water Law* 57-60. Almost 40 acts were promulgated for this purpose.
96 Thompson *Water Law* 58; Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.
97 Thompson *Water Law* 61-62.
98 Long title of the *Water Act* 56 of 1956. The *Water Act* 56 of 1956 contains a separate schedule which lists all the laws that were repealed by this Act. See the schedule in this regard.
99 Kidd *Environmental Law* 65.

Dutch law and English law principles. These two inhibiting principles were the Act's entrenchment of the doctrine of riparian ownership and the distinction between the public and private forms of water.[100] These two factors dictated the use of water in South Africa and in the light of the Apartheid regime of that time, the natural consequence was that many inhabitants suffered.[101] In the Apartheid regime, the majority of the population was restricted from access to water, for the use of water was linked to the ownership of land. It will be re-emphasised in chapter 5 of this dissertation that the majority of South Africa's land was in the hands of white people.

The regulation of water in terms of the *Water Act*[102] can be explained as follows:[103]

> The use of water was derived from and linked to the ownership of land:
> (a) in the case of public water, riparian ownership;
> (b) in the case of private water, ownership of the land over which the water flowed or where the source of water was situated;
> (c) in the case of water servitudes, only those granted by the owner of the servient tenement.

Thus, in terms of the *Water Act* of 1956, the public water[104] was available to the riparian owner, although regulated by the state. In terms of the 1956 Act, riparian owners were entitled to "sufficient quantities of surplus water for domestic use, watering of cattle and cultivation".[105] The state regulation

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100 This distinction of these different forms of water has ancient roots, as indicated earlier in this chapter. Vos *Elements of South African Water Law* 1.

101 The majority of the population was restricted from access to water. Kidd *Environmental Law* 65.

102 *Water Act* 54 of 1956.

103 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 266; Pienaar and Van der Schyff 2007 *LEAD* 183.

104 Water in public streams. Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

105 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

of public waters allowed the grants of water servitudes to the public in certain instances. The *Water Act* 54 of 1956 was not clear on the sole ownership of private water,[106] but its use was obvious, for the Act confirmed the existence of exclusive rights for the landowner on whose land the water occurred.[107]

In order to explain the role that the 1956 Act played in the history and development of the South African water law, one has to admit that the Act undoubtedly contributed to the sorry state of Apartheid and poverty by linking land access to the use of water. The White Paper on South African Land Policy[108] explains the situation of the precedent unequal land access with the deplorable fact that more than 3,5 million people and their descendants have been victims of racially based dispossessions and forced removals from their land during the Apartheid era.[109] As indicated above, the ownership of land was linked to the use of water, thus, these appalling dispossessions directly had an effect on the victim's use of water, for the use and enjoyment of water was vested in the new owner of the repossessed land.[110] Thus, together with the forced land removals, the deprivation of a number of South Africans' access to water severely contributed to the sorry state of poverty.

It was during this time of forced land removals and deprivations of access to water that valuable developments in the international sphere of human rights took place. In the year 1966 the International Covenant on Economic, Social and Cultural Rights came into operation.[111] However, in

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106 Spring water on land, or eater flowing over land. Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

107 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 265.

108 *White Paper on South African Land Policy* of 1997 http://land.pwv.gov.za/White%20Paper/white4.htm at 3.17.3.

109 Du Plessis 2006 *PER* 1.

110 S 5(1) of the *Water Act* 54 of 1956.

111 See ch 5 *infra*.

South Africa, this Covenant was not ratified and the sorry state of poverty lingered. It was only in 1993, with the promulgation of the Interim Constitution, and ultimately in the 1996 Constitution, that a mechanism was created through which the interpretation within the South African law must be done in accordance with International instruments.[112]

The Constitution brought light to the horizon. In the dark circumstance of lingering poverty and unequal access to water, the light, the "beacon" or the "monument" of the Constitution closed the chapter of darkness in South Africa:[113]

> At the beginning of the twenty-first century the 1996 South African Constitution is a beacon of hope in a world plagued by conflict, *poverty* and the failure of governments. The Constitution is a monument to the determination of a society to *overcome the burden of its history*- the evils of *colonialism, racism and Apartheid* and the manifold *social problems that are the legacy of centuries of inequality*.
>
> Why do we recognise the creation of the new Constitution as closing the chapter on the past and as a fundamental step towards building a new society?

The writer's connection between the South African Constitution and water law can be justified by referring to Thompson. He states that section 27(1)(b)[114] of the Constitution provides for a total political and social reformation within South Africa. This reformation brought about by the Constitution led to the development of a new framework for governing water in South Africa.[115]

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112 Ss 39(1)(b) and 232 of the Constitution.
113 Currie and De Waal *The New Constitutional & Administrative Law* 2.
114 S 27(1)(b) of the Constitution reads that everyone has the right to have access to sufficient water.
115 Thompson *Water Law* 1; S 27(1)(a) of the Constitution.

2.3 *The beacon of hope: The Constitution*[116]

Van der Schyff and Viljoen[117] states:

> The victory of democracy and promulgation of the Constitution of the Republic of South Africa 1996 emphasised the need for land reform and equitable access to all South Africa's natural resources and demanded a revision of the national water use policy. The amendment of the South African water law dispensation was inevitable.

Supported by the "social, political and democratic"[118] changes brought about by the Constitution in 1996, the South African government is indeed in a process of developing and implementing a new complex and dynamic framework for a new water law.[119] Thus far, this process has resulted in a set of *inter alia* six direction-giving documents, which will be referred to in the following chapters of this dissertation, and can be listed as follows:

i. Fundamental Principles and Objectives for the New Water Law in South Africa (1996)[120]
ii. White Paper on a National Water Policy for South Africa (1997)[121]
iii. Water Services Act (1997)[122]
iv. National Environmental Management Act (1998)[123]

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116 See ch 5 *infra* for a complete exposition of the exact impact of the Constitution on the South African water law and the people of the country.
117 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 340.
118 Thompson *Water Law* 158.
119 Thompson *Water Law* 1; Kidd *Environmental Law* 68. The Bill of Rights, as contained in ch 2 of the Constitution, is accepted as the cornerstone of the South African democracy. Currie and De Waal *Bill of Rights Handbook* 7. In the Bill of Rights, s 7(2) intentionally stipulates that the state must *inter alia* promote and fulfil the rights recognised in the Bill of Rights.
120 *Fundamental Principles and Objectives for the New Water Law in South Africa* approved by the Cabinet in November 1996.
121 See ch 3,4 and 5 *infra*.
122 See ch 5 *infra*.
123 See ch 5 *infra*.

v. National Water Act (1998)[124]

vi. National Water Resources Strategy (2004)[125]

Although not all of these documents are legally binding,[126] it is important to stress that each of these documents plays an important role in the history and development of the South African water law. This can be seen in the fact that the (legally binding) NWA is based on the "Fundamental Principles and Objectives for a new Water Law", and gives effect to the "White Paper on a National Water Policy."[127]

Thus, as a result of the fundamental principles, objectives and policies, the NWA was drafted to lead South Africa's water dispensation into a new direction of constitutionality. The NWA reforms the water law dispensation from the principle that riparian ownership regulates the use of water to a system where water allocations are granted by the state.[128] This reformation was accomplished through the interference of the state, who deprived[129] the nation's water that was in private ownership, and now

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124 See ch 1,2,3,4 and 5 of this dissertation.

125 See ch 4 and 5 *infra*.

126 As each of the above-mentioned products is extensive documents, it is not possible to study each in detail under the title of this dissertation. As Principles, Objectives and Strategies have no legal binding; this dissertation will focus on legislation, which is legally binding, and reference will only be made to the non-binding documents where applicable. Thompson *Water Law* 134:

> Policies...provide the reasoning as to why something should be done and the strategies the manner to achieve that. If the law is used to implement policy and strategies, the law stipulates what should be done, by whom, how, when and under what circumstances as well as what should not be done, to achieve the set of objectives. Policies and strategies are not legally enforceable while the law is.

127 Thompson *Water Law* 162.

128 Pienaar and Van der Schyff 2003 *Obiter* 133.

129 Water was not expropriated in South Africa, for no formal procedures or measures were taken by the state to constitute this act of expropriation. The concept of constructive expropriation is introduced in this field of water reformation. While compensation is payable in terms of s 22 of the NWA, and while the expropriation is done in terms of the public purpose, the state's interference can not be that of deprivation, but expropriation. Pienaar and Van der Schyff 2007 *LEAD* 193; Van

regulates all of the nation's water resources through the public trust doctrine,[130] which corresponds to the common law *dominus fluminis*-principle, as explained above.[131] The most important principles that underpin the NWA will be studied below.

2.3.1 The *National Water Act* 36 of 1998

It is important to note first of all that the distinction between the different forms of water, as common in the Roman law, the Roman-Dutch law and the English law, is now something of the past. This forms the basis for the most important changes regarding the use and regulation of water resources in South Africa under the new democracy and since the enactment of the NWA. Only one type of water is acknowledged by the NWA, namely "all water".[132] As the different water resources could no longer be regulated according to its form,[133] another way of regulation had to be introduced. Regulations now ensue through the application of the public trust doctrine, as stipulated in section 3 of the NWA. This aspect will be scrutinised in chapter 3 of this dissertation.

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der Schyff *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* 27. See also ss 25(1) and (2) of the Constitution.

130 See ch 3 *infra* for a complete exposition of this aspect.

131 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 266. See par 2.2 *supra*.

132 S 3(3) of the NWA.

133 For example between public or private water resources (see para 2.2.2.2.1, 2.2.2.2.2 *supra*). As the previous water dispensation's "private water" is now incorporated under the one form of water, namely "all water", the question arises whether a deprivation has occurred from landowners that were previously entitled to the exclusive use of private water. Van der Schyff explains in *Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteiening?* 3 that:

> Due to the fact that the state did not appropriate any rights in this process, the conclusion was reached that this provision does not amount to expropriation. It does however appear that the provisions of the *National Water Act* can give rise to *inverse condemnation* or constructive expropriation in specific circumstances.

Section 3(3) of the NWA reads:

> The national government, acting through the Minister, has the power to regulate the use, flow and control of *all water* in the Republic.

The second, very important reformation within the South African water law brought about by the NWA lies in the fact that every South African citizen needs to have equitable access to the country's water resources. In this regard the general purpose of the NWA ensures that a number of factors need to be taken into consideration when the nation's water is protected, used, developed, conserved, managed and controlled by the custodian of all the water resources. Factors include the meeting of basic human needs; the promotion of equitable access to water; the redressing of the consequences of past racial discrimination and the promotion of efficient, sustainable and beneficial use of water in the public interest.[134]

The third theme covered by the NWA is contained in chapter 3, and deals with the Reserve. The concept of the Reserve can best be understood by the words of the explanatory note of this section:[135]

> [This part] deals with the Reserve, which consists of two parts: the basic human reserve and the ecological reserve. The basic human reserve provides for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene. The ecological reserve relates to water required to protect the aquatic ecosystems of the water resource.

The fourth, and last, theme contained in the post-constitutional water law dispensation is dealt with in chapter 10 of the NWA. This chapter makes provision for the implementation of international agreements regarding the

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134 S 2 of NWA. Ch 5 *infra* will discuss all these factors.
135 Ch 3, Explanatory note of Part 3 of the NWA.

development and management of water resources that are shared by neighbouring countries.[136] Examples of such agreements are the Komati Basin Water Authority that was established through an agreement with the Kingdom of Swaziland, and the Vioolsdrift Noordoewer Joint Irrigation Authority established in agreement with the Government of Namibia.[137]

2.4 Conclusion

To conclude the study on the history and development of the South African water law, it should again be emphasised that since the Dutch occupation of the Cape in 1652, the Roman-Dutch law was applied to the South African water law. The enforcement of Roman-Dutch law led to the position that the state was regarded as *dominus fluminis* over all of the country's water resources. The state as *dominus fluminis*, and not private individuals, had the right to allocate the waters of South Africa, whether the water was regarded as *res publicae* or running water.

However, with the British occupation of the Cape in 1806, the Roman-Dutch law doctrine of the state being *dominus fluminis* gradually faded, for it had to make way for the English law to be applied to the South African water law. The English law provided for the distinction between two forms of water, namely public water and private water. This distinction had the consequence that the state as *dominus fluminis* played a progressive negligible role in the allocation and regulation of private water under private ownership.[138] Private riparian ownership resulted in landowners having an exclusive right to use the private water passing or running over his land, and this restrained the state as *dominus fluminis* from regulating the use of private water.

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136 Explanatory note of Ch 10 of the NWA.
137 S 108 of the NWA.
138 Pienaar and Van der Schyff 2007 *LEAD* 182.

In addition, South Africa's political history of Apartheid gravely impacted on the peoples' right in land.[139] As the use of water was linked to the ownership of land, many people were deprived of access to water resources. In this dark and unfortunate circumstance, South Africa's water history can be described as being disproportionate. An attempt to reverse the social injustices of the past came about with the rise of democracy.

With the promulgation of the NWA after democracy, the water law dispensation of South Africa was changed in its totality. Kidd[140] illustrates the different themes of the NWA that was responsible for a new water law dispensation:

> First, that the government must be the custodian of water resources in the country to manage effectively a critical strategic resource. Second, that equitable access to water by all South Africans must be attained. The third theme is one which was not directly the concern of earlier water legislation: that the hydrological cycle is a single system and that the water needs of the environment are crucial for the healthy operation of that cycle. Fourth, the international dimensions of South Africa's water resources and that the rights of neighbouring countries are recognised.

While the main themes of the new water law dispensation of South Africa are now clear, the next chapter will examine whether the statutorily introduced public trust doctrine,[141] which changed the water law dispensation in its totality, corresponds to the *dominus fluminis*-principle of the ancient Roman law.[142]

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139 Du Plessis 2006 *PER* 1.
140 Kidd *Environmental Law* 69.
141 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 342.
142 Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 266; Soltau 1999 *Acta Juridica* 241.

Chapter 3

The nature of the public trust doctrine

3.1 Introduction

The preceding chapters of this dissertation indicated that South Africa's pre-1998 water law dispensation contributed to the sorry state of poverty by linking access to water to land access. The victory of our democracy and promulgation of the Constitution, with its demands for land reform[1] and equitable access to all of South Africa's natural resources,[2] required a revision of the national water use policy. The amendment of the South African water law dispensation was inevitable.[3]

The government's commitment to amend the South African water law dispensation is confirmed by section 27 of the Constitution.[4] Section 27(2)[5] stipulates that the state is obliged to take legislative measures to progressively realise *inter alia* the right to have equitable access to water.[6]

Since the Constitution, a number of legislative measures[7] have surfaced. This confirms the government's commitment to amend the South African water law dispensation in the course of realising the right to have access to

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1 Ss 9(2) and 25 of the Constitution.
2 S 27(1) of the Constitution. This study is focussed on water as natural resource. Water is, however, not the only natural resource within the South African Environment. Chapter 1 of the *National Environmental Management Act* 107 of 1998, henceforth referred to as NEMA, defines the environment as the surroundings within which humans exist and it is made up of land, water, the earth, micro-organisms etc.
3 See ch 2 *supra*. The long title of the NWA demands fundamental reform of South African water law.
4 The Constitution is the supreme law of the Republic. S 2 of the Constitution.
5 S 27(2) of the Constitution.
6 S 27(1)(b) of the Constitution.
7 NEMA, NWA, *Water Services Act* 108 of 1997 (henceforth referred to as WSA), *Environmental Conservation Act* 73 of 1989 (henceforth referred to as ECA) etc.

sufficient water.[8] It is interesting to note that these newly promulgated environmental- and water directed legislations break new ground by introducing a novel and significant concept, that of public trusteeship.[9]

Van der Schyff and Viljoen[10] are of the opinion that although this concept entered the South African legal realm without much fanfare, it changed the foundation of the water law dispensation in totality. This chapter will argue that although the deepest roots of this concept of public trusteeship can be traced back to the early Roman law,[11] this novel concept has only recently been introduced through the legislature.[12] Due to the novelty of the concept of public trusteeship, reviewers hold different views on its meaning and full implications.[13] This necessitates an explanation of the concept of public trusteeship, its attributes and the legal aspects of the public trust as a legal tool. Only when clarity regarding the concept is attained, the research question of this dissertation, namely to what extent the statutory incorporation and practical application of the concept of public trusteeship impact on the South African water law regime, can be answered.

3.2 Diverse ideas on public trusteeship

As indicated in the introductory paragraph,[14] different assumptions exist regarding the meaning and full implications of the "novel" concept of a

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8 See ch 5 *infra* for a complete exposition regarding the state's commitment to realising the right stipulated in s 27(2) of the Constitution with reference to legislative and other measures.

9 S 3 of the NWA; Stein 2005 *Texas Law Review* 2167.

10 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in South Africa* 340.

11 See ch 2 *supra* for a complete exposition in this regard.

12 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 132, 150.

13 Thompson *Water Law* 279; Pienaar and Van der Schyff 2007 *LEAD* 183-184, Kidd *Environmental Law* 70; Stein 2005 *Texas Law Review* 2170-2183.

14 See par 3.1 *supra*.

public trust doctrine[15] in the water law dispensation of South Africa. One of the assumptions is that water is regarded as a natural resource that falls under the *custodial sovereignty* of the state.[16]

In order to clarify the different assumptions regarding the character, content, implementation and consequences of the public trust doctrine in the South African water law, relevant attributes of public trusteeship have to be identified from other legal systems where characteristics of such a doctrine can be detected. Two legal systems that can be of help in this regard is that of the Roman law (which will denote a very early form of public trusteeship) and that of the legal regime of the United States of America, which represents a modern, well-established public trust doctrine. Due to the fact that these legal systems are very extensive, emphasis will only be placed on the attributes of the public trust doctrine within each of these legal systems.

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15 Thompson *Water Law* 279 stipulates that this contentious principle, namely the public trust doctrine, is not so new in the South African law as it seems. Thompson is of the opinion that the principle of the public trust is based on the Roman law, from which South African water law descends. He qualifies his statement by explaining that the Romans used this principle for determining entitlements in naturally flowing water. The fact that the South African water law, and also the principle of the public trust, is founded on Roman law is not in dispute. However, his statement that this is not a new mechanism in the South African water law is quite debatable. He justifies his statement by saying that certain factors dictated how this principle was applied during a specific period in time. Factors include the competitiveness for the usage of water and the political framework applicable at a certain time in history, for example the Apartheid regime. Contradictory to this, Van der Schyff indicates that the public trust doctrine has been incorporated in the water law dispensation, as stipulated in the *White Paper.* However, she noted that one finds no exposition of the content of the doctrine in the said *White Paper,* and furthermore, no South African study could be found where this doctrine has been discussed extensively, except that of Van der Schyff. Van der Schyff states that this public trust-concept has been unknown and foreign to South African jurisprudence until very recently. Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 106.

16 Schrijver *Sovereignty Over Natural Resources Balancing Rights and Duties* 20; see Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 79-152, for a thorough exposition on this aspect.

3.2.1 An ancient idea of public trusteeship

Slade[17] brings to the fore a certain assumption regarding the public trust doctrine when he commands water users to, when using the water, thank a Roman emperor for the right to do so.

When following up on this assumption, one has to go as far back as to the classic Roman law, on which the Roman-Dutch law is based.[18] It is commonly known that during the governance term of the roman emperor Justinian between 527 and 565 A.D., the "Institutes of Justinian" was written, which is a codification of the law of that time.[19] The Romans' celebrated differentiation between the different categories of things can be found in the "Institutes of Justinian".[20] As "things" or "*res*" need not be limited to land only,[21] water could be incorporated and categorised under the said differentiation of things.

Chapter 2 of this dissertation indicated that according to the Romans' categorisation system of things,[22] water was classified under the category of *res extra commercium*, which had the effect that water could not be owned privately. The things within the category of *rex extra commercium* could further be sorted into two sub-categories,[23] of which only one is relevant to water. This category (*res humani iuris*) contained things that could be used

17 Slade 1999 www.nrpa.com/public_trust.htm.
18 Slade 1999 www.nrpa.com/public_trust.htm; See ch 2 *supra* for a complete exposition on this aspect.
19 Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 7, 63.
20 See ch 2 *supra* in this regard. Kaser *Roman Private Law* 80; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 63, 121-125; Pienaar and Van der Schyff 2007 *LEAD* 182.
21 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The law of property* 720. S 25(4)(b) of the Constitution stipulates the current law of South Africa, for property need not be limited to land.
22 See par 2.2 *supra*. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122.
23 *Res divini iuris* and *res humani iuris*. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 122; Kaser *Roman Private law* 80.

freely by all of the general public. Again a subdivision in this category surfaced, between *res communes* (things used by everybody, such as the air and flowing water) and *res publicae* (things that were owned by the state, for example a river).

Slade's[24] correlation between the public trust doctrine and the Roman law can be justified when considering the similarities between the characteristics of public trusteeship and *res publicae*, for water can not be available for private ownership.[25]

The consequence of water not being available for private ownership in the Roman law, was that the government was appointed as *dominus fluminis* (custodian)[26] over water as a scarce natural resource. The custodian granted the Roman citizens entitlements[27] to use the water,[28] but due to the custodianship the *praetor* had the right to regulate, control, limit or prohibit the use of the water.[29]

The South African public trust doctrine shares characteristics with certain of our common law principles as it relates to the categories of things and custodianship. In an effort to indicate this fact, the essence of this doctrine will receive attention. An investigation into a foreign legal system where it is currently applied as part of the common law of that jurisdiction can be helpful to highlight the core of the doctrine. Consequently, the chapter

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24 Slade 1999 www.nrpa.com/public_trust.htm.

25 "Alhoewel 'n rivier nie vir privaat eiendomsreg vatbaar was nie, was die oewerbank van 'n rivier wel vir privaat eiendomsreg vatbaar." Wessels *Waterreg in 'n nuwe Konstitusionele bedeling* 8. The owner of such a river-bank was not allowed to restrain any member of the public to use water from the river. Pienaar and Van der Schyff 2007 *LEAD* 182.

26 See par 2.2 *supra*. Pienaar and Van der Schyff 2007 *LEAD* 182.

27 The real extent of the entitlements was not always clear, but owners on whose property water originated, had preferential rights to the use of water. However, it should be kept in mind that the bank of the river could well be owned by the riparian owner. Thompson *Water Law* 20.

28 An entitlement could include uses such as the taking or diverting water. Fishing and navigation were also included.

29 Thompson *Water law* 20.

briefly focuses on the application of the public trust doctrine in the United States of America.[30]

3.2.2 A modern idea of public trusteeship

Glazewski[31] distinctly starts his discussion on the South African public trust doctrine with the words: "This [doctrine] played a central role in the heyday of the US environmental movement..." Since the content of the Anglo-American public trust doctrine[32] seems to be firmly established, this system's attributes will be used as a basis for determining whether the South African public trust doctrine has justly been introduced in the new water law dispensation of South Africa.

In observing the Anglo-American public trust doctrine, its association to state sovereign ownership clarifies the existing assumptions regarding the doctrine and indicates its exact meaning. State sovereign ownership (as seen in the previous discussion on the Roman law) means that water is held by the state in a fiduciary capacity, and has to be used in the public interest. Consequently, the public trust doctrine "could be regarded as simply the *law* on the fiduciary aspect of state sovereign ownership."[33]

Pienaar and Van der Schyff highlighted the attributes of this legal figure, the Anglo-American public trust doctrine, in trust terms:[34]

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30 In the United States of America the public trust doctrine is well entrenched and forms part of the common law. Valuable lessons can be taken from this legal system in developing the public trust doctrine within the South African water law.

31 Glazewski *Environmental Law in South Africa* 17.

32 Note that this dissertation will not incorporate a complete discussion regarding the roots and upcoming of the Anglo-American public trust doctrine. See Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 79-152 for a complete insight into it.

33 Dunning "Sources of the Public Right" 39.

34 Pienaar and Van der Schyff *LEAD* 184.

> 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.

When taking the above exposition into consideration, it must be emphasised that the Anglo-American public trust doctrine attributed a fiduciary responsibility to the state as it relates to water as natural resource that is not available for private- or state ownership. The doctrine thus recognises the concept of public rights to use water to the nation as beneficiary.[35] These attributes of the Anglo-American public trust doctrine will be used in determining whether this doctrine has justly been introduced in the South African water law.

3.3 The South African notion of public trusteeship

3.3.1 Legal uncertainties regarding the nature of a public trust

3.3.1.1 Tripartite nature

In order to fully understand the true legal nature of a public trust, one will have to examine whether the public trust correlates with the tripartite nature of a regular trust. A trust[36] normally consists of three parties, namely the creator (first party) that carries over his or her assets to another (the trustee), to manage the goods for the benefit- or on behalf of a third- or impersonal party.[37] However, in the case of the public trust as it functions in relation to the public trust doctrine, it seems that the tripartite nature is not met: The preamble of the NWA acknowledges only two parties, namely the "third party" by stipulating that water is a natural resource asset that

35 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 280.
36 Examples of trusts: *Inter vivos*-trust, Charity trust or Entrepreneurial trust.
37 Benade *ea Ondernemingsreg* 349; De Waal and Schoeman-Malan *Inleiding tot die Erfreg* 158.

belongs to *all people*[38] (as beneficiaries) and the "second party", the *national government*, as the public trustee to ensure the benefit of all persons.[39]

It should therefore be clear that the public trust only has two parties, and can thus not be classified as a true legal trust.[40]

3.3.1.2 Legal interpretation of the dual nature of a public trust

Within the scope of water law, the word "trust" must not be interpreted literally, but should rather be interpreted to refer to the fiduciary responsibility[41] ascribed to the state (as trustee) to ensure that the water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner.[42]

The reason for this different interpretation of the word "trust" was indicated above. It was indicated that the tripartite nature of a normal trust

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38 Preamble of the NWA.

39 S 3(1) of the NWA. The question that arises is who the creator can be in the instance of a public trust. It can be stated that the Legislative branch of the government is the creator, for it introduced this doctrine through legislation. The question, however, is whether the creator can also be the sole trustee. Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 6 states that the "public trust" was created when the United States was created.

40 The public trust must not be confused with similar terminology or principles within the Law of Succession or Commercial Law. The trust as law figure in the Commercial law signifies the legal relationship that rises due to the carrying over of assets by one person or persons, to another person or persons (the trustees). The reason for this conveyance is for the trustees to manage the assets to the benefit of a third party, or impersonal reason. Benade *ea Ondernemingsreg* 349. Neither should this terminology be confused with the so-called "state land trusts". Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 106.

41 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 28 of 2002 106. See ch 3.6 *infra* regarding the extent of the state's fiduciary capacity.

42 S 3(1) of the NWA. The state has these responsibilities to benefit "all people".

disqualifies the public trust from being classified as a true legal trust in the United States of America.[43]

It should therefore be clear that the public trust doctrine should not be characterised by the legal nature or the terminology[44] of a trust, but rather as the fiduciary responsibility ascribed to the state to manage the water resources beneficially.

3.3.2 Birth of the South African public trust doctrine

In the United States of America the public trust doctrine came into existence as the Unites States was established.[45] In South Africa this was not the case. The tranquil rising of the public trust doctrine in South African water law is interwoven with a number of water-directed Acts.[46] The public trust principle is acknowledged in the preamble of the *Water Services Act*,[47] which confirms the national government's role as custodian of the nation's water resources in no uncertain terms.[48] The principle then echoes in section 3 of the NWA where it is explicitly stated that:

> (1) As the public trustee of the nation's water resources the national government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.
> (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used

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43 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 106.
44 Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 106.
45 Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 6.
46 S 27(2) of the Constitution demanded new legislative measures.
47 *Water Services Act* 108 of 1997. Henceforth referred to as the WSA. The preamble of this Act stipulates that the role of the national government is confirmed as the custodian of the nation's water resources.
48 Another incorporation of the public trust doctrine can be found in the s 3 of the *Minerals and Petroleum Resources Development Act* 28 of 2002.

beneficially in the public interest, while promoting environmental values.

(3) The national government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.[49]

The concept of public trusteeship is further enhanced through the stipulations of an environmentally directed Act, that of the *National Environmental Management Act*.[50] The relevance of NEMA in the study of water law lies in the fact that NEMA defines "environment" with reference to the surroundings within which humans exist. According to the Act, the environment is made up of *inter alia* land and water, which also includes the aesthetic conditions that influence human health and well-being.[51] Water is therefore clearly part of the concept "environment". The public trust doctrine consequently finds its rightful place as one of the principles in NEMA. Section 2(4)(o) of NEMA stipulates that the environment is held in public trust for the people; the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

It will be indicated below that this statutory birth of the public trust doctrine within the South African water law changed the water law dispensation in totality.[52]

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49 S 3 of the NWA.

50 *National Environmental Management Act* 107 of 1998. Henceforth referred to as NEMA.

51 S 1 of NEMA. This also relates to s 27(1)(b) of the Constitution, which stipulates that everyone has the right to have access to *sufficient* water. Gabru is of the opinion that while the Constitution does not explain the full meaning of "sufficient" water, its meaning still has to be considered by court. She reminds of the minimum quantity of water, but accentuates the fact that sufficient water is a component of an adequate standard of living or well-being. Gabru 2005 *PER* 12-13.

52 See ch 2 *supra* for a complete exposition of the previous South African water law dispensation.

3.3.3 The concept of the South African public trust doctrine

As indicated earlier, different assumptions exist regarding the meaning and full implications of the "novel" concept of the public trust doctrine in the water law dispensation of South Africa. The concept of public trusteeship should therefore be analysed intensively in order to understand its content. An analysis will pave the way for the effective implementation of the statutorily introduced concept, which will directly have an effect on both the nation and its poor. This section will be dedicated to a scrutiny of the South African concept of public trusteeship, while the following chapters will deal with its implementation in the South African water law.

3.3.3.1 The proposal

> 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 Africans, in a way which takes into account the public nature of water resources and the need to make sure that there is fair access to these resources. The central part of this is to make sure that these scarce resources are beneficially used in the public interest.[53]

Four elements come to the fore in the above quotation that together form the attributes of the concept of public trusteeship. These four elements will therefore guide the chronology of the remaining of this section. Firstly, the duty of the South African government to regulate water uses will be discussed. Secondly water is seen as public in nature. The third aspect deals with the duty of the state to regulate the water so that fair access will be achieved, and lastly (fourthly) an exposition will be given regarding the fact that these scarce resources should be used beneficially in the public interest. Although these four elements will subsequently be dealt with

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53 *White paper on a National Water Policy for South Africa* of 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf at 5.1.2.

under separate headings, it is important to keep in mind that they are intertwined and are not exclusive to each other.

3.3.3.2 Duty of the government

Beck *et al*[54] explains the duty of the government in the Anglo-American public trust doctrine as:

> At the core of the public trust doctrine is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public.

Montague[55] delved into this important element of the government's role in environmental (thus also water-related) issues, and noted that the government's role can be traced back to the creation of a nation's government. At the time of such creation, people delegate many powers and duties to the country's sovereign authority, which includes the guardianship and the authority over the nations' water resources.[56]

> In trust terms, the *people designated* the government as trustee of the land and other *natural resources* and themselves as beneficiaries.[57]

Montague[58] refers to Peter Manus, a legal scholar, who describes the above quotation with reference to the fact that the people of a nation thus possess an "abstract form of sovereignty over the land and its natural

54 Dunning "Sources of the Public Right" 44.
55 Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 2.
56 Caring for the commonwealth is an ancient duty of the sovereign. Sometimes this duty is considered so basic that it is taken for granted and not spelled out. At other times, this duty is given a name: the public trust. Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 5.
57 Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 5.
58 Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 5.

resources". This abstract form of sovereignty of the people implies a specific duty of the state, which is designated as trustee by the people. It can be explained as follows:

> [The] government has a duty to promote and maintain a healthy natural environment on behalf of current and future citizens. This duty is not optional: it is a mandatory, affirmative duty that government cannot deny, repudiate, or alienate.[59]

When these Anglo-American public trust principles are applied in the South African water law, it is apparent that the government has the mandatory duty to protect our common heritage for present and future generations on behalf of the people. The duty of the South African government even has a greater scope, which goes beyond the protection and conservation of water resources for generations, but includes also the usage, development, management and control over the water as natural resource.[60]

In conclusion, the government is the "protector, the guardian, [and] the shield of the public trust",[61] with the "specific duty" to protect, use, develop, conserve, manage and control our water resources as a common heritage.[62]

3.3.3.3 The public nature of water

The preamble of the NWA recognises the fact that water as a natural resource belongs to *all people.* The question arises whether the ownership of this natural resource can legally vest in "all the people".

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59 Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 5.
60 S 2 of the NWA. See ch 5 *infra* for a complete exposition on these aspects.
61 Montague "Government has a Public Trust Duty to take Precautionary Action to Achieve Environmental Justice" 6.
62 S 2 of the NWA.

Addressing this quandary requires insight into the law of property as well as the law of persons. The law of property deals *inter alia* with how property rights can be acquired as well as the relations between persons and their property.[63] Due to the private property framework that dominates our property law, the notion has developed that for someone to acquire and exercise rights and obligations in law, the person needs to be a legal subject.[64]

> A legal subject can be either a natural person (any individual person) or a juridical person (groups or bodies operating and recognised as a single legal entity).[65]

The question arises whether the nation as "all the people", qualifies as a juridical person (*legal personae*) or legal subject with legal personality to own water as natural resource. *Webb & Co Ltd v Northern Rifles*[66] distinguishes a *universitas* from a regular association. It is acknowledged that a *universitas* is an entity distinct from the individuals forming it and further, the rights and obligations which are acquired, are intended for the body as a whole and not for the individual members.[67]

If this approach is accepted, it should be clear that the nation as "all the people", can not acquire ownership of water as natural resource, for the nation does not qualify as a juridical person (*legal personae*).

The incorporation of the public trust doctrine therefore poses two fundamental dilemmas: How could something "belong to all people" if the entity named "people" does not have legal personality? and Where does the

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63 Van der Walt and Pienaar *Inleiding tot die Sakereg* 8.
64 Robinson and Horsten *Inleiding tot die Suid-Afrikaanse Personereg* 4, 5, 8, 9; Van der Walt and Pienaar *Introduction to the Law of Property* 7.
65 Van der Walt and Pienaar *Introduction to the Law of Property* 7.
66 *Webb & Co Ltd v Northern Rifles* 1908 TS 462 464-465.
67 "All the people" is thus not regarded as a *universitas*.

legal title of water as public property then vest?[68] Two approaches are of relevance in this regard. The first approach is that the doctrine does not mean that the government owns the water, but that the government has a duty to regulate water use for the benefit of all South Africans.[69] This is a direct and erroneous understanding of water resources that "belong to all people".

The correct understanding is stressed by Pienaar and Van der Schyff[70] when they state that:

> The reality is, however, that the preamble and section 3 of the Act, indicates that this is precisely what the legislature set out to achieve. The Act reflects the legislature's unmistakable intention that water as a natural resource "belongs" to *all people.*

The legislature overcame the above uncertainties by emphasising the state's fiduciary role and fiduciary responsibilities within the NWA.[71] The Anglo-American public trust doctrine clearly designates that the title in public trust property vests in the state as trustee, with the nation as beneficiary.[72] The second approach will therefore be that the public trust doctrine vests ownership of the country's natural resources in the *state,* but to acknowledge the introduction of a system of public rights pertaining to water as natural resource.[73] This is the viewpoint that holds water, as will be explained below.

It can on this note be accepted that property in public trust is held in a different title than property for sale.[74]

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68 See Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 343, where this question was examined.
69 Thompson *Water Law* 279.
70 Pienaar and Van der Schyff 2007 *LEAD* 184. They refer to s 3 of the NWA.
71 Stein 2005 *Texas Law Review* 2178; Pienaar and Van der Schyff 2007 *LEAD* 184.
72 Pienaar and Van der Schyff 2007 *LEAD* 184.
73 Stein 2005 *Texas Law Review* 2167.
74 *Illinois Central Railroad Company v Illinois* 1892 146 US 387.

Chapter 2 of this dissertation attended to the fact that a transition in relation to the nature of water rights had taken place in order to align the country's water law with the constitutional values of dignity, freedom and equality.[75] It should therefore be clear that the emphasis shifted from "ownership in water" to the "water use rights", which is still protected as property under section 25 of the Constitution.[76]

This paradigm change in the South African water law correlates with what has been seen in the joint application of American and English-law (Anglo-American law). The application of the Anglo-American law led to certain distinctions in the American water law.[77] The most important of these is the differentiation between *ownership* and the *rights of use* in relation to streams. The aspect of the current ownership of all water was attended to above. It is now necessary to delve into the aspect of public rights to water.

A system of public rights,[78] where the government holds the title of the nation's natural resources for the benefit of the people, legislatively infiltrated into the South African water law dispensation with the enactment of the public trust doctrine. The NWA therefore abolished a private rights

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75 Ss 7(1) and 27(1)(b) of the Constitution.

76 "Private property can thus be converted into public resource." The purpose of section 25 of the Constitution has to be seen as protecting property rights together with serving the public interest. Pienaar and Van der Schyff 2007 *LEAD* 188, 199; Van der Walt *Constitutional Property Law* 378.

77 For a complete exposition of the historical overview and development of the Anglo-American trust doctrine, see Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* 79-152. In this dissertation, however, the focus will fall on the meaning and full implications of the statutory introduced public trust doctrine within the South African water law.

78 The historical formulation of a public right allowed the public user to enjoy the commercial navigation of water over land. However, the public right has never been limited to commercial navigation, for fishing was also included in this formulation. Dunning "Scope of the Public Right" 82. The public uses of water in place furthermore permitted other water-related activities, such as recreational boating and swimming. However, Dunning informs that all public uses of water stayed subject to police power regulation by government, which had to be in line with the protection of navigation in general, or any other legitimate public purpose.

system[79] of water allocation and has introduced a public rights system intended for the beneficiaries ("all the people") of the trust.[80]

It should therefore be emphasised that although the public trust doctrine vests ownership of the country's natural resources *in the state* it simultaneously acknowledges the introduction of a system of *public rights* pertaining to water as natural resource.[81] The scope of this public rights system has to be examined.

3.3.3.3.1 Extent of the people's rights in water

In South Africa, the people's public rights in the water as trust property are both determined by, as well as restricted through, the provisions of the NWA.[82]

Section 21[83] determines the various possible water uses or user rights recognised in terms of the NWA. Water uses include the taking of water from a water resource, storing it and impeding or diverting the flow of water in a watercourse. Further water uses are *inter alia*, engaging in a stream flow reduction activity and engaging in a controlled activity. The discharging of waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit and the disposing of waste in a

79 See ch 2 *supra*. The *Water Act* of 1956 distinguished between "public" and "private" water. The owner of a piece of land that had "private water" on it had the exclusive enjoyment of the water. Water-use rights were therefore linked to land access. The beds and banks of public rivers did not belong to riparian owners, but to the state, "The rights of use vested in the public." Thompson *Water law* 32; Dunning "Antiquity of the Public Right" 9 and 11 indicates that two different rights pertaining to the water of "great rivers" were acknowledged in the Anglo-American water law. These rights entailed both a 'common right' as well as a 'right in the Crown'. The only clear common right of the public in the use of water was for travel. Since the NWA, all waters are categorised uniformly.

80 Stein 2005 *Texas Law Review* 2167.

81 Stein 2005 *Texas Law Review* 1.

82 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 345; *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and others* (OFS) 3215/06 decided on 13 December 2007. Unreported.

83 S 21 of the NWA.

manner which may detrimentally impact on a water source, are also identified as water uses. Other water uses can be defined as the disposing of water that contains waste from, or which has been heated in, any industrial of power generation process, altering the bed, banks, course or characteristics of a water course, removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for safety of people, and using water for recreational purposes.

As the above exposition on the usage of water can be described as the broadest scope of the people's public right to use water, the Minister may make regulations to limit, or restrict the purpose, manner or extent of the above water uses.[84] Chapter 4 of the NWA determines the starting point for regulating water uses, which will be discussed below.[85] The explanatory note of this chapter emphasises the principle that the national government has an overall responsibility and authority over regulating water resource usage.

This regulatory control by the Minister is a consequence inherent to the public trust doctrine. In this regard, it is important to note that the NWA stresses that the language to be used is not that of use-rights, but rather, entitlements to use water, that may be limited through licensing or authorisation procedures, as will be discussed in chapter 4 of this dissertation.[86]

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84 S 26(1)(a) of the NWA. The recognition of the people's right of the country's water resources does not mean that any individual person has an unrestricted right of access and use. As a result of the objectives stated in the NWA, the state must balance opposing interests to attain a balance between the different water uses. This may result in the public trust doctrine interfering with entitlement to use water awarded in terms of the NWA. Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 345. See s 32 of the NWA regarding existing water uses.

85 S 21 of the NWA stipulates the various possible water uses (user rights) recognised in terms of the NWA.

86 This aspect of water entitlements leaves room for further research.

It should therefore be clear that the applicability of the public trust lays in the fact that the NWA sets parameters to determine the extent of public rights of all the people of South Africa.[87]

3.3.3.4 Fair access to water resources

The nature and extent of the people's public rights to use water were examined above.[88] However, this theoretical exposition of rights does not provide closure on the uncertainties regarding *access* to the *limited*[89] water resources of South Africa. The question arises whether everyone now has the fundamental right to exhaust all the limited water resources, because they have the public right to use water.[90] This is not accepted to be the case, for the right stipulated in section 27(1)(b) does not impose an unqualified obligation[91] on the state (as trustee) to guarantee this socio-economic right.

An understanding of the language in section 27(1)(b) of the Constitution will provide clarity in this regard, for it states that everyone has the "right to have access to sufficient water". Although chapter 5 of the dissertation will delve into the constitutional meaning of this right,[92] it is important to realise that these words qualify the duty of the state as public trustee to realise the right relating to water to all of the people of South Africa. The qualified duty of the state, as in section 27 of the Constitution, relates very closely to the state's commitment to alleviate poverty, for the standard of the poor's living conditions are addressed by this regulation of the Constitution.

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87 Or public entitlements.
88 See par 3.3.3.3.1 *supra*.
89 South Africa is considered to be under water stress. Thompson *Water law* 7.
90 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 720.
91 Gabru 2005 *PER* 12.
92 See par 5.4 *infra*.

3.3.3.5 Public interest

As indicated above, the state now has a fiduciary public trust duty to regulate public rights to water as well as its accessibility. A vital issue, however, is the fact that the government should (in fulfilling this duty) make sure that the water is beneficially used in the *public interest.*[93]

Section 25(4)(a) of the Constitution defines the concept of public interest as including the nation's commitment to land reform, and such reforms also have to bring about equitable access to all South Africa's natural resources.[94] In other words, in *inter alia* executing its commitment to land reform and to reforms to bring about equitable access to water, the government will meet the obligation of meeting the public interest.

Stallworthy[95] further widens the applicability of the public interest with regard to the government's connection with the nation's natural resources. He regards the essence of the public trust doctrine as the fact that the fiduciary duty also includes the judicial protection that safeguards the natural resources from degradation. He is of the opinion that where an interest is recognised, this interest can be used as a limitation on actions by the government, or even to restrict the range of actions that normally would have been available under private property rules.

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93 S 2(d) of the NWA; *White Paper on a National Water Policy for South Africa of* 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf.

94 S 25(4)(a) of the Constitution. Different approaches exist regarding the full meaning of the concepts "public purpose" or "public interest". Should it be interpreted strictly or leniently, widely or narrowly? See Van der Walt *Constitutional Property Law* 242, for a complete exposition regarding its interpretation. Public purpose requirements are included to assure that expropriations are unavoidable. Public interest includes land reform and other reforms for the realisation of equitable access to South Africa's natural resources. Ss 25 (2) and 25(4)(a) of the Constitution.

95 Stallworthy *Sustainability, Land use and Environment* 13.

3.4 Conclusion

This chapter scrutinised the idea of public trusteeship within the South African water law. Four elements emerged as forming the attributes of the South African public trust doctrine. Firstly, the South African government, as public trustee, has a mandatory duty to regulate the people's uses of water as natural resource. Secondly, water is public in nature and consequently public rights can be attained in it. Thirdly, the public trustee should regulate the waters of South Africa in such a way that fair access can be achieved to all South Africans. The fourth and last attribute of public trusteeship relates to the aspect of water that has to be used in a beneficial way in the public interest. An examination of these attributes led to the following conclusion:

> The idea of the "trust" is essentially an equitable mechanism, whereby legal and beneficial entitlements are maintained as recognisably separate. Resulting obligations placed upon the trustee, as legal titleholder, include a strict obligation to deal with trust property in accordance with the terms of the trust, for the benefit of defined persons, purposes or objects.[96]

The following chapter of this dissertation will focus on how the public trust (as a legal mechanism) can effectively be used as a legal framework through which water management can be executed to realise the objectives of the NWA. Chapter 5 of this dissertation will indicate that by characterising water use rights as public in nature (held in trust by the national government as custodian of the nation's water resources), the objectives of *inter alia* equity, environmental sustainability and efficiency, which are the core values of the NWA, can be achieved.[97]

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96 Stallworthy *Sustainability, Land use and Environment* 13.
97 Stein 2005 *Texas Law Review* 2167.

Chapter 4

The public trust doctrine: the basis for a legal framework for water management[1]

4.1 Introduction

The preceding chapters provided an exposition of the reformation process of the South African water law dispensation. Chapter 3 in particular investigated the turning point of this process by indicating that the NWA statutorily appointed the national government as the public trustee or custodian over South Africa's water resources.[2]

A concept such as "public trusteeship" needs to be interpreted by legislation in order to emphasise the responsibilities of the national government as the public trustee or custodian over the nation's water resources.[3] The current interpretation of public trusteeship is supported by the Constitution,[4] which stipulates the government's responsibility relating to the environment. This

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1 Bray 1996 www.geocities.com/CapitolHill/Senate/3616/PublicTrustDoctrine.html; Stein 2005 *Texas Law Review* 2174.

2 Karar Academy of Science of South Africa entitled *IAP Water Programme Regional Workshop for* Africa, Proceedings Report "Integrated Water Resources Management in South Africa" 42; Lotz-Sisitka and Burt 2006 *A Critical Review of Participatory Practice in Integrated Water Resource Management* WRC Report 1434/1/06 9. McDonald and Kay *Water Resources Issues & Strategies* 49 state that authority in the sphere of water management has to be based on legislation to be effective. In South Africa, the public trustee statutorily possesses authority in terms of S 3 of the NWA.

3 It has been indicated in the previous chapter of this dissertation that the national government or public trustee has certain duties in terms of its role as public trustee. In this chapter, these duties will be extended to include certain responsibilities. It must be kept in mind that the national government as public trustee or custodian acts through the Minister of Water Affairs and Forestry. S 3(1) of the NWA.

4 S 24 of the Constitution stipulates that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

responsibility resonates in the NWA, which structures the extent of the government's responsibilities as public trustee:[5]

> As the public trustee of the nation's water resources the national government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.[6]

As stipulated in this provision of the NWA, the public trustee's responsibilities are expanded in such a way to cover a remarkable wide range of activities relating to water. From this same provision, it can be deduced that the public trust doctrine limits the power of the state,[7] for the responsibilities must be executed in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.[8] This chapter will indicate that the concept of public trusteeship provides the basis for a legal framework[9] of water management that sets parameters[10] within which these responsibilities need to be executed.

The emphasis that is placed on "responsibility" is not strange to the concept of public trusteeship. This is *inter alia* highlighted by Carol Rose[11] in her article dealing with the notion of public trusteeship. She points to the fact that the concept of a *national government being the public trustee or custodian over the nation's water resources* draws attention due to its

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5 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 726; Kidd *Environmental Law* 70.

6 S 3(1) of the NWA.

7 Jewell and Arnold "The Real Public Trust Doctrine: The Aftermath of the Mono Lake Case" 155; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 346.

8 S 3(1) of the NWA.

9 A new regulatory framework has to be developed and introduced with the new water law dispensation. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 717. Bray 1996 www.geocities.com/CapitolHill/Senate/3616/PublicTrustDoctrine.html; Stein 2005 *Texas Law Review* 2174.

10 Stoop "Water" 252.

11 Rose 2003 *Ecology L.Q.* 351.

intimation to the aspect of "responsibility". It is for this reason that this chapter will focus on the public trustee's responsibility as it relates to water management.

4.2 The responsibility

Tortajada *et al*[12] indicate the need for the public trustee to accept its responsibility as it relates to water:

> At the dawn of a new century, we are at a critical juncture in the era of water management. According to the report of the World Commission on Water for the 21st century (World Water Commission, 2000), renewable blue water flows will be insufficient to meet all industrial, domestic and agricultural needs by 2020, primarily due to...inappropriate management practices.

In South Africa, government launched an attempt to provide for proper management practices to meet these needs by the year 2020. This attempt kicked off with the promulgation of the NWA in 1998, which changed the water law dispensation radically. The NWA sets out an extensive framework[13] for more appropriate water management practices.[14] The public trustee's[15] duty to develop strategies to facilitate appropriate management practices for South Africa's water resources was significantly extended, as is set out in chapter 2 of the Act.[16] In this regard the NWA required the public trustee to develop a national water resource strategy that would provide for *inter alia* strategies, objectives, plans, guidelines, procedures and institutional arrangements for the proper management of

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12 Tortajada, Rockström and Figueres *Rethinking Water Management Innovative Approaches to Contemporary Issues* 1.

13 The comprehensive NWA deals with the use, protection as well as the management of South Africa's water. Gildenhuys 1999 *Butterworths Property Law Digest* 1.

14 Lotz-Sisitka and Burt 2006 *A Critical Review of Participatory Practice in Integrated Water Resource Management* WRC Report 1434/1/06 9.

15 The national government acts though the Minister of Water Affairs and Forestry acts as the public trustee. S 3(1) of the NWA.

16 Explanatory note of ch 2 of the NWA.

the water resources of South Africa.[17] This document was drafted, accepted by the Cabinet, and published in a notice in the *Government Gazette* as the NWRS.[18] Ever since the water resources in the Republic of South Africa has to be protected, used, developed, conserved, managed and controlled in terms of the NWRS.[19]

This having been said, Rossouw *et al*[20] states a concern relating to documents (such as the NWRS) that detain strategies for "management practices". He states that most of the management failures in society are not due to strategies that are in place, but rather a lack of actual execution of such strategies.[21] Therefore, the discussion will also focus on the identification and examination of a management practice in order to determine whether the public trustee's management practice will prove to be executed effectively or whether it is merely empty words filling paper.

4.3 Integrated Water Resources Management (IWRM)[22]

Unfortunately, due to the extent of the management facets that are set out in the NWRS,[23] not all of them can be examined in this dissertation. It is, however, necessary to draw attention to one vital water management

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17 S 6(1) of the NWA. Kidd *Environmental Law* 70; Thompson *Water Law* 286.

18 GN 65 in GG 27199 of 28 January 2005 or the National Water Resource Strategy, henceforth referred to as the NWRS; Thompson *Water Law* 286; Glazewski *Environmental Law in South Africa* 433; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 727. Gildenhuys *Butterworths Property Law Digest* 3.

19 S 5(3) of the NWA; Stoop "Water" 252.

20 "One common reason for failure was not strategy, but the execution of strategy" Rossouw *Strategic Management An Applied South African Perspective* 1.

21 It is stated that enforcement of a management regime is crucial. Kidd *Environmental Law* 74.

22 Integrated Water Resource Management will henceforth be referred to as IWRM.

23 Kidd *Environmental Law* 80. The NWRS consists of five chapters. Chapter 1 of the NWRS is titled "Water Policy, Water Law and Water Resource Management", chapter 2 "South Africa's Water Situation and Strategies to Balance Supply and Demand", chapter 3 "Strategies for Water Resource Management", chapter 4 "Complementary Strategies" and chapter 5 "National Planning and Co-ordination, and International Co-operation in Water Management".

practice that can be of assistance in answering the research question of this dissertation.[24] The concept of IWRM is set out in chapter 1 of the NWRS.

In an attempt to ensure the optimal implementation of IWRM, it is necessary to define the concept of IWRM and to examine its cornerstones as it is applied in the South African water law.[25]

The concept of IWRM can be defined as:

> A process which promotes the co-ordinated development and management of water, land and related resources in order to maximise the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems.[26]

Given this definition, IWRM can be understood as the approach that the public trustee follows to take all the "natural, social, economic and political environments" into consideration when managing the nation's water resources in order to achieve equity, efficiency and sustainability in South Africa's water resources.[27]

The cornerstones of IWRM can *inter alia* be identified as "institutional structuring" and "catchment management", and these will be studied

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24 The research question of this dissertation is: To what extent does the statutory incorporation and practical application of concept of public trusteeship impact on the South African water law regime?

25 Van der Schyff, Terblanche and Viljoen Water Research Commission Project K5/1839 2008 *The Impact of IWRM on the lives of woman and the poor in South Africa* 2008 Starter Document for Workshop Version 0.2 13.

26 GWP Technical Committee (TEC) Backgroundpaper No.4. "The meaning of the IWRM concept continues to be contested and various definitions have been put forward." Tapela Water Research Commission Project K5/1839 2008 *The Impact of IWRM on the lives of woman and the poor in South Africa* 2008 Starter Document for Workshop Version 0.2 3.

27 It will be indicated in ch 5 *infra* that the implementation and actual execution of this management practice of IWRM will undoubtedly be of assistance in the bettering of livelihoods, the achievement of water conservation, social equity, sustainable development and economic efficiency which will impact the alleviation of poverty within South Africa.

below.[28] Through these two cornerstones of IWRM, the responsibility of the public trustee can efficiently be executed.

4.3.1 Institutional structuring

Pegram *et al*[29] explains the first cornerstone of IWRM, identified to assist and support the public trustee in his responsibility to manage the nation's water in an integrated approach. From their exposition it becomes clear that the structuring or arrangements of systems, consisting of different institutions, are imperative for IWRM.[30]

Due to the Constitution's supremacy,[31] it will by design be the point of departure. Chapter 3 of the Constitution[32] reveals the basics for constituting institutional structures, within which IWRM must be fulfilled. In terms of the Constitution, structures are constituted at the national, provincial and local spheres of government.[33] It is further indicated that this structural arrangement of the spheres of government includes different institutions,

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28 Public participation is also identified as a cornerstone of IWRM, but will only be referred to below under the exposition of CMA's. See par 4.3.1.4 *infra*. Uys 2006 *A Legal Review of the South African Natural Resources Management Mechanisms, Towards Integrated Resources Management* WRC Report 176/06 2.

29 Pegram *ea* 2006 *Strategic Review of Current and Emerging Governance Systems Related to Water in the Environment in South Africa* WRC Report 1512/1/06 6.

30 The term used by Pegram *et al* to refer to these institutional structures is the concept of water governance. This terminology of water governance as a cornerstone of IWRM can be accepted, for the concept of water governance does not only imply the activity of running a government. The concept encompasses elements of *authority* to manage the nation's water resources and the *comprising* of *institutions* to do so. Pegram *ea* 2006 *Strategic Review of Current and Emerging Governance Systems Related to Water in the Environment in South Africa* WRC Report 1512/1/06 5. From Thompson's discussion on water governance, it is clear that he also incorporates institutions as part of the water governance system. Thompson *Water Law* 220.

31 S 2 of the Constitution.

32 S 40(1) of the Constitution.

33 These spheres of government are distinctive, interdependent and interrelated to one another. S 40(1) of the Constitution.

which are organs of the state.[34] The Constitution defines an organ of the state in section 239(a) and (b), as:

> (1) any department of state, or administration in the nation, provincial or local sphere of government; or
> (2) any other functionary or institution:
> i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

In other words, the prescribed constitutional structures with its departments and administrations,[35] were instituted by the South African water law as a framework to assist the public trustee in his responsibility of IWRM.[36]

Through these constitutional structures, the administration of IWRM is decentralised, while the control of IWRM stays centralised under the public trusteeship of the national government.[37] The decentralised constitutional water management institutions[38] can be summarised as follows.[39]

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34 It will be indicated in Figure 1 *infra* that an institution or functionary that does not form a part of the administration will still be organs of the state. KaMdumbe 2005 *SAPR/PL* 9.

35 These institutions constitute the Administration of South Africa. They do the day-to-day work of the government. Hoexter *Administrative Law in South Africa* 5.

36 Uys 2006 *A Legal Review of the South African Natural Resources Management Mechanisms, Towards Integrated Resources Management* WRC Report 176/06 48 & 52:

> The Constitution does not confer powers on various institutions to undertake resources management activities, but sets the institutional structure which underlies all statutory resources management systems.
>
> S 24(1) of NEMA stipulates that potential impact on the environment must be considered, investigated, assessed and reported to the competent authority.

37 Uys 2006 *A Legal Review of the South African Natural Resources Management Mechanisms, Towards Integrated Resources Management* WRC Report 176/06 53. Public Participation stays imperative for this process of decentralisation.

38 Environmental and Land management also impacts on water management. It is for the reason of integration that the departments and institutions responsible for environmental and land management will also be listed below. Pegram *ea* 2006 *Strategic Review of Current and Emerging Governance Systems Related to Water*

4.3.1.1 National Water Management Institutions

The Department of Water Affairs and Forestry[40] is an organ of the state instituted to assist the public trustee in fulfilling his responsibility of *inter alia* IWRM.[41] The different forms of assistance to the public trustee include the formulation of goals and the assessment of water resources. DWAF must continually develop and regulate water resources, its uses and services. This Department also operates water resource infrastructures and takes decisions relating transfers and allocations of water resources.[42]

Other institutions that affect IWRM within in the national sphere are the Department of Environmental Affairs and Tourism,[43] the Department of Minerals and Energy,[44] the Department of Agriculture,[45] the Department of

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in the Environment in South Africa WRC Report 1512/1/06 61. Uys 2006 *A Legal Review of the South African Natural Resources Management Mechanisms, Towards Integrated Resources Management* WRC Report 176/06 49-51: a wide range of Resource Management Institutions exists. Examples are the Management Bodies, Advisory Bodies, Policy-Making Bodies, Strategy Bodies, Utility Organisations, Judicial Bodies, Auditing and Monitoring Institutions, Coordinating Institutions, Control Bodies, Consultative Bodies, Education Bodies, Information Institutions, Administration Bodies, Stakeholder Bodies.

39 Francis 2005 *The Georgetown Int'l Law Review* 165.

40 Hereafter referred to as DWAF.

41 Kotzé 2007 *CILSA* 476.

42 Thompson *Water Law* 220, 221, 222, 225.

43 The Department of Environmental Affairs and Tourism (DEAT) is also accepted to be an organ of the state. This department is the custodian of the nation's environment, of which water forms a part. See NEMA for a full exposition on this department's responsibilities. See par 5.5.2.1 *infra.* DEAT's water related activity entails the regulating of activities that may affect any water resource. Thompson *Water Law* 223; Kotzé 2007 *CILSA* 476.

44 Another organ of state within the national sphere is the Department of Minerals and Energy. This department is the custodian of the nation's mineral resources. See the *Mineral and Petroleum Resources Development Act* 28 of 2002 for a thorough exposition of the responsibilities of this department. The relevance of this department to water law is that it is the responsibility of this department to regulate the components of mining activities that may affect the water resources. Thompson *Water Law* 223; Kotzé 2007 *CILSA* 476.

45 Other Departments within the national sphere of government is the Department of Agriculture that supports sustainable resources usage (amongst other things). This department needs to regulate the components of agricultural activities that may affect water resources. Thompson *Water Law* 223; Kotzé 2007 *CILSA* 476.

Land Affairs,[46] the Department of Housing[47] and the Department of Provincial and Local Government.[48]

4.3.1.2 Provincial Water Management Institutions

The provincial departments are responsible for the the day-to-day performance of municipalities and their functions.[49] They are consequently responsible for *inter alia* the evaluation of environmental impact assessments (EIA's) and for issuing certain authorisations.[50] These departments furthermore assist the national departments in exercising its functions at a local level.

Departments that are connected with IWRM in the provincial sphere are the Departments of the Environmental Affairs, Agriculture, Local Government, Departments of Housing and the Department of Land Administration.[51]

4.3.1.3 Local Water Management Institutions

Local Authorities Municipalities (mostly Metropolitan, but also District Municipalities) are water services authorities. These authorities need to

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46 The Department of Land Affairs needs to take reasonable steps to realise all the citizens' right to equitable access to land. They also have to redress results of past discriminatory practices where persons have been disposed of their property. Thompson *Water Law* 224.

47 The Department of Housing also has to ensure all the citizens the right to have access to adequate housing. This department is occupied with developing a housing policy. The policy of "Housing development" accentuates the specific mandate to develop potable water services and adequate sanitation facilities. Thompson *Water Law* 224.

48 The Department of Provincial and Local Government together with the Provincial Government, have to realise effective performances by municipalities and their functions. Thompson *Water Law* 225.

49 Thompson *Water Law* 224, 225.

50 Authorisations as found in the *Environmental Conservation Act* 73 of 1989.

51 The functions of the Provincial departments of Local government, provincial departments of Housing and the provincial departments of Land administration are *inter alia* to conserve nature and to site abattoirs. Thompson *Water Law* 225.

provide for services, within their areas of jurisdiction, which normally relates to domestic and industrial water purposes.[52]

4.3.1.4 Other Water Management Institutions

Other water managing institutions exist and are accepted as organs of the state as well. However, they do not form part of the sphere of government,[53] and can therefore not be categorised as "local institutions for water governance". These "other water management institutions" can be sub-categorised under the two categories of *Water Resources Regulators and Developers* and *Services Providers*. Water Resources Regulators and Developers consist out of Catchment Management Area's (CMA's)[54] and bodies that implement international agreements. On the other hand, Services Providers consist out of Water Boards, Water Services Committees, Water User Associations[55] and Private water services providers.

All the institutional structures, through which the public trustee executes its fiduciary responsibilities, can thus be summarised with the figure *infra*:

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52 Thompson *Water Law* 227.

53 Thompson *Water Law* 221.

54 Chapter 7 of the NWA provides for the establishment of Catchment Management Agencies for every water management area. Henceforth referred to as a CMA. See par 4.3.2 *infra*. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 733. Thompson *Water Law* 221- 223 explains the responsibility of CMA's as being future planners for water resources and water management activities at the local level. See the Explanatory note of Ch 7 of the NWA. CMA's will thus be responsible for the licensing and the monitoring of water uses.

55 See ch 8 of the NWA. Gildenhuys 1999 *Butterworths Property Law Digest* 2. Stoop "Water" 289. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 734; Francis 2005 *The Georgetown Int'l Envtl Law Review* 165-166.

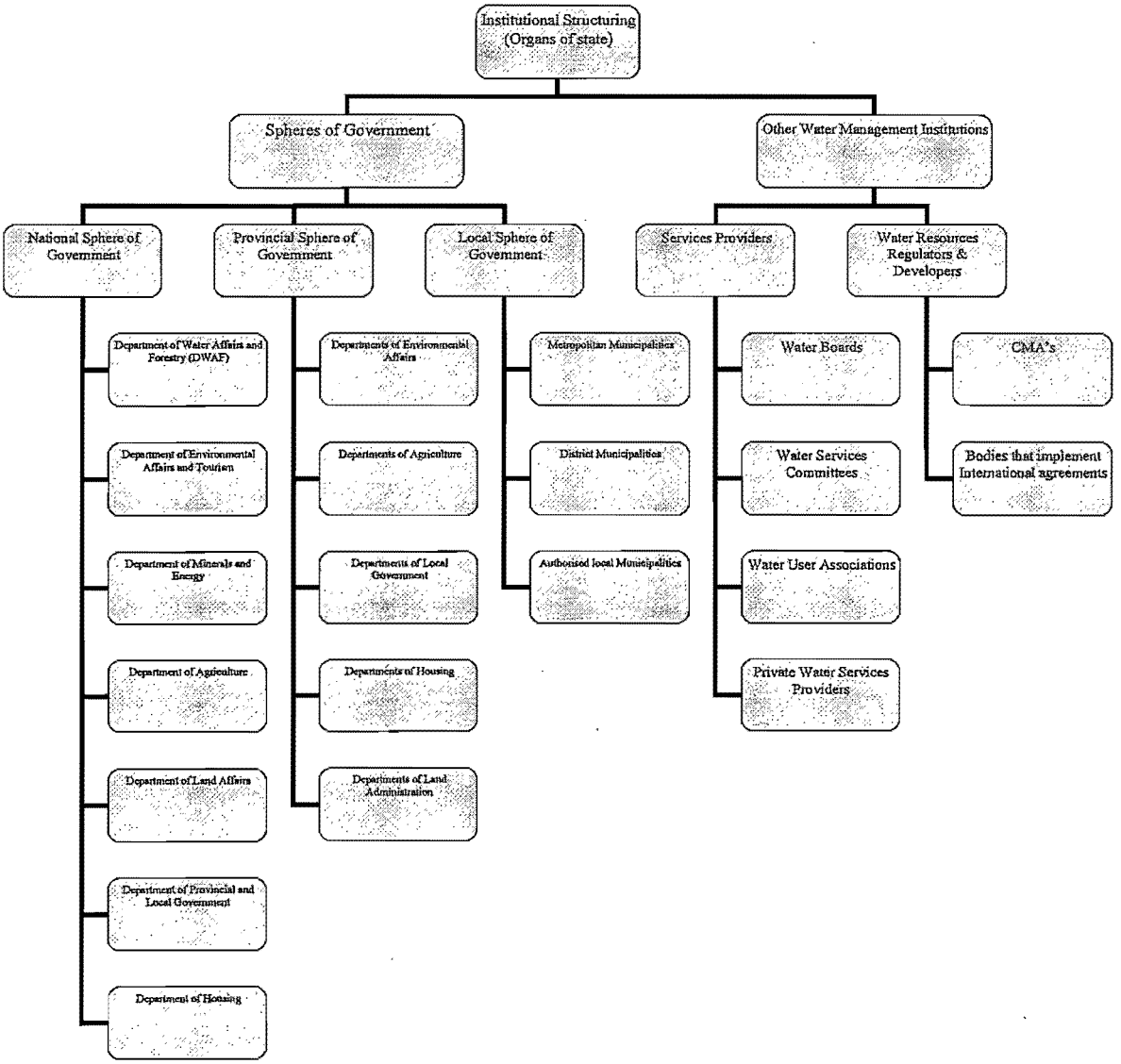

Figure 1 "As the *public trustee* of the nation's water resources the *National Government*, acting through the *Minister*, must ensure that water is protected, used, developed, conserved, managed, controlled..." S 3 of the NWA.

When considering the above institutional structures,[56] one should however keep in mind that although many water management functions are delegated to different departments and administrations, the overall responsibility to manage the nation's water still vests in the public trustee.[57]

Although the overall responsibility to manage the nation's water resources still vests in the public trustee, Dixon[58] explains that it can not reasonably be expected from an administrative official to personally perform every single responsibility that is imposed to him by legislation. The inevitability of granting the administrative official or public trustee the power to delegate his responsibilities is therefore recognised within the South Africa water law.

4.3.2 Catchment Management Agencies (CMA's)

The second cornerstone of IWRM is Catchment Management Agencies. This is the sphere to which most of the IWRM functions of South Africa will be delegated.[59] This is also the point where IWRM will be executed on a catchment basis.[60] For the purposes of this function, South Africa is divided into 19 areas covering the country.[61]

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56 See par 4.3.1 and figure 1 *supra*.

57 Gildenhuys 1999 *Butterworths Property Law Digest* 2. The National government as public trustee or custodian acts through the Minister of Water Affairs and Forestry. S 3(1) of the NWA. Francis 2005 *The Georgetown Int'l Envtl Law Review* 166.

58 Dixon 1984 *TSAR* 251.

59 Francis 2005 *The Georgetown Int'l Envtl Law Review* 165. It is stated that the NWA decentralised the management of water through CMA's "which are formed to manage water according to the natural boundaries of river basins (catchments)."

60 Thompson *Water Law* 163.

61 NWRS 94; Kidd *Environmental Law* 71.

Pegram *et al*[62] state a concern regarding the delegation of functions to CMA's:

> Even though there has been some experience with catchment forums, South Africa has limited experience with such fundamental decentralisation of responsibility and decision-making around natural resource management. The challenge is significant, but the opportunity for improved governance of the entire hydrological cycle is potentially greater.

In an attempt to challenge this concern, it is necessary to indicate the exact role of CMA's in the responsibility of IWRM within South Africa.

Pegram et al[63] indicate the functions of a CMA:

> Each CMA is responsible for those water resources management functions that have been assigned or delegated to it within a WMA,[64] as well as co-ordinating the management of other local water management institutions. Once a CMA is fully functional, it should be responsible for all regional (intra-WMA) water resources management (WRM) implementation functions, including the authorisation of water use. The CMA must develop and give effect to a catchment management strategy (CMS), which provides the framework for management of water resources in a WMA and that is consistent with the NWRS.

As indicated above, all of these responsibilities or functions will be executed on a catchment level.[65] The crisis, however, is that Schedule 3 of the NWA set out the powers and duties of the CMA's, but clearly lacks an exposition

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62 Pegram *ea* 2006 *Strategic Review of Current and Emerging Governance Systems Related to Water in the Environment in South Africa* WRC Report 1512/1/06 59.

63 Pegram *ea* 2006 *Strategic Review of Current and Emerging Governance Systems Related to Water in the Environment in South Africa* WRC Report 1512/1/06 120.

64 Water Management Area.

65 Stoop "Water" 284.

of the wide-discretionary[66] decision-making procedure to be followed in the authorisation of water uses as part of IWRM,[67] soon to be fulfilled by a CMA. The concept of administrative decision-making[68] relating to water use authorisations and licensing within CMA's needs to be incorporated.

4.3.2.1 Authorisation of water use

The NWRS introduces a novel notion into the South African Water Law in its chapter concerning water uses with the words:

> Concerning equity of access, the Act replaces the previous system of water rights and entitlements, many of which were based on the ownership of riparian land,[...] with a system of administrative, limited-period and conditional authorisations to use water.[69]

This new system of equitable water use introduced three different means to acquire authorised water uses. In the first case an authorisation to use water can be granted directly in terms of Schedule I,[70] secondly, water use can be permitted under a general authorisation,[71] and thirdly, water use must be licensed.[72] These three authorised water uses that are made subject to the public trust[73] will be discussed below.

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66 Pienaar and Van der Schyff 2007 *LEAD* 187.

67 Du Plessis *An Environmental Management Framework for DWAF Related Projects* 6-2.

68 Kidd *Environmental Law* 72. The *Promotion of the Administrative Justice Act* 3 of 2000, henceforth referred to as PAJA, defines a "decision" by any organ of the state by any decision made of administrative nature, proposed to be made or required to be made under an empowering provision, including the making, suspending, revoking or refusal to make an award or determination. A decision will also include the issuing, suspending, revoking or refusal to issue a water use license, etc. S 1 of PAJA. S 4 of the NWA provides for water use licenses.

69 Ch 3 of the NWRS, Part 2.

70 See ch 3 *supra* for a further exposition regarding water entitlements to be used without a licence.

71 According to the NWRS, a general authorisation to use water allows limited, but conditional, water use without a license. Chapter 3.2.1 of the NWRS.

72 See the explanatory note Part I of Chapter 4 of the NWA; Stoop "Water" 251, 258-261.

73 Pienaar and Van der Schyff 2007 *LEAD* 194.

4.3.2.1.1 Entitlements to use water without a licence

Section 4(1) of the NWA[74] permits that water may be used without an authorisation or a licence[75] if the water use is listed under Schedule 1 of the Act. Schedule 1 of the NWA permits water uses such as the taking of water for reasonable domestic use, for small gardening purposes and for the purpose of watering animals. Water uses further permitted by the NWA are the storage and use of run-off water from a roof, the taking of water for human consumption or fire fighting in a situation of emergency, to take water for recreational purposes such a boating, and for the discharging of waste of water containing waste or run-off water.

4.3.2.1.2 Water use in terms of a general authorisation

Section 39 of the NWA establishes the procedure for a responsible authority, such as a CMA, to permit certain water uses through general authorisation. These authorisations, subject to Schedule 1 of the NWA, are published in the Government Gazette. By a notice in the Government Gazette any category of persons can be authorised to use water generally, in relation to a specific water resource or within an area specified in the notice. It is accepted that the use of water under a general authorisation does not require a water use licence until such general authorisation is revoked, whereafter licensing will be necessary.[76]

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74 See s 22 of the NWA.

75 Kidd *Environmental Law* 73. S 22(1)(ii) of the NWA further makes provision for the fact that a water use license will not be necessary if the water use is a continuation of an existing lawful water use. See also s 32 of the NWA in this regard.

76 S 39 of the NWA; Explanatory note, Part 6 of chapter 4 of the NWA; S4(1) of the NWA; Pienaar and Van der Schyff "The history, development and allocation of water rights in South Africa" 267. Kidd *Environmental Law* 73.

4.3.2.1.3 Water use in terms of a licence[77]

Section 41 of the NWA stipulates the procedure for a responsible authority (such as a CMA) to undertake compulsory licensing[78] of certain water uses. The conditions compelling a license[79] to use water from a specific water resource are set out in section 43 of the Act. A water use licence is compulsory in the conditions where fair allocation of water resources must be achieved if the water in question is under water stress. Compulsory licences are further necessary to promote the beneficial use of water, to facilitate efficient water management and to protect the quality of the water resource.[80]

In the light of the above, the question arises why it is necessary to differentiate between three different administrative authorisations within the new system of water uses.[81] This uncertainty is best elucidated and simplified by the NWRS:[82]

> The Act's provisions in respect of Schedule 1 use and use under general authorisations are primarily intended to reduce the

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77 S 22(3) of the NWA holds that a responsible authority may dispense with the requirement for a licence for water use if it is satisfied that the purpose of the Act will be met by a *permit* or *other authorisation* under any other law. The preliminary note of s 39 of the NWA, explains the relevance of a general authorisation. A general authorisation may be restricted to a particular water resource, a particular category of persons, a defined geographical area or a period of time. When a general authorisation or licence, in terms of s 39 of the NWA, is issued under this Act, s 27 once more accentuates the consideration of factors. Factors include the rectification of results of past racial and gender discrimination; the resourceful use of water in the public interest and the social-economic impact. S 27(1) of the NWA. See also Stoop "Water" 271.

78 This aspect of licensing processes will be examined in par 4.3.2.2 *infra*.

79 Licensing of water uses are recognised as being of utmost importance in equitable allocations of water resources. See the explanatory note of ch 4 of the NWA. Equitable allocations also attend to redress the results of the previous discriminating water dispensation. See ch 2 *supra* in this regard.

80 S 43 of the NWA.

81 Kotzé is of opinion that "*duplication* of administrative procedures, jurisdictional *overlap*, and a *time-consuming* and *confusing governance* effort" will be the outcome of a matrix of different procedures. Kotzé 2006 *PER* 1.

82 NWRS ch 3.2.1. Thompson *Water Law* 452.

administrative effort of authorising every use in the country individually. However, any water use that exceeds a Schedule 1 use, or that exceeds the limits imposed under general authorisations, must be authorised by a licence.

Administrative water use licensing procedures are therefore becoming important tasks to be carried out by the organisational institutions constituted for that purpose. Thompson[83] indicates that most water use licensing functions will gradually be delegated from DWAF to CMA's.

When issuing general authorisations or licenses, the responsible authority has to consider a number of relevant factors to ensure IWRM.[84] Negligence when considering such factors could result in a poor decision.

4.3.2.2 Good decision-making in the authorisation process[85]

It has been indicated above that most water use authorisations and licensing will gradually be delegated to CMA's.[86] In this regard, the CMA's will gradually be required to exercise its discretion in the decision-making[87] of water allocations. The procedure that must be implemented in the

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83 Thompson *Water Law* 221.

84 See S 27(1) of the NWA.

85 S 33 of the Constitution provides for the right to just administrative action. The question therefore arises whether these "decision-making powers" qualify as being "administrative action", otherwise section 33 will not be applicable to prevent autocracy. See s 1 of PAJA for a definition of the concept of administrative action. In terms of the Act, administrative action means any decision taken (or failure to take a decision) by *inter alia* an organ of the state when exercising a power in terms of the Constitution of a provincial constitution. A natural or juristic person can also take a decision that qualifies as administrative action if such a person acts in terms of an empowering provision. This decision should, however affect the rights of persons adversely.

86 See Stoop "Water" 280 regarding the delegation powers of the Minister.

87 For the purposes of PAJA, a "decision" by any organ of the state, means any decision of administrative nature made, proposed to be made or required to be made under an empowering provision, including the making, suspending, revoking or refusal to make an award or determination. A decision will also include the issuing, suspending, revoking or refusal to issue a water use licence, etc. S 1 of PAJA. S 4 of the NWA provides for water use licenses.

authorisation of water uses by a CMA is not prescribed by the NWA and a procedure needs to be established.

The *Lebowa Granite*-case[88] is of assistance in establishing a procedure for decision-making in the CMA's authorisation process. This case demonstrates that awarding a mining licence constitutes administrative action. As actions relating to licensing thus qualify as administrative action,[89] water use licensing will be included. It can thus be inferred that the CMA's will have to turn to integrated administrative decision-making powers.[90] In this section reference will be made to the decision-making procedures that exist in the Administrative law.

A good (administrative) decision-making process[91] by a CMA should be just and free of autocracy.[92] Autocracy in decision-making can be identified when the applicable decision is "irrational or senseless, without foundation or apparent purpose".[93] Administrative facets of water use authorisations within a CMA should steer clear of any sign of autocracy and the process of decision-making can (very practically) be summarised as follows:[94]

(i) Step 1- Check whether or not you are empowered to act;
(ii) Step 2- Check which procedures must be followed;
(iii) Step 3- Check which conditions must be met;
(iv) Step 4- Check what the consequences will be;
(v) Step 5- Make a preliminary decision. If this is in favour of the person, notify them of your decision. If not, move to step 6;

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88 *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 8 BCLR 908 (T) 915 C-E.
89 S1 of PAJA. Hoexter *Administrative Law in South Africa* 175-176.
90 Glazewski *Environmental Law in South Africa* 86; Uys 2006 *A Legal Review of the South African Natural Resources Management Mechanisms, Towards Integrated Resources Management* WRC Report 176/06 9.
91 Moran 2002 www.A_practical_guide_to_Administrative_Justice.gov 10.
92 Glazewski *Environmental Law* 97. The reason for his statement lays in the fact that environmental conflicts normally turn to the exercise of decision-making powers.
93 Hoexter *Administrative Law in South Africa* 291-292.
94 Moran 2002 www.A_practical_guide_to_Administrative_Justice.gov 10.

(vi) Step 6- Notify anyone whose rights may be adversely affected by the preliminary decision (the first notice) and allow them to make representations;
(vii) Step 7- Consider all representations made and make a decision; and
(viii) Step 8- Notify anyone whose rights are adversely affected by the decision (the second notice). Also, notify those people in whose favour you have made a decision.

Although the above exposition of a practical step-by-step process of decision-making is very clear, a short discussion is necessary as it relates to water use authorisations by CMA's.

4.3.2.2.1 Empowering act[95]

Step one of this vibrant process has little to do with the nature of the decision that needs to be taken. However, no administrative decision can be made without adhering to this step; the decision-maker should always act in terms of an empowering provision.[96] It is stated that a responsible authority should have the written approval of the public trustee before a license can be issued.[97]

Hoexter[98] states in this regard:

> [A]ny actor must be acting under an empowering provision if the action in question is to qualify as administrative action. However, the definition of "empowering provision" in the PAJA is a very broad one. It means "a law, a rule of common law, customary law, or an

95 Without such empowerment, the to-be-made decision will not qualify as being administrative action executed by a CMA. S 1 of PAJA stipulates the elements necessary for administrative action. An organ of state should exercise its power in terms of the Constitution or a provincial constitution before such decision can qualify as being administrative action. The organ of state should also, in exercising a public power, act in terms of any legislation. If an action is not administrative in nature, section 33 of the Constitution will not be of any relevance.
96 S 1 of the PAJA.
97 Stoop "Water" 263.
98 Hoexter *Administrative Law in South Africa* 191-192.

agreement, instrument or other document in terms of which an administrative action was purportedly taken.

If Hoexter's exposition is observed, the NWA will indeed qualify as a document consisting of empowering provisions as it relates to water use authorisations. Section 27(1) of the NWA states that a "responsible authority"[99] can issue a general authorisation or a licence. Decisions with regard to water use authorisations or licenses are instated by an empowering provision.

4.3.2.2.2 Procedures to be followed[100]

The second step in the decision-making process is that of following procedures. Section 41 of the NWA sets out the procedure for water use licensing applications. It is stated that the documentation regarding the application must be made in the form, contain the information and be accompanied by a processing fee[101] as determined by the responsible authority.[102] The remaining part of section 41 of the NWA stipulates all the different requirements that the responsible authority can demand to obtain from the applicant when considering the application. If the applicant does not act in terms of these procedural requirements, the application must be returned together with recommendations[103] in order to assist the applicant in rectifying the procedural defect.

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99 S 1 of the NWA interprets a "responsible authority" as the Minister (the public trustee) or a CMA if a power of a duty has been assigned to it. S 63 of the NWA empowers the minister *to delegate* his power to take a decision. The official that acts on behalf of the minister (by delegation) would therefore also be empowered by legislation.

100 See Stoop "Water" 267 regarding the procedure for licence applications.

101 Stoop "Water" 266.

102 S 41(1)(a)-(c) of the NWA.

103 Moran 2002 www.A_practical_guide_to_Administrative_Justice.gov 13.

A further aspect that must be attended to in the administrative decision-making process, is the aspect of procedural fairness.[104] Section 3(1) of PAJA stipulates:

> Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

4.3.2.2.3 Conditions to be met

Moran[105] states that even when an empowered decision-maker follows the correct procedures, the conditions of the initial empowering provision should still be checked before a decision can be made. In the very first instance, it is important to note that all the decisions relating to water uses have to be determined with reference to the Reserve.[106] The second condition that must be attended to when considering a water use authorisation, is whether the decision meets the public interest.[107] Section 27(1) and section 43(1) of the NWA further list a number of conditions or factors that need to be taken into account before a general authorisation of a license can be issued. Eight identified conditions or factors must be investigated:[108]

i The existing lawful water use related to the water resource
ii The need to redress the results of past racial and gender discrimination
iii The need for efficient and beneficial use of water in the public interest
iv The socio-economic impact of authorising the water use

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104 Glazewski *Environmental Law in South Africa* 87.
105 Moran 2002 www. A_practical_guide_to_Administrative_Justice.gov 14.
106 Kidd *Environmental Law* 72. The Reserve will be examined in chapter 5 *infra.*
107 Gildenhuys 1999 *Butterworths Property Law Digest* 5; Pienaar and Van der Schyff 2007 *LEAD* 187; Soltau 1999 *Acta Juridicia* 250. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property 719-720.*
108 S 27 of the NWA.

v The likely effect of the intended water use on both the water resource and other water users
vi The investments that were already made by the water user with respect to the intended water use
vii The water in the water resource which may be required for the Reserve and meeting international obligations
viii The duration of the intended water use.

Only after the above listed conditions or factors have been considered, the process of decision-making can proceed. Whereas a water use authorisation or license will reversely affect such conditions or factors, the application must be turned down.

4.3.2.2.4 Consequences of the decision

The fourth step in the decision-making process is to investigate what the potential consequence of such an authorisation or issuing of a license will be.[109] If the consequences of a possible authorisation or license meet the purpose of the NWA, one can move to the next step in the decision-making process. According to the NWA, the consequences must be to:[110]

i Meet the basic human needs of present and future generations
ii Promote the equitable access to water
iii Redress the results of past racial and gender discrimination
iv Promote the efficient, sustainable and beneficial use of water in the public interest
v Facilitate the social and economic development

109 The consequence will vary according to the nature of the empowering provision, for example, is it a mandatory or a discretionary provision. Moran 2002 www. A_practical_guide_to_Administrative_Justice.gov 18.
110 S 2 of the NWA.

vi Provide for the growing demand for the use of water

vii Protect the aquatic and associated ecosystems and their biological diversity

viii Reduce and prevent pollution and degradation of water resources

ix Meet international obligations

x Promote dam safety

xi Manage floods and droughts

4.3.2.2.5 Preliminary decision[111]

At this stage of decision-making, after considering the consequences of the authorisation of a water use license, there is an interesting turn, for there are two different directions that can be followed from here.[112] If all the above steps are fulfilled and it is clear that no-one's rights will be adversely affected by issuing an authorisation or a license, the authorisation or license can be issued in favour of the applicant. However, if anybody's rights will be affected adversely by such decision of authorising or issuing a license, the decision-maker should take another route, which leads to step 6.

4.3.2.2.6 Notification and representation

Step 6 of the decision-making process entails the sending of a first notice to the people whose rights could be affected adversely. Section 4 of the PAJA gives guidance in this process. The sending of a notice will give the affected parties the opportunity to give representations. This step in the decision-making process calls attention to another important cornerstone of

111 S 17 of the NWA makes provision for a preliminary determination regarding determinations of the Reserve.

112 Moran 2002 www. A_practical_guide_to_Administrative_Justice.gov 22.

IWRM, namely the execution of a "participatory process".[113] This process is also accepted to form a cornerstone of IWRM,[114] but as this subject is a study in its own right, one has to refer to Scott[115] who explains the concept of participatory practice as:

> An ongoing process of decision-making by which the views of all stakeholders who have an interest in, or are affected by, an issue or project, are incorporated into decisions regarding the issue at hand. Other terms used are public involvement in decision-making, community consultation or public consultation.

In the *The Vaal*-case it was decided that the interested parties had the right to oppose an application for a mining license and be heard by the Director.[116] If this precedent is followed, it can be stated that this process of participatory practice should give power to previously disempowered or poor persons to influence decisions that affect their livelihood.[117]

4.3.2.2.7 Consider representations

Once all the representations have been received by the decision-maker after an adequate notice and reasonable opportunity to make the representations, a decision needs to be taken after the received representations are taken into consideration.[118]

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113 It is stated that the decision-making process is more democratic as the process under the preceding water law dispensation. Gildenhuys 1999 *Butterworths Property Law Digest* 8.

114 Uys 2006 *A Legal Review of the South African Natural Resources Management Mechanisms, Towards Integrated Resources Management* WRC Report 176/06 65.

115 Scott 1999 *Guidelines for including Public Participation in the Permitting Process* WRC Report KV 125/00 1.

116 *The Director: Mineral Development, Gauteng region and another v Save the Vaal Environment and Others* 1999 2 SA (SCA). Glazewski *Environmental Law in South Africa* 87.

117 Scott 1999 *Guidelines for including Public Participation in the Permitting Process* WRC Report KV 125/00 10.

118 Moran 2002 www. A_practical_guide_to_Administrative_Justice.gov 23, 26.

4.3.2.2.8 Second notice

In the event of the final decision has been reached regarding the authorisation or license regarding a water use, a second notice should be sent to the affected parties. This second notice has to set out the following:

- A clear statement of what was decided;
- Notice of the person's rights to appeal or review; and
- Notice of their right to request written reasons.[119]

Thompson[120] concludes the importance of a good decision-making process, as set out above, with the words that:

> Good water decisions could improve the lives of people, boost the economy and safeguard the natural environment. On the other hand, a poor decision could wreak havoc on nature, exacerbate poverty and disease and create conflict. If all the role-players are involved in the decision-making process and alternatives are investigated, it could lead to good decisions.

4.4 Conclusion

The public trustee or custodian of the nation's water is mandated with a range of responsibilities. As these responsibilities are almost an "administrative burden",[121] the public trustee established a legal framework within which these responsibilities can be delegated and executed.

The management of water is now a "complex task that involves substantial administration."[122] It is for this reason that the public trustee introduced IWRM to constitute the legal framework wherein the responsibilities of the

119 See s 42 of the NWA, s 5 of the PAJA. Moran 2002 www. A_practical_guide_to_Administrative_Justice.gov 29.
120 Thompson *Water Law* 242.
121 Kidd *Environmental Law* 81.
122 Kidd *Environmental Law* 74.

public trustee could be performed. The concept of IWRM established a legal framework for the public trustee with its cornerstones of institutional structures, CMA's and public participation.

In an attempt to assure that the legal framework of IWRM will be executed in an effective way, further attention was drawn to two administrative concepts within IWRM. The first that has been investigated is the notion of water-use licensing, and the second is administrative decision-making[123] powers. Both these concepts were attended to in explaining the functions of DWAF, which are then transferred to CMA's at a catchment level.

In the following chapter, the objectives of IWRM will be examined and the effective execution of it in the lives of the poor will be scrutinised.

123 S 33 of the Constitution provides for the right to just administrative action. The question therefore arises whether these "decision-making powers" qualify as being "administrative action", otherwise s 33 will not be applicable to prevent autocracy. S 1 of PAJA defines the concept of administrative action.

Chapter 5

The public trust doctrine: a benefit for the nation

5.1 Introduction

The previous chapters of this dissertation continuously examined the escalating significance of the public trust doctrine within the South African water law. Since the advent of democracy, South Africans are in a process of developing and implementing a new complex and dynamic water law dispensation[1] (see chapter 2) within which the national government, acting through the Minister as the public trustee (see chapter 3), must ensure that water is managed through an integrated approach (see chapter 4).

As this dissertation is dedicated to a scrutiny of the statutory incorporation and practical application of the public trust doctrine within the South African water law, the study would be incomplete if it does not consider the impact of the public trustee's approach of Integrated Water Resources Management[2] on its beneficiaries.[3] This chapter will examine the impact of IWRM on the people of South Africa, especially the poor.

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1 Thompson *Water Law* 1.

2 Henceforth referred to as IWRM.

3 This chapter will examine whether the statutory incorporation and practical application of the public trust doctrine will effectively address the sorry state of poverty in South Africa through a right-based approach. Unfortunately, due to the length of this dissertation the implementation performance of the South African government can not be entertained in depth in this dissertation. However, the implementation performance leaves room for further research. See par 4.3 *supra* for a complete exposition regarding the approach of IWRM that needs to be followed by the public trustee.

The aim of IWRM can be defined as:[4]

> [T]o strike a balance between the use of resources for livelihoods and conservation of the resource to sustain its functions for future generations, and [to] promote social equity, environmental sustainability and economic efficiency. Because the resource cannot be considered separately from the people who use and manage it, a balanced mix of technological and social approaches must be used to achieve integrated management.

If the above aim of IWRM is analysed, five vital components can be identified that define the scope and content of the public trustee's responsibility to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled to benefit the people of South Africa.[5] These five components will constitute the structure of this chapter. Firstly, the usage of water resources for the people's livelihoods will be look at. In the second place, attention will be drawn to the aspect of water conservation to sustain South Africa's future water functions. Thirdly, the promotion of social equity will be investigated. In the fourth place, the aspect of environmental sustainability will be scrutinised, and in the last place, economical efficiency through water management will be examined.

5.2 Managing the use of water for the improvement of livelihoods

As the first component extracted from the aim of IWRM is related to the use of water resources for the livelihoods of South Africans, it is necessary in the first instance, to conceptualise the expression "livelihood". For the purpose of this study the concept must be understood to refer to "property yielding an income".[6]

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4 GN 65 in GG 27199 of 28 January 2005 at ch 1.4. Henceforth referred to as the NWRS.

5 S 3(1) of the *National Water Act* 36 of 1998. Henceforth referred to as the NWA.

6 The word "livelihood" can also be defined as "the way in which a person earns money to live on." Alswang and Van Rensburg *New English Usage Dictionary*

In studying the South African water law, and in particular the NWA with the focus on the improvement of livelihoods, it becomes clear that the Act embraces an overall shift in emphasis from the previous water dispensation. The emphasis shifted from "supply management" to "demand management" of water as natural resource.[7] The new emphasis of the South African water law brought about an important priority attached to water usage focused on the improvement of the livelihoods of South Africans.

The reason for the new emphasis of the South African water law dispensation is a historical one.[8] Kirsten *et al*[9] indicate in this regard that 83% of all South Africa's agricultural land and the majority of water for irrigated agriculture were previously in the hands of white farmers.[10] The South African government made a commitment to rectify this unequal distribution of land and water (or "property that yields income") between the sectors of the population, and introduced land reform programs.

As this study is focused on the water law of South Africa and not on the expansive property law and its reformations, an extensive study on land reform programs can unfortunately not be entertained under the title of this dissertation. However, as water is categorised as a "thing" for the purposes of the law of property,[11] brief reference should be made to the government's commitment to land reform as it relates to water.[12] The government introduced three land reform programs, namely the Restitution of Land

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485; Onions *The Shorter Oxford English Dictionary* 1155. Hope and Gowing 2003 http://www.brad.ac.uk/acad/bcid/GTP/HopeGowing.pdf 11 state that the core of livelihoods must be based on an understanding of the asset profile of the poor, the challenges they face and the institutional structures set in place to assist their escape from poverty.

7 Glazewski *Environmental Law* 428.

8 See par 2.2.2.3.5 *supra*.

9 Kirsten, Perret and Van Zyl "Land Reform and the New Water Management Context in South Africa: Principles, Progress, And Issues" 1.

10 Mbazira 2007 *ESR Review: Economic and Social Rights in South Africa* 29.

11 See para 2.2; 3.2.1 *supra*.

12 S 25(4)(a) of the Constitution.

Rights,[13] the Redistribution of Land[14] and Land Tenure Reform.[15] The relevance of the second program, that of redistribution, should be briefly investigated.[16]

In the year 1994, the South African government adopted a comprehensive program of redistributing land in an attempt to enable black people to become farmers in their own right. The target of the government regarding this program was to redistribute 30% of all South African agricultural land by the year 2014.[17] This program includes, in addition to redistributing and allocating agricultural land to black farmers, the granting of extra services to the black farmers, such as infrastructure and access to water.[18]

This section will enquire into whether the NWA provides for adequate mechanisms of support for this comprehensive program of redistribution to improve the livelihoods of South Africans.

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13 The Restitution of land rights reform program is focussed on land that was taken away from specific people in the Apartheid era. An effort is initiated by the state to offer the land back the the deprived people. See Miller and Pope *Land Title in South Africa* 313-397 for a complete exposition on this land reform program.

14 This program is not only concerned with historical land claims, but also attempts to provide land to the poor. See Miller and Pope *Land Title in South Africa* 398-455 for a complete exposition on this land reform program.

15 The program of Land and Tenure Reform, focusses on the improvement of the security of land rights that was prevented by Apartheid. See Miller and Pope *Land Title in South Africa* 456-551 and Van der Walt and Pienaar *Introduction to the Law of Property* 322-335 for complete expositions in this regard.

16 The preamble of the NWA acknowledges the reform program of redistribution of water. Stein 2005 *Texas Law Review* 2168 links water and land. It is for this reason that this land reform program should briefly be entertained.

17 De Villiers 2008 *Land Reform- A Commentary* 3, 10; Kirsten, Perret and van Zyl "Land Reform and the New Water Management Context in South Africa: Principles, Progress, And Issues" 1.

18 De Villiers 2008 *Land Reform: A Commentary* 3; Kirsten , Perret and van Zyl "Land Reform and the New Water Management Context in South Africa: Principles, Progress, And Issues" 2-3. The need for access to water is seen in the fact that the new black farmers need access to water resources for *inter alia* the irrigation of the redistributed agricultural land.

The devotion of the public trustee (the national government acting through the Minister)[19] in this regard is not stipulated anywhere but in the long title of the NWA. There it is stated that the NWA has "to provide for fundamental reform of the law relating to water resources".[20]

In the first chapter[21] of the NWA two important aspects are noted in relation to water law reform. It is stated that factors such as the redressal of the consequences of past racial discrimination[22] and the facilitation of social development[23] need to be taken into consideration when the nation's water resources are "protected, used, developed, conserved, managed and controlled". Secondly, the public trusteeship of the nation's water resources ensures that water is *inter alia* used, developed, managed and controlled in an equitable manner in accordance with its constitutional mandate.[24] When taking the above two aspects into consideration, it is clear that the government is committed to reform the water law dispensation of South Africa to include the improvement of livelihoods of South Africans.

In the third instance, the NWA further attends to the aspect of water reform on the front of financial assistance in order to better the livelihoods of South Africans. Francis[25] states in this regard that:

> The NWA embraces the policy of cost recovery, in which the dispensation of water pays for itself through fees. Cost recovery has had devastating effects on the majority of the populace, leading to substantially increased household debt, widespread water service cut-offs, citizen unrest, and a nationwide cholera epidemic. As implemented in South Africa, the policy of cost recovery

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19 S 3(1) of the NWA.
20 The reason for such reform within the South African water law is accentuated by the preamble of the NWA, which recognises that the discriminatory laws and practises of the past have prevented equal access to water as well as its use.
21 Ch 1 of the NWA is entitled Interpretation and Fundamental Principles (ss1-4).
22 S 2(c) of the NWA.
23 S 2(e) of the NWA. See par 5.4 *infra* where this aspect will be dealt with.
24 See ss 9 and 27(1)(b) of the Constitution.
25 Francis 2005 *The Georgetown Int'l Envtl. Law Review* 170.

operates as a net economic loss and continues to deny the most impoverished South Africans access to a basic quantity of clean water.

The NWA[26] explains why it is necessary for the Minister to establish a pricing strategy[27] that differentiates between different water users,[28] on the basis of their economic circumstances.[29] It is stated that the differentiated water use charges are used to *inter alia* fund the costs of water distribution.[30] While the establishment of priced water will undoubtedly deprive certain (poor) sectors of the community of the usage of water, the NWA makes provision that the Minister may give financial assistance to water users, which includes the granting of access to water to upcoming farmers.[31] Before such assistance can be considered, the Minister must see to the need to redress results of past racial discrimination[32] and the financial position of the recipient.[33] It should be kept in mind that financial assistance will only be given to achieve the purpose of the Act, or to enable certain people to apply for licences.[34] Assistance to the poor and previously disadvantaged will therefore be provided through grants, loans or subsidies given by the Minister acting as the public trustee.[35]

The fourth major facet of the reformation process found in the NWA, is the expropriation of property.[36] Section 64(1) of the Act enables the Minister or a relevant authorised institution to expropriate any property,[37] for any

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26 Explanatory note of ch 5 of the NWA at part 1.
27 S 56 of the NWA.
28 S 56(3)(a)(iii) of the NWA.
29 S 56(4)(c)(iii) of the NWA.
30 S 56(2)(b)(vi) of the NWA.
31 S 61(1) of the NWA. Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 353.
32 S 61(3)(c) of the NWA.
33 S 61(3)(f) of the NWA.
34 S 2 of the NWA.
35 S 61(1) of the NWA.
36 S 64 of the NWA.
37 S 64(1) of the NWA is in line with the property-clause of the Constitution. S 64(1) of the NWA stipulates that property may be expropriated for any purpose, if that purpose is a public purpose or is in the public interest. In this regard, S 25(2) of

purpose to be found in the NWA, if such a purpose is in the public interest. An example of such a purpose is the attempt to redress the results of past racial discrimination, a purpose expressly stated in section 2 of the NWA.[38]

In observing the NWA it should therefore be clear that the commitment of the government to improve the livelihoods of South Africans in helping them to become subsistent farmers is crystal clear and supported by the NWA.[39]

Glazewski[40] also hails the NWA on this note:

> On the whole the Act is a remarkable piece of legislative social engineering which emphasis both redistributive and social justice in the context of resource management and environmental needs.

5.3 The conservation of water to sustain its future functions

The second component of IWRM as extracted from its aim[41] is the component of the beneficial impact of water resource conservation on the people of South Africa. While researching this aspect of water conservation in the South African water law and in particular the NWA, a distinction between an implicit and an explicit dimension of water conservation was noted.[42]

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the Constitution stipulates that property may be expropriated in terms of law of general application, for a public purpose or in the public interest, which is subject to compensation. The public interest includes the nation's commitment to land reform and other reforms that bring about equitable access to the natural resources of South Africa, which includes water and land. S 25(4)(a) of the Constitution.

38 See ss 2(b) and 64(2) of the NWA. It should however be noted that all expropriations in terms of the NWA must be done in accordance to the *Expropriation Act* 63 of 1975.

39 See NWRS at ch 3 part 2 par 3.2.3.2 65-66.

40 Glazewski *Environmental Law* 429.

41 See par 5.1 *supra*.

42 Soltau 1999 *Acta Juridica* 251.

5.3.1 Implicit dimension of water conservation within the NWA

An examination the aspect of water resource conservation revealed a gap in the comprehensive NWA. Throughout the NWA, no exposition can be found on the aspect of water conservation.[43] It is for this reason that Soltau[44] argues that the non-wasteful use of water is an "implicit" condition within the South African water law. The only reference to the concept of water conservation in the NWA is the definition of "conservation" given in chapter 1 of the Act. According to this definition of water conservation, conservation must be understood as the efficient use and saving of water, which can be achieved through measures such as water saving devices, water-efficient processes, water demand management and water rationing.[45]

5.3.2 Explicit dimension of water conservation within the NWA

It must be acknowledged that if the above explained definition of water conservation is followed, certain provisions in the NWA can be identified and linked to the concept of water conservation.[46]

In an attempt to fill this gap of water conservation in the NWA, DWAF is developing a National Water Conservation and Water Demand Management Strategy for South Africa.[47] This Strategy will explicitly pave the way for some measures and interventions to encourage water

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43 NWRS at ch 3 part 3 78.
44 Soltau 1999 *Acta Juridica* 251.
45 S 1(1)(v) of the NWA.
46 See ch 3; ss 29(1) and 56(6)(b) of the NWA.
47 Henceforth referred to as the Strategy. Thompson *Water Law* 357; NWRS at ch 3 part 3 par 3.3.2 78-79. The *Environmental Conservation Act* 73 of 1989 is also relevant in this regard. This Act will henceforth be referred to as the ECA. The long title of the ECA provides for the effective protection and utilisation of the environment and matters related to it.

institutions as well as water users to increase the efficiency of their water usage.[48] This strategy is based on three fundamental principles, namely:

- Water institutions must strive to supply water efficiently and effectively and to minimise water losses.
- Users ought not to misuse water and should strive to use it efficiently.
- The National Water Conservation and Water Demand Management Strategy should be an integral part of the planning processes for IWRM and water supply.[49]

Through the above listed exposition, it is clear that the South African Government is committed to supply water efficiently and effectively to improve the general living conditions of the poor through taking both implicit and explicit measures to conserve South Africa's water resources. The next section of this chapter will examine whether the concept of public trusteeship and its intimation to responsibility[50] can make a further contribution to the improvement of the lives of South Africans.

5.4 The promotion of social equity

The third component of IWRM, as identified above,[51] is found in the definite connection between access to water and social equity. Thompson[52] states in this regard that:

> [A]t the dawn of democracy on 27 April 1994 there was an inequity between the different groups in respect to access to water services to support life and personal hygiene. Only about 43% of the Black people had piped water to support life and personal hygiene in comparison to nearly 100% for the other groups. This social

48 NWRS at ch 3.3.2 part 3 78.
49 NWRS at ch 3.3.3 part 3 79.
50 See par 4.2 *supra*.
51 See par 5.1 *supra*.
52 Thompson *Water Law* 8-9.

> problem is clearly visible in that there was then a lack of water services with between 12 and 14 million people out of a total population of 42 million people without access to safe water and over 20 million people without adequate sanitation.

The above stated social inequity in South Africa with respect to access to water was recognised and addressed. A right to access to water was included in the final Constitution.[53] The Constitution now affirms that, since the upcoming of the new water dispensation, everyone has the right to have access to sufficient water.[54] However, the existence of this right within the Bill of Rights can only be of value to the people of South Africa if its constitutional meaning is scrutinised to its core to ensure its application in the widest possible sense.[55]

In paragraph 5.4.1 *infra* the meaning of "access to sufficient water" will be scrutinised while the extent of the state's duty to take reasonable legislative

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53 S 27 of the Constitution.

54 S 27(2) of the Constitution.

55 The right as encapsulated in S 27 of the Constitution will be examined so that the right can be challenged to give voice to the new water dispensation. Winkler "Respect, Protect, Fulfil: The Implementation of the Human Right to Water in South Africa" 12. Kotzé 2006 *PER* 1 is of opinion that the current ineffectiveness of water law lies in the lack of adequate enforcement of the water law regime. In order to denote the water law dispensation as being efficient, it should therefore be assessed whether the water law dispensation can effectively be enforced in South Africa. As it relates to judicial enforcement of for example water rights or licenses, it can be accepted that the government's activities of judicial enforcement with the country's water resources are firmly constrained by the public trust doctrine or to the objectives and the purpose of the NWA, as well as the Constitution. *De Beers Consolidated Mines Ltd v Ataqua Mining (Ltd) and others* (OFS) 3215/06 decided 13 December 2007- Unreported. Although this case dealt with minerals as natural resource, the relevance of the case can be found in the public trust doctrine that is both applicable to water and minerals as natural resources. See in this regard s 3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 345. As the government's activities regarding judicial enforcement have been outlined, it can be noted that *locus standi* is awarded to any aggrieved member of the public who can prove that the government is not complying with the above objectives. The reason for this remedy lies in the fact that the public's right of use creates judicially enforceable rights held in common by all the people of the country. As a result of litigation through the aggrieved party, the activities of the government can be regarded void or voidable, which will ultimately lead to efficiency. Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 346.

and other measures to achieve the progressive realisation of the right will be dealt with in paragraph 5.4.2 *infra*.

5.4.1 Section 27(1)(b) of the Constitution[56]

The meaning of section 27(1)(b) will be studied under the two key concepts as stipulated in the constitutional right. First, attention will be given to the aspect of the right to have "access" to water resources; secondly the focus will fall on the right to have access to "sufficient" water.

5.4.1.1 "Access" to water

In order to understand the impact of the public trustee's role in the improvement of the lives of South Africans through the promotion of social equity, it is necessary to refer to the language used in the constitutional right regarding water, namely that everyone does not have a right to water, but rather a right to have access to water.

Gabru[57] explains the inclusion of the word "access" within the constitutional right to water best by comparing sections of the population to one another. She states that social inequity is detected in the fact that one part of the population has financial means, while the other part does not. It is accepted that people with financial means already have access to the socio-economic rights stipulated in section 27 of the Constitution, simply because they can afford it. The poor, however, is not in the position to afford such access,[58] which qualifies them as people without access to water.

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56 S 27(1)(b) of the Constitution stipulates that "Everyone has the right to have access to sufficient... water".

57 Gabru 2005 *PER* 12.

58 This position was worsened by the fact that the majority of South African citizens were deprived of this right of access to water resources in the previous water dispensation.

If this differentiation between the sectors of population is accepted, it can be stated that the qualification of the "right to have access to water" places a duty on the government to actively promote such "access" only[59] to the sections of the population that can not afford such service, for the other part of the population already exercises their right to have access to water.[60]

However, this differentiation between the sectors of the population was not followed by the High court in the *Mazibuko*-case.[61] In addressing the legal right to water, the court attended to section 39(1)(b)[62] of the Constitution and considered international law in its interpretation of the right to have access to water within the Bill of Rights.[63] The court interpreted the aspect of accessibility to water as:

> both physical and economic accessibility on a non-discriminatory basis. The effect is that the right to water must be *accessible equally to the rich as well as to the poor* and to meet the most vulnerable members of the population. It is in this context that the State is under an obligation to provide the poor with the necessary water and water facilities on a non-discriminatory basis...[64]

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59 Further restrictions on the duty of the public trustee to realise this right is made clear by the words of s 27(2) of the Constitution. The national government acting through the public trustee is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this fundamental right. Currie and De Waal *The Bill of Rights Handbook* 591.

60 Gabru 2005 *PER* 12. It should be kept in mind that the duty of the government to actively promote the right to access to sufficient water is constant, regardless the financial position of citizen. It is the scope of the government's duty that will differ. See par 5.4.2 *infra*.

61 *Mazibuko and others v The City of Johannesburg* case no 06/13865, decided on 30 April 2008 http://209.85.135.104/search?q=cache:k2oM0ejAUTIJwww.law.wits.ac.za/cals/phiri/Mazibuko%2520Applicants%2520Heads.pdf+Mazibuko+prepayment+water&hl=en&ct=clnk&cd=3&gl=za para 36 and 37. Henceforth referred to as *Mazibuko v The City of Johannesburg* case no 06/13865. This is with good reason. See comment at footnote 55 *supra*.

62 S 39(1)(b) of the Constitution stipulates that a court must consider international law when interpreting the Bill of Rights.

63 *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) page 63 states that international law can be a guide in the interpretation process.

64 *Mazibuko v The City of Johannesburg* case no 06/13865 36,37.

Thus, whereas Gabrus' explanation of the phrase "access to water" seems to restrict its meaning only to differentiate between the sectors of the population, the High Court in the *Mazibuko*-case broadened the concept, not only to include access to water, but also to embrace water facilities, such as water institutions and infrastructure.[65] Through the *Mazibuko*-decision of the High Court the scope of the public trustee's duty to ensure access to sufficient water has been conceptualised. As the aspect of accessibility has now been attended to, section 27(1)(b) of the Constitution calls for further examination of the right to have access to "sufficient" water.

5.4.1.2 Access to "sufficient" water

The second aspect that relates to the right to have access to water and its relation to social equity, is located in the word "sufficiency" that is incorporated in this constitutional right. The question that needs to be attended to below is what the requirement of sufficiency entails.[66]

Gabru[67] comments that the precise quantity and quality of the concept of "sufficient" water still has to be considered by a South African court. However, she indicates that to date the concept has been interpreted to mean "basic water supply".

> Basic water supply is the minimum standard prescribed by regulation of abstraction, conveyance, treatment and distribution of potable water for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life.[68]

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65 Long title of the *Water Services Act* 108 of 1997. Henceforth referred to as the WSA; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) 92 I.

66 S 27(1)(b) of the Constitution.

67 Gabru 2005 *PER* 12-13.

68 Thompson *Water Law* 693.

This minimum standard of basic water supply was formulated and published in the *Government Gazette*[69] as being:

> A minimum quantity of potable water of 25 liters per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household.

This exposition of basic water supply can be regarded as an important guiding mechanism to determine the substance of the fundamental right of access to sufficient water.

However, the applicants in the High Court case of *Mazibuko* challenged this guiding mechanism of sufficiency. They held that 25 litres of free water per person per day or 6 kilolitres per household per month is unconstitutional and invalid.[70] It was on these grounds that the applicants sought a declaratory order to entitle each person to 50 litres of free water per day.[71] In evaluating this aspect, the court emphasised the fact that South Africa is a water scarce country with the burden of unequal water distributions due to the past system of Apartheid.[72] The quantity of 25 litres of free water per person per day should in the light of this be regarded as the "lowest level to maintain life"[73] and if the local water sevices authority possesses the means to increase the minimum of 25 litres of free water, they may do so.[74]

In the Supreme Court of Appeal, this judgment was upheld and it was declared that the amount of 42 litres of water per resident of the township

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69 GN 3 R509 in GG 22355 of 8 June 2001; Thompson *Water Law* 694.

70 They argued that this amount of water is not enough to be sufficient. *Mazibuko v The City of Johannesburg* case no 06/13865 11.1.

71 *Mazibuko v The City of Johannesburg* case no 06/13865 11.2.

72 "Any increase in free basic water, would of necessity have financial implications to the equitable share distribution." *Mazibuko v The City of Johannesburg* case no 06/13865 22, 48.

73 *Mazibuko v The City of Johannesburg* case no 06/13865 46; Winkler "Respect, Protect, Fulfil: The Implementation of the Human Right to Water in South Africa" 13.

74 *Mazibuko v The City of Johannesburg* case no 06/13865 49.

Phiri per day will be sufficient in terms of the Constitutional right to have access to sufficient water.[75]

In other words, the exposition of the basic water supply as indicated above is accepted to be sufficient, constitutional and valid, but as a minimum[76] requirement that could be expanded if practically possible, as it was done in the Supreme Court of Appeal.[77]

5.4.2 Section 27(2) of the Constitution[78]

The first section of this chapter of the dissertation gives an exposition on legislative and other measures of the state to improve the livelihoods of the people of South Africa.[79] It is also trite that the NWA and WSA have been promulgated to facilitate access to sufficient water. In this section, the focus will fall on the actual duty of the government to progressively realise the right to have access to water within its available resources.

The nature and content of the state's duty regarding the progressive realisation of the right to have access to water were clarified in the High court judgment of the *Mazibuko*-case:

> The contention is that in terms of section 7(2) of the Constitution the State has both the negative and positive obligation towards the applicants' right to access to water. In the **negative sense**, the State is obliged to respect the applicants' existing unlimited access to water and not to interfere with this right. Any interference will be

75 *City of Johannesburg v L Mazibuko* 2009 489/08 (ZASCA) 20 24.
76 Jansen van Rensburg 2008 *Stell LR* 420.
77 *Mazibuko v The City of Johannesburg* case no 06/13865 42; *City of Johannesburg v L Mazibuko* 2009 489/08 (ZASCA) 20 27.
78 S 27(2) stipulates that "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."
79 See par 5.2 *supra*.

unlawful unless it can be justified in terms of the provisions of section 36 of the Constitution.[80]

In the **positive sense**, the State is obliged in terms of section 27(2) of the Constitution and the Water Services Act to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of everyone's right to access to sufficient water.[81]

In order to effectively examine the state's obligation in this regard, the remaining part of this section will be dedicated to both the negative and positive obligations regarding the right to access to water.

5.4.2.1 Negative obligations of the state

In examining the negative obligation of the state towards the right to access to water[82] and its connection to social equity, two court cases need to be discussed.[83] The cases are the *Residents of Bon Vista Mansions v South African Metropolitan Local Council* and the *Mazibuko v The City of Johannesburg*-cases.

5.4.2.1.1 *Residents of Bon Vista Mansions v South African Metropolitan Local Council*-case[84]

In this case the right to access to sufficient water was interpreted in the context of an urgent application that was brought before the court as a result of an act by the local authority of disconnecting the water supply to a block of flats.

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80 *Mazibuko v The City of Johannesburg* case no 06/13865 97.
81 *Mazibuko v The City of Johannesburg* case no 06/13865 98.
82 See also Rautenbach 2005 *TSAR* 647-653 for an exposition on the violation of rights by inaction.
83 Although it is not general practice to examine court cases in a *magister* dissertation, the importance of two specific cases necessitates an exposition.
84 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W).

5.4.2.1.1.1 Facts of the case and arguments of the parties

The applicants of this case are the residents of Bon Vista Mansions, a block of flats under the authority of the Southern Metropolitan Local Council of Johannesburg, which is in turn the respondent of the current case.[85] The applicants launched an urgent application to restore the residents' water supply[86] after the respondent disconnected it because the applicants failed to pay for the respondent's water services.[87] The restoration-application was based on the fundamental right to have access to sufficient water as stipulated in section 27(1)(b) of the Constitution, without the necessity to pay for such service.[88]

5.4.2.1.1.2 Arguments before the court

The applicants - the residents of the block of flats - thus sought the respondent to restore their water supply, which was disconnected by the respondent. The applicants' arguments held that the disconnection of their water supply was *in casu* a breach of the municipality's duty to respect, protect, promote and fulfil the right to have access to water.[89]

Three pertinent aspects therefore had to be inspected by the court in the first instance. First, the scope or effect of section 27 of the Constitution, secondly the local authority's (the respondents') constitutional duty to respect section 27(1)(b) and thirdly, the correct procedure that had to be followed in the discontinuation of water services, as stipulated in the WSA.

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85 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 1.

86 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 2.

87 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 27.

88 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 11.

89 Ss 7(2); 27(1)(b) of the Constitution.

The court attended to the above-mentioned aspects, and started directly with the interpretation of the language used in section 27(1)(b) of the Constitution, where it is stated that everyone has the right to have access to water. In its interpretation, the High Court referred to international law,[90] and more particularly to the International Covenant on Economic, Social and Cultural Rights[91] to interpret of the scope and ambit of this right.[92] With the interpretation of the Covenant, attention is drawn to section 7 of the Constitution.[93] Section 7 stipulates that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights, which include the right to access to sufficient water.[94] It was consequently argued that, as the city council (the respondent) is an organ of the state, it is obliged to fulfil the duties set out in section 27 of the Constitution, as every word of section 27 has a particular meaning.[95]

In this regard Budlender AJ said:[96]

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

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90 S 39(1)(b) of the Constitution stipulates that a court must consider international law when interpreting the Bill of Rights.

91 Henceforth referred to as the Covenant. For the text, see Salman and McInerney-Lankford *The Human Right to Water* 109-144.

92 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 3 14. Winkler "Respect, Protect, Fulfil: The Implementation of the Human Right to Water in South Africa" 5-9.

93 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 15.

94 S 27of the Constitution; *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 11.

95 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 12, 13.

96 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 20.

In addressing the last argument, reference was made to the WSA regarding the procedure for discontinuance of water services. Section 4(3) stipulates that the discontinuance of water services must be "fair and equitable"[97] and should certainly not result in a person being denied access to basic water services for non-payment, if such person can prove that he or she is unable to pay for such services.[98] It should therefore be clear that the state is obliged to respect every citizen's right to have access to water.

5.4.2.1.1.3 Judgment[99]

It was decided that:

> The effect of section 27(1)(b) (read with section 7) of the Constitution, and of section 4 of the Water Services Act is as follows:
>
> If a local authority disconnects an existing water supply to consumers, this is *prima facie* a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification.[100]

Therefore, in interpreting the Covenant, the Constitution and the WSA, a negative obligation of the State as it relates to the right to access to water can be identified. This can be seen in the fact that the "state must refrain from action"[101] that will deprive citizens of their constitutional rights. In this case it was decided that the council who disconnected the water supply, will be ordered to restore the water supply of the applicants.[102]

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97 S 4(3)(a) of the WSA. *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 23.

98 S 4(3)(c) of the WSA. *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 23.

99 See also Pieterse 2003 *SALJ* 44.

100 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 27.

101 Pieterse 2003 *SALJ* 43; *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 16.

102 *Residents of Bon Vista Mansions v South African Metropolitan Local Council* 2002 6 BCLR 625 (W) 35.

5.4.2.1.2 Mazibuko v The City of Johannesburg-case[103]

5.4.2.1.2.1 Facts of the case

The applicants of the High Court *Mazibuko*-case were four residents[104] of Phiri, an old township of Soweto, which was entitled to unlimited water supply on credit up until 2001.[105] The respondents, for convenience referred to as the City of Johannesburg,[106] were brought to court on the grounds that it did away with the unlimited water supply, and provided every household of Phiri with 6 kilolitres of free water per month. Prepayment meters were implemented for subsequent service delivery, with the effect that once the 6 kilolitres of free water per month have been consumed, water credits had to be purchased, or otherwise the water supply was automatically cut of until the household becomes entitled to the next month's 6 free kilolitres of water.[107] The applicants consequently challenged a number of the respondent's water regulations and policies, as these did not agree with the declaration of DWAF that *"Water is life, sanitation is dignity"*.[108] Relevant to this section, the disconnection of the applicants' previous unlimited water supply and the introduction of prepayment water meters were challenged.[109] The arguments as set out above, led to the High Court's examination of the legal right to water as

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103 The *Mazibuko v The City of Johannesburg* case no 06/13865 will henceforth be referred to as the *Mazibuko*-case. This case was taken on appeal in the *The City of Johannesburg v L Mazibuko* 2009 489/08 (ZASCA) 20. As the Supreme Court of Appeal upheld the judgment of the High Court, the more elaborate arguments of the latter court will be explained in para 5.4.2.1.2.2 and 5.4.2.1.2.3 *infra*.

104 It is stated that the residents of Phiri are "mainly poor, uneducated, unemployed and are ravaged by HIV/AIDS." *Mazibuko and others v The City of Johannesburg* case no 06/13865 3, 4 and 5.

105 *Mazibuko and others v The City of Johannesburg* case no 06/13865 3.

106 *Mazibuko and others v The City of Johannesburg* case no 06/13865 8.

107 *Mazibuko and others v The City of Johannesburg* case no 06/13865 3.

108 *Mazibuko and others v The City of Johannesburg* case no 06/13865 1 and 2.

109 *Mazibuko and others v The City of Johannesburg* case no 06/13865 9.

stipulated in the Constitution.[110] Relevant principles that crystallised from this case relating the right to access to sufficient water will be examined hereafter.

5.4.2.1.2.2 Arguments of the court in the first instance

In court, the respondent's interference through disconnecting the previous unlimited water supply and substituting it with prepayment meters were contended to be administrative action.[111] The applicants challenged the respondent's administrative action through the requirements[112] set out for just administrative action in the Constitution. These requirements are that the action should be lawful, reasonable and procedurally fair.[113] It was held that the introduction of prepayment meters does not have any source in law and is therefore *ultra vires* and unlawful.[114]

The second requirement of just administrative action, that of reasonableness,[115] was explained by O'Regan J to mean rationality.[116] Section 6(2)(f)(ii) of the *Promotion of Administrative Justice Act*[117] gives guidance with regard to the meaning of rationality and explains it to be that the action taken should be connected rationally to the purpose for which the action was taken.[118] The purpose of the respondent's interference of introducing prepayment meters was indicated to be a measure to renovate

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110 *Mazibuko and others v The City of Johannesburg* case no 06/13865 13.
111 Jansen van Rensburg 2008 *Stell LR* 423.
112 Hoexter *Administrative Law in South Africa* 224.
113 *Mazibuko and others v The City of Johannesburg* case no 06/13865 104; S 33(1) of the Constitution.
114 *Mazibuko and others v The City of Johannesburg* case no 06/13865 73, 100, 105, 164.
115 Jansen van Rensburg 2008 *Stell LR* 432.
116 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) 43.
117 *Promotion of Administrative Justice Act* 3 of 2000. Henceforth referred to as PAJA.
118 Hoexter *Administrative Law in South Africa* 224.

the poor water piping infrastructure of Phiri.[119] In court, the respondents thus contended that the applicants should not "frustrate the implementation" of such prepayment meters "which are beneficial to the majority of the residents".[120]

The last requirement of administrative action, that of procedural fairness,[121] was examined and it was indicated that:

> [P]repayment meters are illegal as they violate the procedural requirement of fairness by cutting of or discontinuing the supply of water without notice and representation.[122]

5.4.2.1.2.3 Judgment of the court in the first and second instances

Tsoka J gave judgment on the question of just administrative action regarding the forced installation of prepayment meters in the township of Phiri. He declared that this interference by the City of Johannesburg, an organ of the state, was unconstitutional and invalid.[123] The City of Johannesburg should rather have exercised their negative obligation; not to interfere with the right to have access to water. Thus, retrogressive measures taken by the state are prohibited as it relates to the right to have access to water.[124]

With the exposition of the two court cases above, it should be clear that the state is under a negative obligation in terms of section 27(2) of the Constitution regarding the realisation of the right to have access to water. The focus will now swift from the negative to the positive obligations of the state in terms of section 27(2) of the Constitution.

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119 *Mazibuko and others v The City of Johannesburg* case no 06/13865 4, 92.
120 *Mazibuko and others v The City of Johannesburg* case no 06/13865 165.
121 Jansen van Rensburg 2008 *Stell LR* 428.
122 *Mazibuko and others v The City of Johannesburg* case no 06/13865 91.
123 *Mazibuko and others v The City of Johannesburg* case no 06/13865 183; *City of Johannesburg v L Mazibuko* 2009 489/08 (ZASCA) 20 62.
124 *Mazibuko and others v The City of Johannesburg* case no 06/13865 37.

5.4.2.2 Positive obligations of the state

The notion of positive obligations[125] of the state will be examined through the key words entrenched in section 27(2) of the Constitution. Firstly, the aspect of "available resources" will be scrutinised, whereafter the aspect of "progressive realisation" will receive attention.

5.4.2.2.1 Available resources

When studying the aspect of "available resources" it is interesting to note that two different explanations can be denoted to this phrase. The first is found in the *Soobramoney*-case[126] heard by the Constitutional Court. It was contended that the obligations imposed on the state to progressively realise the right to have access to water "are dependent upon the resources available for such purpose".[127]

On the other hand, the aspect of availability[128] was addressed in the *Mazibuko*-case of the High Court in a somewhat different form. While keeping in mind that South Africa's water resources are scarce and distributed unevenly, an additional aspect of continuity must also be referred to:

> Availability means that the water supply must not only be sufficient for each person for personal and domestic use but also be continuous.[129]

125 See also Rautenbach 2005 *TSAR* 647 for an exposition on the limitation of the right to have access to sufficient water by positive interference of the state.
126 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC).
127 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) 11.
128 S 27(2) of the Constitution.
129 *Mazibuko and others v The City of Johannesburg* case no 06/13865 36,37.

5.4.2.2.2 Progressive realisation

Both the High Court and the Supreme Court of Appeal judgments of the *Mazibuko*-case[130] brought to the light that the state has a "constant and continuing duty to the progressive realisation of the right to water."[131] In terms thereof, it can be stated that the state has a positive, constant and continuing obligation over a period of time[132] to fulfil the right to have access to sufficient water.

When taking these expositions of "available resources" or "availability" and "progressive realisation" into consideration, the content of the state's positive obligation to progressively realise the right to access to water must be interpreted within the parameters set out by the aspect of the availability of water. On the one hand, the lack of available water resources can limit the state's capacity[133] to realise its obligation, while the second explanation broadens the state's duty in the way that the water supply must not only be available for sufficient use, but should also be continuous.

5.5 Environmental sustainability[134]

The fourth component that was distilled from the aim of IWRM is the aspect of environmental sustainability.[135] With reference to this component the focus will initially fall on the concept of sustainable development and thereafter on the realisation of sustainable development to improve the lives of South Africans.

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130 See par 5.4.2.1.2 *supra*.
131 *Mazibuko and others v The City of Johannesburg* case no 06/13865 36,37.
132 Gabru 2005 *PER* 8.
133 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) 11.
134 The concept of sustainable development is regarded central to recent and future development of environmental law and policy. Bell and McGillivray *Environmental Law* 62.
135 See par 5.1 *supra*.

5.5.1 *The concept of sustainable development within the South African water law*

Before the impact of the concept of sustainability on the people of South Africa can be scrutinised, one must understand the exact meaning of this concept within the South African water law. Stallworthy[136] indicates the necessity for this investigation when he warns that, due to misinterpretation, the concept is recklessly used and interpreted in international declarations and treaties.

In an attempt not to abuse or misinterpret the concept, sustainable development has to be defined and understood uniformly. However, attributing an exact meaning to sustainable development is known not to be an easy task.[137]

In order to understand this, two possible explanations of the concept will be considered. Stallworthy[138] provides one possible definition for this concept as development that should secure the *needs of the present generation* without compromising the future generations' *needs*. A more expansive definition of sustainable development is found in section 1 of NEMA. Here it is stipulated that sustainable development entails the integration of social, economic and environmental factors into the planning, implementation and decision-making processes in a way that ensures that development serves the present and future generations.

Several different impressions regarding sustainable development come to mind when the different explanations of the concept are studied.[139] One

136 Stallworthy *Sustainability, Land use and Environment* xxxv.
137 Stallworthy *Sustainability, Land use and Environment* xxxv.
138 Stallworthy *Sustainability, Land use and Environment* xxxv; Atapattu "International Human Rights and Poverty law" 312-313.
139 Ellis & Wood "International Water Law" 375 state:

concept, that of *needs* (especially the essential needs of the poor) should be investigated further.[140] By prioritising this concept of *needs*, the realisation of the concept of sustainable development in South Africa, as endorsed in the Constitution at length,[141] will gain momentum.

5.5.2 *Sustainable development and its intimation to the needs of South Africans*

The concept of sustainable development and its impact on the needs of the people of South Africa will be considered in relation to its connection to both the *National Environmental Management Act* 107 of 1998[142] (as it relates to present needs) and the reserve as found in the NWA (as it relates to both the present and future needs of the people).

[M]any legal experts agree that [sustainable development] embraces four basic elements:
1. the idea that the needs of present and future generations must be taken into account;
2. the need to ensure that renewable and non-renewable resources are conserved and not exhausted;
3. the requirement that access to and use of natural resources must take equitable account of the needs of all peoples, and
4. the recognition that issues of environment and development must be treated in an integrated manner.

140 See par 5.5.2 *infra*. Atapattu "International Human Rights and Poverty Law in Sustainable Development" 313.

141 S 24(b)(iii) of the Constitution stipulates that everyone has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The idea of sustainable development can be traced back to 1972 and the United Nations Stockholm conference on the Human Environment. The definition of sustainable development was originally developed by the World Commission on Environment and Development in 1987 (Brundtland Commission). Bell and McGillivray *Environmental Law* 31 and 62. Scholtz 2005 *TSAR* 1.

142 Henceforth referred to as NEMA.

5.5.2.1 NEMA

The preamble of NEMA justifies the Act's relevance in the realisation of sustainable development, for it recognises the fact that inequality exists in the distribution of needs,[143] which includes water.[144] The question arises whether NEMA provides mechanisms of support for the needs of the poor as it relates to the concept of sustainable development. This section attempts to assess this situation.

A number of management principles relating to water as natural resource are found in chapter 1 of NEMA. These principles denote signs of the government's commitment to alleviate the poverty in South Africa, by recognising the needs of the previously disadvantaged. Section 2(4)(c) of NEMA introduces itself as the very first sign of bettering the lives of the poor, for it is stipulated that environmental justice must be pursued in such a way that the distribution of the need of water will not be an indication of unfair discrimination against any person, particularly vulnerable and disadvantaged persons. Section 2(4)(d)[145] further stipulates that the equitable access to water resources, its benefits and services must be pursued to meet basic human needs. It even states that special measures may be taken to ensure access thereto to categories of previously disadvantaged people.[146] NEMA further provides for water governance, for it must be ensured that vulnerable and disadvantaged persons take part in

143 See chapters 1 and 2 *supra*.

144 NEMA stipulates the concern that poverty can in its turn be recognised as an important cause (and result) of environmentally harmful practices. Harmful practices will undoubtedly resist the concept of sustainability, for the water available for future generations are currently harmed under such practices. Thus, a way to realise the concept of sustainability, is to alleviate poverty in South Africa. Preamble of NEMA; Atapattu "International Human Rights and Poverty Law in Sustainable Development" 313.

145 S (4)(d) of NEMA.

146 S 2(4)(d) of NEMA.

the participation processes.[147] Well-participated decision-makers should, in making their decisions, take the *needs* of all the interested parties into account.[148] This facet of decision-making[149] stresses the importance of prioritising the needs of South Africans as it relates to water. The Reserve, as found in the NWA, will be used to set up a hierarchy in prioritising the needs of South Africans.

5.5.2.2 The Reserve

Chapter 2 of this dissertation indicated that the reserve can be identified as a major theme of the post-constitutional water law dispensation.[150] The Reserve must also be seen as a major theme within the concept of sustainable development.

The NWA defines the Reserve as consisting of two parts.[151] Firstly, the reserve is the quantity and quality of water that is required to satisfy the present basic human needs of South Africans by securing citizens basic water supply. In the second instance, the Reserve is set up to protect the aquatic ecosystems in order to secure the use and ecologically sustainable development of the water as natural resource for the future.[152]

When the aspect of people's needs, as referred to above, and the Reserve are taken into consideration collectively, a hierarchy of water needs are set

147 S 2(4)(f) of NEMA. Ch 2 of NEMA provides for environmental institutions. One of these, the National Environmental Advisory Forum, stipulates the need to ensure representation within this forum by people previously disadvantaged by unfair discrimination. S 4(2) of NEMA. Another institution, that of the Committee for Environmental Co-ordination should, in executing its functions, advise the government on law reforms. S 7(3)(h) of NEMA. This committee should further present an annual report to the Minister on *inter alia* law reform that was undertaken and proposed by the Committee. S 10(1)(f) of NEMA.

148 S 2(4)(g) of NEMA.

149 See par 4.3.2.2 *supra*.

150 See par 2.3.1 *supra*.

151 Kidd 1997 *South African Human Rights Yearbook* 85.

152 Ch 1 of the NWA.

in place.[153] The amount of water that is required for the Reserve, has priority over all other water uses.[154] Therefore, *before* water entitlements can be allocated, the amount of water that is required for basic human needs such as drinking or food preparation and the protection of water ecosystems for present and the future generations must be met.

In order to conclude the examination of the concept of sustainable development within the South African water law, it should be stressed that the Reserve's attendance to the present and future needs of the people and protection of ecosystems will undoubtedly have immense uplifting consequences for the lives of the poor.

5.6 Economic efficiency

The fifth component that can be extracted from the aim of IWRM, is that of economic efficiency.[155] The relevance of the intertwinement of the environment (with the focus of water in the current dissertation) and the economy is well stated by the President of Earth Education and Research:[156]

> Because the environment and the economy are intimately linked, improving environmental quality is good for the economy. Thus, the sustainability revolution is also an economic revolution. According to visionary economic and environmental leaders, making a shift to more environmentally sustainable economies is the biggest investment opportunity in this country.

In the last division of this chapter, attention will be paid to the concept and impact of economic efficiency within the South African water law. As in the first section of this chapter, this section will focus on water that needs to be

153 Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in Southern Africa* 351.
154 Kidd *Environmental Law* 72.
155 See par 5.1 *supra*.
156 Miller *Living in the Environment* 567.

allocated for the farming industry,[157] although with an entire different angle. This chapter commenced with the argument that water has to be redistributed in order to enable black people to become subsistent farmers in their own right. This section will indicate that South Africa is in need of a highly technological and specialised farming industry for commercial purposes, and not only for farming for the improvement of livelihoods of the previous disadvantaged.

If this focus of commercial farming is carried out efficiently, it will generate employment, improve the quality of life and "improve the productivity of the economy."[158] Shifting towards the more efficient usage of water as natural resource can stimulate the economy of South African and it can create jobs and alleviate poverty.[159]

It can thus be concluded that the approach of IWRM, with the aim of economic efficiency, will undoubtedly have a positive impact on the lives of South Africans, especially the poor.

5.7 Conclusion

Tempelhoff[160] states that:

> Although new South African [water law]...legislation presents an extensive and progressive legal framework for reaching constitutional goals, an array of obstacles poses great challenges. Shaped by centuries of colonial rule, socio-economic conditions are characterised by inequitable distribution of wealth and resources. Development in times of political isolation, has exploited the country's mineral and natural resources with little concern for long-term environmental impacts. Apartheid and other negative factors

157 See par 5.2 *supra*.
158 *White Paper on a National Water Policy for South Africa* of 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf at 2.2.4.
159 Miller *Living in the Environment* 567.
160 Tempelhoff *Intergenerational Equity as a Constitutional Objective* 1.

> of the past had an enormous impact on the interaction between people and the environment; especially the disadvantaged who was at times forced to live in very poor conditions.

In the light of this quotation, this chapter articulates the need for the public trustee to focus on IWRM within the South African water law. The state executes its public trust duty[161] through IWRM when it conducts studies, establish policies, make plans, and authorise regulations for the improvement of livelihoods, conservation of water resources, promoting social equity, sustainability and economic efficiency.[162]

It has been explained above that the improvement of livelihoods of South Africans can take place through the redistribution of land and water as natural resource. This will lead to the fact that black people will have the opportunity to become subsistent farmers in their own right. An examination of water conservation shows that the planning of water supply to the poor is a big part of water conservation. The aspect of social equity was examined through the right to have access to sufficient water. Water sustainability was attended through following the approach of attending to the present and future needs of the people. It was indicated that economic efficiency through commercial farming can lead to the maintenance[163] and increase of food production and the creation of employment in the black population of South Africa.[164]

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161 Mandatory duty of the state Ch 3 of the NWA. Dunphy shows that the *Water Quality Act* of 1973, s 144.26(1) explains the role of the state as public trustee. See Dunphy 1976 *Marq LR* 788 for a complete extraction from the Act with regard to Public trusteeship.

162 Dunphy 1976 *Marq LR* 788. See also the duties described in s 2 of the NWA. Dunphy stresses in this regard the efficient use, conservation, development and protection of this state's water resources.

163 De Villiers *Land Reform- A Commentary* 20. The emerging farmers should be assisted to continue the farming practices of the previous owner.

164 De Villiers *Land Reform- A Commentary* 10-13.

Chapter 6

Conclusion

6.1 Revisiting the research question and objectives of the study

The research question that constituted both the foundation and centre of this study was to what extent the statutory incorporation and practical application of the concept of public trusteeship impacts on the South African water law regime. In order to answer the research question an assessment of section 3 of the NWA and the impact of this section's application formed the mid-point of this dissertation. As a result the primary objective of this dissertation was to determine the implication of the concept of public trusteeship within the South African water law.

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

1) to endow the historical development of South African water law;[1]
2) to assess the legal nature of the concept of public trusteeship;[2]
3) to reflect on the public trust doctrine as a basis for establishing a legal framework for water management;[3]
4) to evaluate the impact of the effective execution of public trusteeship.[4]

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1 See chapter 2 *supra.*
2 See chapter 3 *supra.*
3 See chapter 4 *supra.*
4 See chapter 5 *supra.*

6.2 *Secondary objectives as foundation for the realisation of the primary objective*

Conclusions were reached regarding the research of the individual components that constituted the secondary objectives of this study as stated in 6.1 *supra*. These conclusions blended together in an overarching perspective regarding the impact of the concept of public trusteeship on the South African water law. It is, therefore, necessary to take a retrospective view of the research in this dissertation before the research question can finally be answered.

6.2.1 The history and development of South African water law[5]

The history and development of the South African water law dispensation was examined in order to gain a full understanding of the dramatic implications that was brought about by the incorporation of the concept of public trusteeship within the South African water law.

Initially the historical impacts of the Roman law, the Roman-Dutch law and the English law that were applied in South Africa since 1652 were discussed.[6] This historical survey on the water law of South Africa was done with the purpose of determining:

- whether the historical principle of the state being *dominus fluminis* shows similarities with the concept of public trusteeship within the contemporary water law dispensation;[7]
- the impact of the English law differentiation of water resources on the pre-1998 water law regime;[8] and

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5 See chapter 2 *supra*.
6 See par 2.2 *supra*.
7 See chapter 2 par 2.2 *supra*
8 See chapter 2 par 2.2.2.2 *supra*.

- the significance of the promulgation of the NWA on the water law dispensation of South Africa.[9]

From the discussion on the Roman water law regime, it was clear that the Romans classified water under the legal category of *res extra commercium*, or non-negotiable things. Further examination of this topic brought to light that surface water could further be sub-categorised under the categories of *res omnium communes* and *res publicae*. Running or flowing water was categorised as part of the non-negotiable category of *res omnium communes*, while perennial rivers of *flumina perennia* were categorised as *res publicae*. Research indicated that as a result of categorising water under non-negotiable things, surface water was not available for private ownership, but was either available for everyone to use, or it was the property of the state.[10]

It became clear from the discussion that the water that was not available for private ownership, had to be controlled in a consistent way. Research indicated that it was for this reason that the Roman government was appointed as *dominus fluminis*, or the custodian of all the running or flowing water. In terms of this principle, the Roman *praetor* had the duty to regulate, control, limit or prohibit certain uses or entitlements of the nation's water.[11] This principle was absorbed into the law of the Netherlands and formed part of the Roman-Dutch law. With the Dutch occupation of the Cape of Good Hope in 1652, the Roman-Dutch law, with its doctrine of the state being *dominus fluminis*, was introduced to South Africa.[12]

The historical survey indicated that after the British occupation of the Cape in 1806, the Roman-Dutch doctrine of the state being *dominus fluminis*

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9 See chapter 2 par 2.3.1 *supra*.
10 See par 2.2 *supra*.
11 See par 2.2 *supra*.
12 See par 2.2.1 *supra*.

gradually faded, for it had to make room for the incorporation of the English law in the South African water law.[13] In terms of the English law, streams were divided into public or private streams.[14] Private streams were private in ownership, while public streams were public in ownership.[15] It was clear form the discussion of the codification of the South African water law that the *Water Act* 54 of 1956 entrenched these English law principles of the doctrine of riparian ownership and the distinction between the public and private forms of water. It was further indicated that these two principles, together with the Apartheid regime of that time, resulted in many inhabitants' deprivation of access to water. The reason for this deprivation became clear from the exposition, namely that access to water was linked to the ownership of land, which was in turn mostly in the hands of white people.[16]

It was indicated that the NWA abolished the differentiation between the different forms of water, as common in the Roman law, the Roman-Dutch law and the English law. As the different water resources could no longer be regulated according to its form, another way of regulation had to be introduced. Research indicated that the NWA introduced the concept of public trusteeship through which *all* water[17] must be regulated in an equitable manner.[18]

The research thus confirmed that the concept of public trusteeship finds its deepest roots in the Roman law, and in particular, in the principle of the state being *dominus fluminis.*[19] It should, however, be emphasised that the

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13 See par 2.2.2 *supra.*
14 See 2 par 2.2.2.2 *supra.*
15 See par 2.2.2.2 *supra.*
16 See para 2.2.2.3.5 and 5.2 *supra.*
17 S 3(3) of the NWA.
18 See para 2.3.1 and 3 3.3.3.1 *supra*; s 3(3) of the NWA.
19 See chapter 3 par 3.1 *supra.*

concept as a whole was recently introduced by the legislature and changed the water law dispensation in its totality.[20]

6.2.2 The nature of the public trust doctrine

In order to fully understand the practical application of the concept of public trusteeship within the South African water realm, the concept has been scrutinised. Due to the novelty of the concept of public trusteeship, reference was made to the Roman water law[21] and Anglo-American[22] legal system in order to identify relevant attributes to give content to the newly statutory introduced South African public trust doctrine. From the extensive study, four elements crystallised that were identified as the attributes of the South African public trust doctrine.[23]

Firstly, the research indicated that the South African government, as the public trustee, has a mandatory duty to regulate South Africa's water resources and its uses to the benefit of the nation.[24] In the second instance, research showed that water can be regarded as being public in nature, from which public rights can be attained by the people of South Africa.[25] Thirdly, it was indicated that the public trust doctrine effects the public trustee's way of water regulation in South Africa. Regulation of water now has to take place in a way that will promote fair and equitable access to the whole of the populace.[26] The fourth and last identified attribute of the public trust doctrine was that the water of South Africa has to be used in a beneficial way while it promotes the public interest.[27]

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20 See par 3.1 *supra*.
21 See par 3.2.1 *supra*.
22 See par 3.2.2 *supra*.
23 See par 3.3.3.1 *supra*.
24 See par 3.3.3.2 *supra*.
25 See par 3.3.3.3 *supra*.
26 See par 3.3.3.4 *supra*.
27 See par 3.3.3.5 *supra*.

The research thus indicated that the concept of public trusteeship emphasises the state's fiduciary responsibility and simultaneously separates legal and beneficial entitlements to water.[28] Obligations are further laid on the trustee as title holder,[29] who has to deal with the trust property in accordance with the terms of the trust.[30]

6.2.3 Public trusteeship as a basis for a legal framework in water management

In order to examine the practical application of the concept of public trusteeship within the South African water law, research indicated that the concept of public trusteeship needs to be interpreted to emphasise responsibilities of the national government.[31]

It was indicated that in terms of section 3 of the NWA, the public trustee's responsibilities are expanded to cover a remarkable wide range of activities relating to water.[32] Since the promulgation of the NWA, the management of water became a complex responsibility that involves substantial administration. The concept of public trusteeship was thus examined and it was concluded to be the basis for the establishment for a legal framework wherein the responsibilities of the public trustee can effectively be executed.[33]

From examining the NWA, the concept of public trusteeship was indeed recognised as being a basis for constituting a legal framework wherein responsibilities of the public trustee can be executed. This was seen in section 6 of the NWA, which placed the responsibility on the public trustee

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28 See par 3.2.2 *supra*.
29 See par 3.2.2 *supra*.
30 See par 3.3.3.2 *supra*.
31 See par 4.1 *supra*.
32 See par 4.1 *supra*.
33 See par 4.1 *supra*.

to develop a NWRS. In terms of the Act, the NWRS was drafted and published. This extensive document now provides water managers with strategies, objectives, plans, guidelines, procedures and institutional arrangements for the proper management of the water resources of South Africa.[34]

Research indicated that the inclusion of the concept IWRM within the NWRS determines the scope of the responsibilities of the public trustee.[35] It was indicated that, in terms of IWRM, the public trustee must take all the natural, social, economic and political environments into consideration when managing the nation's water resources.[36]

With the examination of the concept of IWRM it became clear that while the overall control over the nation's water stays centralised under the public trusteeship of the national government,[37] the administration of IWRM is decentralised, which constitutes the two cornerstones of IWRM. The two cornerstones of IWRM were recognised as "institutional structuring" and "catchment management".[38]

Research indicated that these decentralised water management institutions can be found within the three different spheres of government.[39] Other water managing institutions were also identified that are accepted to be organs of state, but research indicated that they do not form part of one of the three spheres of government. These "other water management institutions" can be sub-categorised under the two categories of *Water Resources Regulators and Developers* and *Services Providers*. Water Resources Regulators and Developers consist of Catchment Management

34 See par 4.2 *supra*.
35 See par 4.3 *supra*.
36 See par 4.3 *supra*.
37 See par 4.3.1 *supra*.
38 See par 4.3 *supra*.
39 *Re* national sphere, see par 4.3.1.1 *supra*; *re* provincial sphere, see par 4.3.1.2 *supra*; *re* local sphere, see par 4.3.1.3 *supra*.

Areas (CMA's) and bodies that implement international agreements. On the other hand, Services Providers consist out of Water Boards, Water Services Committees, Water User Associations[40] and Private water services providers.

Attention was drawn to the fact that, through these institutions, the public trustee is occupied with the notion of water-use licensing[41] and administrative decision-making.[42] The study showed that the concept of IWRM can be regarded as the public trustee's legal framework wherein these responsibilities of administration can effectively be executed.

6.2.4 The impact of the public trust doctrine on the people of South Africa

The research indicated that the concept of public trusteeship impacted greatly on the people of South Africa. This was seen in chapter 5 *supra*, where the need was articulated that the public trustee must focus on IWRM as a legal framework within the South African water law. The objectives of IWRM were examined and the impact of its effective execution was scrutinised.

With the examination of the aim of IWRM, five vital components were identified that define the scope and content of the public trustee's responsibilities to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled to benefit the people of South Africa.

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40 See Ch 8 of the NWA. Gildenhys *Butterworths Property Law Digest* 2. Stoop "Water" 289. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 734; Francis 2005 *The Georgetown Int'l Envtl Law Review* 165-166.

41 See par 4.3.2.1 *supra*.

42 See par 4.3.2.2 *supra*.

The five components that were identified and examined were, firstly, the usage of water resources for the livelihoods of the people of South Africa. The second component was the conservation of water resources to sustain its functions for future generations. Thirdly, the component of social equity was examined, whereafter sustainability was recognised as the fourth component. The fifth and last component of IWRM was recognised as the aspect of economic efficiency.[43]

The study further indicated that the public trustee executes its public trust duty through applying the legal framework of IWRM, when it facilitates the improvement of livelihoods, conservation, social equity, sustainability and economic efficiency.

Research showed that, through the concept of public trusteeship, livelihoods of South Africans can be improved through the redistribution of land, which is connected to water as natural resource. This will lead to the fact that black people will have the opportunity to become subsistent farmers in their own right.[44] With the examination of water conservation, it was indicated that the planning of water supply for the poor is a big part of water conservation.[45] The third component of IWRM, that of social equity, was addressed through the examination of the right to have access to sufficient water.[46] The aspect of water sustainability received attention through the approach of attending to the present and future needs of the people.[47] It was indicated that economic efficiency through commercial farming can lead to the maintenance and increase of food production and the creation of employment in the black population of South Africa.[48]

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43 See par 5.1 *supra*.
44 See par 5.2 *supra*.
45 See par 5.3 *supra*.
46 See par 5.4 *supra*.
47 See par 5.5 *supra*.
48 See par 5.4 *supra*.

6.3 *Answering the research question and attaining the primary objective of this dissertation*

The research question that constituted both the foundation and centre of this study was to what extent the statutory incorporation and practical application of the concept of public trusteeship impacts on the South African water law regime.

In conclusion, a concise answer to the research question would be that the statutory incorporation of the concept of public trusteeship changed the foundation of the South African water law dispensation in totality: It has been indicated that the concept of public trusteeship attributed a fiduciary responsibility to the national government (as public trustee) to regulate South Africa's scarce water resources to the benefit of the general public (the beneficiary).

In this regard, it should be emphasised that the concept of public trusteeship unites the nation as beneficiary. "We", as the general public or the beneficiary, now have the authority to ensure that the state (as public trustee) regulates the water resources of South Africa to "our" advantage. Hence, the united beneficiary, together with the judiciary, must see to the effective enforcement of the reformed and beneficial water regulation by the national government.

In the practical sense, it can thus be indicated that *through* the concept of public trusteeship, the livelihoods of the people of South Africa can be improved, water conservation can be pursued, social equity can be promoted, sustainable development can be realised and a shift to economic efficiency can be attained, to the benefit of the nation.

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