A STRUCTURAL ANALYSIS OF THE WATER ALLOCATION MECHANISM OF THE WATER ACT 54 OF 1956 IN THE LIGHT OF THE REQUIREMENTS OF COMPETING WATER USER SECTORS

with special reference to

THE ALLOCATION OF WATER RIGHTS FOR ECOBIOTIC REQUIREMENTS

and

THE HISTORICAL DEVELOPMENT OF THE SOUTH AFRICAN WATER LAW

by

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ABSTRACT

Current water legislation does not provide protection for ecobiotic water requirements, and neither does it contain sufficient measures for the sustainable conservation of water as a scarce resource. This lack of statutory protection can no longer be afforded, because it is assumed that environmental elements are interdependent, and that neglected conservation measures with respect to one of these elements, may harm the entire environmental cycle. During a case study of the Letaba river system in the Eastern Transvaal, it was realised that very little protection exists for ecobiotic water needs, and that little more than moral condolence will ensure prolonged water supply for natural ecosystems during drought conditions. This conclusion necessitated a critical analysis of the legal system in terms of which water rights are allocated in the South African law. In order to do this analysis, the historical development process of the South African water law was investigated, and the main tendencies followed in the Roman and Roman-Dutch law systems, as well as the principles of water allocation which had been adopted into the South African system by the courts and the legislature, were critically analysed. This investigation was followed by an analysis of the current water allocation mechanism of the Water Act 54 of 1956, to indicate the lack of basic principles which could form the basis of an allocation system aimed at the protection of the environmental network of interdependency, as described. This study was followed by proposals for fundamental principles to form the basis for revision of the South African water law, in order to create a system of water allocation which accommodates the water requirements of all user sectors in a balanced and equitable way.

OPSOMMING

Bestaande waterwetgewing voorsien nie genoegsame beskerming vir die waterbehoeftes van ekobiota nie, en nog minder bevat dit voldoende maatreëls vir volgehoue bewaring van water as 'n skaarser wordende hulpbron. Hierdie gebrek aan bevredigende statutêre beskerming kan nie langer bekostig word nie, omdat daar veronderstel word dat die omgewingselemente interafhanklik is, en dat verwaarloosde bewaringsmaatreëls met betrekking tot een van hierdie elemente die omgewingsiklus in sy geheel mag beskadig. Gedurende 'n gevallestudie van die Letaba rivierstelsel in die Oos Transvaal het dit geblyk dat daar baie min regsbeskerming vir ekobiotiese waterbehoeftes bestaan, en dat weinig meer as morele besorgdheid sal sorg vir volgehoue watervoorsiening aan sulke natuurlike stelsels gedurende ernstige droogtetoestande. Dit kan nie bekostig word nie, en hierdie gevolgtrekking het 'n kritiese ontleding van die regstelsel in terme waarvan waterregte in Suid Afrika toegedeel word, genoodsaak. Om hierdie analise te kon doen, was dit nodig om die geskiedkundige ontwikkeling van die Suid Afrikaanse waterregstelsel te ondersoek, en om die hoofstrome en neigings waarvolgens die Romeinse en Romeins-Hollandse waterregstelsels ontwikkel het, asook die beginsels wat in die Suid Afrikaanse waterreg oorgeneem is, te analiseer. Hierdie ondersoek was gevolg deur 'n ontleding van die toedelingstelsels wat in die Waterwet 54 van 1956 vervat is, om die gebrek aan basiese beginsels wat die basis kan vorm van 'n toedelingsmeganisme gemik op die beskerming van die interafhanklike omgewingsnetwerk, aan te dui. Hierdie studie was op sy beurt gevolg deur voorstelle vir onderliggende beginsels vir die hersiening van die Suid Afrikaanse waterreg, om sodoende 'n stelsel van watertoedeling te skep wat die waterbehoeftes van alle gebruiksektore in 'n gebalanseerde en regverdige wyse akkommodeer.

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ABBREVIATIONS AND EXTRAORDINARY TERMINOLOGY

acre	0,4047 hectares
cumec	cubic metres per second
cusec	cubic feet per second (while 35,31 cusec = 1 cumec)
C	*Codex Justiniani*
D	*Digesta Justiniani*
Fanie Botha dam	Now Tzaneen dam
gallon	4,564 litres
GEP	General Environmental Policy
GG	Government Gazette
GN	Government Notice
GNP	Gross National Product
IUCN	International Union for the Conservation of Nature
lcd	Litres per capita per day
MAR	Mean Annual Runoff
morgen	0,8565 hectares
morgen foot	2 611 square metres
Park	Kruger National Park
WP	White Paper

CHAPTER V

THE WATER ALLOCATION MECHANISM

"The use to be enjoyed is not a mere reasonable use consistent
with similar rights in other owners, but a use
not in excess of the reasonable requirements
for primary and secondary use"

THE ALLOCATION MECHANISM

INTRODUCTION

Rights in respect of the use of water are contained in the Water Act, and depend on whether the water is public or private, and, in the case of public water, whether the water source is within or outside one of the control areas which may be declared in terms of the act. Within government water control areas, the minister is empowered to suspend existing water rights and re-allocate rights of use to specified lawful users for specified lawful purposes of use. Outside such areas, water rights must be exercised according to the provisions of sections 9 and 10 and in reasonable common use, subject to state control in the public interest, which control (mainly during drought conditions), is exercised by the minister and the water court.

Ecobiotic use does not feature as a lawful water user sector either within or outside control areas, although ecobiota increasingly demands statutory recognition in the water allocation mechanism.

In an attempt to revise the management system of water and the rules which apply to its allocation in order to acquire a more fair and balanced system, it will be necessary not only to supplement the existing allocation mechanism, but in fact to thoroughly reconsider the spectrum of lawful water users and the functions of administration authorities, and to restructure the very system of apportionment.

In this chapter, the lawful water users to which the allocation mechanism of the act applies, will be discussed first. Secondly, the function and administrative discretion of the main administrators of the act, being the minister and the water court, will be evaluated in the light of the needs of the various water users. Thirdly, the nature and extent of rights of use which may be legally vested in respect of the different types of water (ie. according to its legal status) will be analysed and evaluated.

CHAPTER V.I

USER SECTORS

"Water is scattered over the face of the earth in
rivers, lakes etc, for the use of animals and vegetables"

De Villiers CJ

Hough v Van der Merwe 1874

CHAPTER V.I
USER SECTORS

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WATER USER SECTORS

1.1. INTRODUCTION

The emphasis of this study rests not only on the nature of the South African water allocation mechanism, but also on the suitability of this system to the competitive demands of a large variety of water user sectors. While the earliest South African water legislation was aimed mainly at irrigation as the most important water user sector, the interests of urban and industrial water users, and in some cases "other" unidentified users, have been accommodated to a debatable degree of sufficiency in the Water Act. Irrigation was however still regarded as the more important of these users,[1] and still enjoys preferential treatment as far as the statutory allocation mechanism is concerned. Currently, the public interest requires a water allocation mechanism which recognises the water requirements of all water user sectors. Man is moreover dependent on a healthy environment, which necessitates provision for the water requirements of environmental elements, as well as the conservation of water as a renewable resource in its natural cycle.

1.2. HISTORICAL BACKGROUND

1.2.1. Roman law

It has been said supra that consumptive use of water played a subordinate role in Roman water law. Navigation and fishing were the main purposes to which rivers were applied. Consumptive users were however entitled to reasonable common use of running water,

[1] This is not altogether without merit, because irrigation uses more than 50% of available water.

and no apportionment was done, although the praetor had the power to issue interdicts to ensure peaceful common use.

Although the Roman territory was relatively arid, a lack of technological skill regarding large-scaled water abstraction and irrigation,[2] as well as a relatively small population, saved the natural running water sources from over-utilization, and negated the necessity for strict consumptive control.

The water user sectors which enjoyed recognition, were not restricted to those who could utilize water for economically beneficial purposes, but water was available in reasonable rights of use to each and all in need of it in terms of the *ius naturale*.[3] This meant that water belonged to each and all who needed it for survival. This was irrespective of the purpose of use, ie. whether the water was needed for irrigation, domestic use, stock watering, urban use, industrial use, navigation, fishing or ecobiotic use. Although, due to a lack of conservation awareness, the environment (and thus natural ecosystems) did not enjoy express recognition as a lawful water user sector, ecobiota should in principle not be denied sufficient water, because that would interfere with the principles of natural justice of the *ius naturale*.[4]

1.2.3. Roman-Dutch law

In Holland, water was described as being rather a nuisance than a scarce strategic resource, and due to its abundance, peaceful common consumptive use was not a problem or a source of dispute. Once again, navigation and fishing, both being non-consumptive purposes of use, were the main causes of user disputes, and the water law

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[2] Not to deny their skill in interbasin transfers, by way of aqueducts.

[3] The *ius naturale* was a system in terms of which laws were based on simple justice and equity (vide Chapter III.I and Chapter VI).

[4] Uys "Natuurbewaring" 384, 390, 398.

revolved around peaceful common utilization of the navigable and perennial rivers for these purposes.

The Roman law principle that running water was available for reasonable rights of consumptive use, was taken over in Roman-Dutch law, yet little governmental control was enforced to acquire peaceful common use. What was however different, was the variety of users entitled to water rights :

The role of the *ius naturale* in the water law was no longer advocated by Roman-Dutch jurists. Instead, it was said that water belonged not to each and all in need of it according to the *ius naturale*, but to the civil community of Holland, or even to the kings. This meant that not only were foreigners excluded from water rights, but non-human users, such as natural ecosystems, as well. This, ironically, happened while a gradual awareness of environmental conservation started to develop.[5]

The transfer of water to the class *res publicae* from *res communes* (where it had been sorted in terms of the Roman law classification of things), confirms a viewpoint that non-human user sectors were in principle no longer entitled to water rights.

1.2.4. South African law

1.2.4.1. Pre-codification

In earliest South African law, water was not classified in the law of things, but was available for common use by all inhabitants. Both permanent inhabitants and the sailors who regularly put in at the harbour, could use it for washing and drinking. The Cape had a few perennial streams, but these were not comparable to the navigable waters of Holland. Inland water use was mainly for consumptive purposes, and fresh water was

[5] Eg. Van Leeuwen *RDL* 2 3 6. Vide Uys "Natuurbewaring" 384-385.

rather used for domestic and agricultural purposes than for fishing and navigation. This was caused by the relatively low precipitation in the summer months and the fertile soil and favourable conditions for the growing of fruit, maize and vineyards.

Disputes amongst irrigators regarding the use of water in the local streams have occurred since the earliest years, and the government (the Political Council) arbitrated disputes or allocated turns of use. This was the beginning of the struggle for irrigation water which still continues. Technological development and increased irrigation development gradually caused increased pressure on the water resources, and thus caused over-utilization and increased disputes. This, in its turn, necessitated increased state interference in an attempt to obtain peaceful common irrigation from the inland rivers and streams. Water was never declared to belong to either the state or any specific user sector, but irrigation, being an ever-increasing water consumer, turned out to be the main user sector.

The cases which came before the supreme court[6] were mainly irrigation disputes. Due to a lack of technological know-how,[7] these were brought mainly by riparian irrigators. This caused a judicial viewpoint to take root that running water, being *communia*, belonged not to everybody, but to riparian owners only.[8] Bell J, in the case of *Retief v Louw*,[9] was responsible for this viewpoint. Although he based the view that water belonged to all in common, on natural law, he restricted these users to whom it so belonged, to riparian owners. It was argued supra that this conception was partly taken

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6 This was after this court had replaced the Landdrost and Heemraden (in 1828) as far as water questions were concerned.

7 ie. to transfer water over great distances to irrigate far-removed lands, which process was assisted by the development of technology concerning electricity.

8 Vide Chapter III.III supra.

9 1874 4 Buch 165.

over from Anglo-American law, where riparian owners owned the water passing their land.[10]

In *Hough v Van der Merwe*,[11] water was said to belong in rights of use to "every individual of the nation", which creates the idea that water was available for human use only. But it was based inter alia on a passage from *Linlithgow v Elphinstone*,[12] where water was said to belong to "animals and vegetables".

Riparian owners, who thus represented the only lawful user sector, were entitled to use water for the maintenance of animal and vegetable life, as well as for mechanical appliances. This preferential order remained the basis for the subsequent water allocation mechanism. In principle, this could be regarded as a recognition of all water needs, whether human, non-human or mechanical, ie. irrigation, domestic, urban, industrial, stock-watering and ecobiotic.[13] But in the course of time, this wide interpretation of the recognised user sectors was restricted, so as to only include agricultural, domestic and industrial uses, which excluded natural ecosystems from the acquisition of water rights.[14]

1.2.4.2. Codification

The idea that riparian owners were the only water users entitled to water rights, was taken over in legislation, and the purposes of use recognised by the early water laws were

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[10] The concept of *res communes* was received from Roman law, yet the subjacent principle of the *ius naturale* was not incorporated in its full meaning.

[11] 1874 4 Buch 148.

[12] 3 Kame's Dec 331.

[13] This is confirmed by a distinction recognized in *Hough v Van der Merwe* 1874 4 Buch 148 between ordinary and extraordinary use, where extraordinary use included all other uses besides animal life and household purposes. Vide Chapter III.III supra.

[14] *Assembly Debates* 5 June 1956 7252 : *"Dit is 'n baie duideliker en eenvoudiger verdeling as die ou verdeling"*.

irrigation, domestic and industrial uses. Although the concept that water was freely available for "the maintenance of animal and vegetable life", was retained, it seems that it was not intended to refer to ecobiotic water requirements, but to crop and stock requirements only (ie. as the property of riparian owners). In the 1912 act, water rights were clearly restricted to human use, specifically for domestic, irrigation and industrial use by riparian owners. These user sectors were not equally entitled to water, but could use water in a preferential order of use. Little remained of the Roman water law principles based on the *ius naturale,* in terms of which water belonged to each and all in need of it in rights of reasonable use. Irrigation was regarded as the main user sector, around which the allocation mechanism revolved.

1.2.5. The Water Act 54 of 1956

An attempt to statutorily recognise more user sectors than irrigation alone, was made by the legislature in 1956.[15] In terms of the Water Act, the normal flow of public water outside control areas, is available for riparian owners in reasonable shares for urban and agricultural purposes. Urban use is defined as, inter alia, use for purposes for which water is ordinarily used by a local authority or its inhabitants, including use for domestic purposes or for water-borne sanitation or the watering of gardens, watering or cleaning of streets or for industrial purposes. Agricultural use is the use of water for the irrigation of land, including use for domestic purposes or water-borne sanitation or the watering of stock or gardens.[16] There are thus few human water requirements excluded from these uses which are recognised by the act in respect of normal flow. Surplus water is available for beneficial domestic purposes, stock watering, agricultural and urban purposes.[17] These uses do not, in the light of the definitions of agricultural and urban use, differ from the uses to which normal flow may be applied.

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[15] The Water Act 54 of 1956. Vide *Assembly Debates* 5 June 1956 7247; Hall *Commission* 3. The name of the Act indicated that irrigation was no longer the cornerstone of the water law.

[16] Section 1.

[17] Section 10.

Although the use of normal flow and surplus water for industrial purposes is allowed,[18] water may not be used as such, unless permission has been obtained from the minister or water court. The minister may authorise the application of a water right, which has been obtained for agricultural purposes, for animal feeding, power development, the winning or washing of sand, gravel or stone, or the breeding of fish or any other mollusc.[19] The water court may authorise the use of agricultural water for any purposes which it may determine, on riparian land or elsewhere.[20] In terms of section 11(2)(b), the water court has to consider the public interest prior to allocating water as such.[21] The minister is entitled to allocate impounded water for any purposes. It is significant that *ex lege* water rights accrue to urban and agricultural users only, while all other users have to obtain authorization from the minister or the water court.[22]

Within control areas, the preference of irrigation as a water user is rather clear. In a government water control area, the minister has to determine the quantity of water which, on a basis of consistency, will be available in a public stream and then allocate such water for irrigation according to a specified formula.[23] Only water which incidentally occurs in excess of this quantity during a certain year, may be allocated to other users.[24] These users include urban, industrial or other purposes. Because the minister is bound to the public interest when allocating the water,[25] it is submitted that the Roman law principle of justice should be applied here, which means that it will be

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18 Sections 9-10. Vide the definition of "urban use" in s 1.

19 Section 11(1A)(a).

20 Section 11(2)(a),(b)(i).

21 Vide Chapter VI infra.

22 In terms of s 56.

23 Section 62.

24 Section 62(2I).

25 Section 59(1)(b).

contrary to the public interest to overlook any water user in need of water, irrespective of the purpose of use.[26] Yet the minister has a free discretion as to what the public interest is, and whether allocation is in the public interest. It is a subjective test.

The provisions of section 63 are aimed specifically at the apportionment of water which is impounded in government water works, for purposes of irrigation. Any water demands in respect of impounded water for purposes other than irrigation, are to be met in terms of the minister's discretion to apportion such water in terms of section 56(3). Water so allocated, can be awarded to any person for any purpose approved by the minister, to be used at any place. It is significant that the minister is not expressly bound to the public interest in this instance. The probable reason is that the minister is exercising rights of ownership, and not merely an administrative function.

Once again, non-irrigation user sectors are not entitled to rights in terms of the *ex lege* allocation mechanism, and the minister will allocate section 56(3) water rights *on application* only, and not in terms of his statutory function.

It therefore seems as if urban and agricultural use[27] are the main water user sectors in terms of the Water Act, and the statutory allocation mechanism is aimed at the apportionment of water for these users. The minister and the water court however have the discretion to allocate water to other user sectors on application as well. These users are however "secondary" claimants to water,[28] and are to be considered when there is an excess of water which can be apportioned.

In spite of the importance which is attached to irrigation during water allocation within control areas, a preferential order of use of normal flow outside such areas exist, which

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[26] Vide Chapter VI infra.

[27] In terms of the definition in s 1, urban use includes industrial use.

[28] ie. they have no *ex lege* water rights.

is aimed at the protection of domestic water requirements, ie. washing and drinking and stock-watering.[29]

In practice, the emphasis on water for irrigation has been phased out, and other user sectors (which are not always identified) have been recognised during water allocation. When water is impounded, the capacity of the dam which is to be constructed is divided into quantities which will be allocated to all the various user sectors, and lodged with the White Paper during the planning phase. Although the act thus prescribes that only irrigation water is to be determined, and that the minister may, on application, allocate excessive water to other users, these users currently enjoy equal status during allocation.

Moreover, section 9A emergency procedures (ie. the suspension or re-allocation of water rights) are applied for the benefit of water user sectors other than those expressly recognised in the statutory allocation mechanism.[30]

Nowadays, nature conservation, forestry, dry agriculture, power generation, mining, and the water requirements of lakes and estuaries, are recognised as user sectors which ought to be considered during water allocation, additional to urban, industrial and agricultural water users.[31] This recognition of a wider variety of water users than those specified in the act, had been initiated by the Commission for Water Matters in 1970, which recommended that water had to be distributed fairly between all the sectors of the nation.[32]

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[29] Section 9(1)(c).

[30] Vide Uys "Drought management" 274 et seq.

[31] Vide the draft policy of the Department of Water Affairs *Water for managing the natural environment.*

[32] This had in fact already been initiated by the Hall Commission, but the proposed act nevertheless recognised three purposes only.

1.3. WATER USER SECTORS

1.3.1. Urban use

The use of water for urban purposes constitutes some 16% of total water use,[33] and grows at a rate of approximately 5% per annum, which means that, by the year 2010, the demand will have doubled.[34] This is due to the population growth, as well as an increase in the standard of living.[35] The Department of Water Affairs endeavours to provide the full domestic water demand for 98% of the time in urban areas, which explains why domestic use is given statutory priority in terms of section 9(1)(c) of the act.[36] The same goal is strived at in the supply of industrial water, yet the use of water for industrial purposes is subject to several qualitative and quantitative control measures.[37]

1.3.2. Strategic industries

Strategic activities such as power generation and the production of liquid fuel,[38] enjoy the highest priority as far as the supply of water is concerned, ie. an attempted 100% for 100% of the time.[39] The reason is that a dearth of water supply for these purposes could have a major effect on the economy in South Africa. The water demand for this user sector is expected to double in the next 20 years, to a required 900 million m^3 per

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33 Fuggle & Rabie 651.

34 Department of Water Affairs *Management of Water Resources* 2.31, 2.45, 2.10 et seq, 2.3 - 2.5. Currently the demand is about 3 700 million m^3 per annum.

35 eg. the use of flush toilets, due to urbanization and better technology (PC 1/1991 34).

36 This does however not apply to black rural areas, squatter camps etc.

37 Conley 5.

38 The range of strategic activities is not fixed yet, and under continuous review (Fuggle & Rabie 629).

39 Department of Water Affairs *Management of Water Resources* 2.12; Conley 5-6; PC 1/1991 34-35. Strategic activities require only 9% of total water use (Fuggle & Rabie 652).

annum, at a growth rate of 5% per annum.[40] Its increase is directly related to an increase in population, urbanization, the quality of living and development in technological know-how. This is counteracted by economic depression and increased poverty.

1.3.3. Mining

The quantitative water demand of the mining sector is said to be relatively low,[41] although it can have a major detrimental qualitative effect on the water resources.[42] Because of its economic importance, it is endeavoured to supply water at a high rate of assurance. The current water demand of approximately 500 million m^3 per annum is expected to increase to 600 million by the year 2010, which will represent a constant yet low growth rate of 1,5% per annum.[43]

1.3.4. Stock-watering[44]

This user sector, of which the water demand is relatively low,[45] currently requires approximately 290 million m^3 of water per annum, which will probably increase to 360 million by the year 2010. This represents a growth rate of 2% per annum. The

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40 Department of Water Affairs *Management of Water Resources* 2.12.

41 Approximately 3% (Fuggle & Rabie 652). (Cf Department of Water Affairs *Management of Water Resources* 2.4, 2.5). Moreover, water is saved by recycling and the use of effluent.

42 Department of Water Affairs *Management of Water Resources* 2.14; PC 1/1991 35; Conley 6.

43 Department of Water Affairs *Management of Water Resources* 2.4; 2.5.

44 Et vide Fuggle & Rabie on aquaculture, 652.

45 Approximately 1,4% of the total water demand.

President's Council recommended that underground resources ought to be investigated to supply this demand.[46]

1.3.5. Afforestation

Forestry does not require water to be diverted or abstracted from public water resources, but intercepts precipitation, which would have contributed to the run-off in public streams. Precipitation is regarded as private water in terms of the Water Act,[47] and therefore an owner is entitled to afforest his land, irrespective of the effect thereof on the run-off in streams lower down. Because forests are highly dependent on rainfall, afforestation is being practised in high-rainfall areas, which often happen to be mountain catchments. This, depending on the density of such plantations, could reduce the run-off in rivers which originate in these catchments, with up to 60%.[48]

Complaints regarding the effect of afforestation on run-off have been heard since 1915,[49] until, in 1968, an Interdepartmental Committee of Investigation into Afforestation and Water Supplies was appointed. This committee suggested that a permit system for afforestation should be established, which was introduced in 1972, and managed by a Central Afforestation Permits Committee.[50] This system functions closely in conjunction with the system which exists in terms of The Conservation of Agricultural Resources Act,[51] which provides that the cultivation of virgin soil and certain slopes and river banks are controlled by a permit system.

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46 PC 1/1991 36. The Water Research Commission is currently undertaking an in-depth investigation in order to establish a proper data-basis of all ground water resources in the country.

47 Section 1 "private water".

48 Department of Water Affairs *Management of Water Resources* 2.21 et seq; PC 1/1991 36; Anonymous *Bosbounuus* 3.

49 Afforestation commenced in 1875 in South Africa.

50 This was in terms of s 7 of The Forest Act 122 of 1984.

51 Act 45 of 1983.

The conflict between agriculture and forestry has however not as yet been settled, and a strategy to address this friction is currently receiving attention. The contribution of forestry to the gross national product is 25% of that of agriculture,[52] which is said to justify its water demand. Forestry uses approximately 7% of the total water demand, although indirectly, ie. by intercepting the run-off.[53] Moreover, to meet anticipated demand, the afforested area ideally has to be increased by 250%. On the other hand, the demand for agricultural produce is increasing at a similar rate, yet the Commission of Enquiry regarding Water Matters of 1970 recommended that the development of new irrigation projects be in accordance with socio-economic considerations, the costs and benefits thereof, available water and alternative uses thereof, and alternative means to supply produce. The reason was that water was relatively scarcer than irrigable land.[54] Although no similar recommendation was made in respect of forestry, a reduced development policy has been accepted in respect of afforestation. This was the result of the findings of an Interdepartmental Commission, and it was also in accordance with the Forestry Guidance Plan (1984) in terms of which afforestation development will, as far as possible, be limited to low-conflict catchments.

Restrictions in respect of forestry development in terms of the Water Act will, unless the distinction between public and private water is abolished, necessarily contradict the very reason for the distinction, ie. that an owner is free to use private water which falls on his land, solely and exclusively. It is submitted that a satisfactory solution to the conflict of interests can be situated only in an interdepartmental water source or catchment management system.

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[52] ie. some 7% of the gross national product, viz. R1 050 million per annum in 1981/2, while agriculture contributes some R4 300 million.

[53] Department of Water Affairs *Management of Water Resources* 2.4.

[54] Department of Water Affairs *Management of Water Resources* 1.44; 2.16-17.

1.3.6. Irrigation

Formal irrigation from the fresh water streams in South Africa commenced in 1657, when the *Vryburgers* received land along the banks of the Liesbeek river.[55] Until then, food supplies were obtained from Holland, because the Cape was originally intended to be a mere trading-post.

> *"So is ... goed gevonden uijt de personen die haer tot vrijdom aanbieden en dese voornome plaetsen uijt gecosen hebben de navolgende als de bequaemste ende van de beste ope wel wesende, ten eijnde voorsz in vrijicheijt te stellen namentlijk tot de landbouwe genaempt Groene velt..., den Hollantsen thuijn..."*
>
> *"Item niet te min op allerleij aert ende thuijn-vruchten als mede gelijck de bovenste op den aenqueeck van bestrael, verkens, ganse...etc...doch't principaelste ooghmerch van de selve is na Comps intentie op den landbou..."*[56]

This initial development was to become the water user sector imposing the severest pressure on the relatively scarce fresh water resources of South Africa, and the one inducing the majority of water user disputes and eventually the necessity to codify the water allocation mechanism.[57]

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55 Vide Visagie 80; Political Resolution C1 208-215 21 February 1657 : *"Jegenwoordigh verscheijden luijden verstaen hebbende de nader ordre onser Principalen om alhier onder voordelige conditien vrijeluiden te planten, ende daer omme eenige haer tot vrijdom aenbiedende ende bij deselve oock al percelen lants na eijgen sin uijtgecosen wesende, Namentlijck eene partije onder haer vijven 't landt aen d' oversijde van de verse reviere bij ons den name gegeven van den Amstel, beneden recht dwers van't bos, daer onse houthackers leggen, ende bij den crommen boom, omtrent 3 mijlen van't fort, over te gaen soo langh, ende breet, als sij begeere : eenlijck sullende moeten aen d' oversijde van de gemelte revier blijven".*

56 Political Resolution 91. The produce which was intended to be grown, was mainly wheat and fruit.

57 "Agriculture - the great importance of which is indisputable - has always enjoyed the lion's share of our water sources" (Fuggle & Rabie 649).

Irrigation was also responsible for the acceptance of the riparian principle, which has dominated the water law until this day, in spite of various attempts to re-introduce the so-called *dominus fluminis*-system.[58]

The ever-increasing demand for food, as well as increased technological know-how,[59] led to increased irrigation development in the nineteenth and early twentieth centuries, to a point where many strong water sources were eventually over-utilized. This, in turn, led to user disputes, judicial attempts to apportion water, and, eventually, the creation of a fair system for the allocation of water rights. By the end of the nineteenth century, it was regarded necessary to codify the water law for the sake of peaceful common use by irrigators, and various ad hoc laws were enacted to address specific questions. Eventually, irrigation acts were promulgated for the Cape and the Transvaal, and in 1912, the Union Irrigation Act followed. The purpose of the Act was

> *"de konsolidatie van de wetten van twee provinsies en de andere provinsies wetgeving inzake irrigatie te geven ..."*

and

> *"Op de voorgrond moet staan het nut voor de persoon, die van het water gebruik moet maken ter besproeiing van zijn land".*[60]

The act was also aimed at the conservation of water.[61]

Irrigation however remained problematic, due to ever-increasing water demands. Furthermore, urban and industrial expansion increased the water demands of these user

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58 Vide Chapter III.III supra.

59 Such as advanced water pumping methods, large-scaled impoundment and electrical supply. Donelly 29-30.

60 *Assembly Debates* 4 April 1912 6534.

61 *Assembly Debates* 4 April 1912 6534. This also appears from the title of the act, being the Irrigation *and Conservation* of Waters Act.

sectors, and eventually it became necessary to accommodate them in the allocation mechanism, according to their demands. Irrigation could therefore not be regarded as a preferential water user anymore, and it became necessary to develop a management strategy for water resources which would address the needs of a variety of users. This was attempted in the 1956 Water Act, although subject to existing rights, and with due recognition of the fact that irrigation was still the largest water consumer, which provided the largest contribution to the gross national product.[62]

Only in 1970 was it realized that the water resources of the country were unable to support the ever-growing irrigation development,[63] and the Commission of Enquiry recommended that such development be reduced. The result was a reduction in new state irrigation schemes, and emphasis was rather placed on more functional management of existing schemes, a gradual growth in private and irrigation board schemes, and better exploitation of the available water resources.[64] Irrigation water demand is currently approximately 9 500 million m^3 per annum,[65] and it is expected to grow by less than 20% in the coming 20 years, ie. 1% per annum, in comparison to an annual growth rate of 3,43% between 1965 and 1978. Some 1 million hectares of a potential of 1,4 million hectares is currently being irrigated, of which 59% was developed by private bodies.[66]

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62 Vide Chapter VI supra.

63 By 1965, agricultural use represented 83% of the total water demand (Fuggle & Rabie 649).

64 Fuggle & Rabie 650.

65 This is irrigation on 1 million hectares. It is 67% of the total water consumption (Fuggle & Rabie 649). According to PC 1/1991 35, 70-75% of the water is used to irrigate 0,7% of the country.

66 Department of Water Affairs *Management of Water Resources* 2.19.

The contribution which irrigation makes to the gross national product is 25-30%,[67] which is said to be relatively low in relation to its water consumption of 70%,[68] and it is doubted whether exportation is profitable if hidden expenses are calculated.

1.3.7. Conservation and ecobiota[69]

As far as its recognition as a lawful water user sector is concerned, ecobiota (or water for conservation) is the most recent major claimant to accommodation in the water allocation system.[70] Although it is not yet directly recognised in the statutory allocation system of the Water Act, the recent draft policy document of the Department of Water Affairs specifically addressed this demand, and recognised it as a lawful claimant.[71]

The first official recognition of ecobiotic water requirements was done by the Department of Water Affairs in 1986. It was estimated that the then ecological water requirements was 2 700 million m^3 per annum, which would hardly increase in the coming centuries.[72]

In 1991, the Presidents Council, in its report on a national environmental management system,[73] recommended that the Water Act would have to be amended to recognise

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67 Department of Water Affairs *Management of Water Resources* 7.6.

68 PC 1/1991 34. Compared to this, forestry contributes 7% to the gross national product (GNP) and uses 7% of the total water demand.

69 Vide in general Uys "Natuurbewaring" 375 et seq; Uys "Natural ecosystems" 101 et seq.

70 Aquaculture is a further sector which ought to be reckoned (Fuggle & Rabie 652).

71 *Water for managing the natural environment* 2 : "Notwithstanding the weak legal and administrative provisions for allocating water to the natural environment, the Department realizes that a substantial quantity of water is required for this user sector". For this reason, this user sector will be discussed in somewhat more detail than the others.

72 Department of Water Affairs *Management of Water Resources* 2.26; 2.4, 5.

73 PC 1/1991.

water requirements of the environment[74] and of natural ecosystems.[75] This initiative was implemented by the Department of Water Affairs in January 1992, when a draft policy was issued concerning water for managing the natural environment. It was declared that "notwithstanding the weak legal and administrative provisions for allocating water to the natural environment, the Department realizes that a substantial quantity of water is required for this user sector".[76]

According to the draft policy, ecobiotic water requirements encompass approximately 17% of the total water use, estimated at approximately 3 000 million m^3 per annum.[77] This demand ought to be accommodated in the statutory allocation mechanism, which step will follow the results of a Commission of Enquiry which will address the question of water for managing the natural environment. A proper knowledge ought also to be obtained prior to statutory amendment. Until such amendment, the Department will endeavour to draw legislative support for this sector's needs from the general powers of the minister, as specified in section 2(m) of the Water Act.

1.4. CONCLUSION

The number of water user sectors which deserve recognition in the water allocation mechanism, has increased since the original irrigation legislation was promulgated. Moreover, the water requirements of current water users continue to increase, due mainly to population growth and increases in the general standard of living of all South Africans.

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[74] 35, 36.

[75] 170.

[76] *Water for managing the natural environment* 2.

[77] *Water for managing the natural environment* 2.

No longer can any user sector be automatically allocated the lion's share of the country's limited water resources. A proper water management system, in terms of which every user sector is recognized proportionally and according to merits, is necessary to substitute the current statutory allocation mechanism, which is aimed mainly at irrigation. Although agriculture still contributes the major share to the gross national product, recognition ought to be given to the relative burden which users place on the available water sources, as well as to the fact that environmental elements are interdependent. This means that man is part of his environment, and if the water resources and their natural purification and renewal procedures are not statutorily protected, effective long-term water management will not be realized.

CHAPTER V.II

ADMINISTRATORS OF THE ACT

"That water is a wandering thing which cannot be held and measured out like land, only constitutes the reason why other means should be adopted for apportioning it than that suited to the apportioning of lands. There must be continuous and sustained system under Government control for the repeated yearly apportionment and measurement of it; and that system must be a Departmental administration; for there is just as much reason why Government should perform this service as there is that it should perform any service in connection with the survey and recordation of land claims or titles"

W M Ham Hall
1898

CHAPTER V.II
ADMINISTRATORS OF THE ACT

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ADMINISTRATORS OF THE ACT

2.1. THE MINISTER

2.1.1. General powers[1]

The Minister of Water Affairs plays a major role in the administration of the Water Act[2] as far as the allocation of water is concerned, especially within government water control areas.[3] His general powers include the construction of water works, the exploitation of ground water, the development of hydro-electric power, the control of irrigation development, and all other steps which he may consider necessary for the development, control and utilization of water, and for giving effect to the provisions of the act.[4] Hall suggests several more, viz.

> "(i) He has absolute control over all public water within any government water control area in that he is authorized to supply water from the water works in it to any person for use at any place, for any purpose and on any conditions he may see fit to impose. All rights to water which existed in these areas previously are vested in him, and no water can be used unless he authorizes its use by permit.
>
> (ii) He may by proclamation be vested with the control of any irrigation board and of the public water it distributes, thereby converting its water works into government water works.

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1 Vide in general Baxter 80-92, 343 et seq, 404 et seq; Wiechers *Administratiefreg*; Fuggle & Rabie 295-315, Rabie "Diskresies" 419; Boulle, Harris & Hoexter 313 et seq; Rabie & Van Zyl Smit 193, 74.

2 Act 54 of 1956.

3 Such areas are declared in terms of s 59(1).

4 Section 2.

(iii) The use of all underground water in a subterranean water control area is entirely under his control and may only be made with his permission. He may, moreover, take over from its owner, by means of agreement or expropriation, any borehole on private property which has been sunk by a government boring machine, or otherwise found on private property.

(iv) In respect of the water of public streams which are situated outside government control areas, he has been given a considerable measure of control for it is an offence against the provisions of the act to use the water without a permit from him, for -

(a) the construction of any work, or the enlargement of an existing work in which more than one hundred morgen feet of public water could be stored, or by means of which more than four cubic feet of water per second could be diverted from a public stream, and whereby

(b) any local authority is to be permitted to expropriate riparian rights to public water for use in its own area of jurisdiction in excess of one million gallons a day. In this case no penalty is attached to non-compliance.

(v) In respect of private water, the right of a landowner to use such water found on his property and to sell or otherwise dispose of such water for use beyond the boundaries of the land on which it is found is made subject to a permit being issued by him.

(vi) The modification of precipitation by means of which the precipitation of water from the clouds is artificially caused to produce rain is the subject of a new chapter III A of the act. The Minister is in entire charge of any such operations and no-one may undertake them without a permit from him under a penalty of prosecution."[5]

2.1.2. Outside control areas

As far as water allocation outside control areas is concerned, the Minister is empowered to restrict the *ex lege* water rights in respect of normal flow and surplus water.[6] Prior to

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[5] Hall *Hall on Water Rights* 29-31.

[6] Section 9A-9C.

the insertion of these provisions, the Minister had very little control over the allocation mechanism and common use of public water, unless a control area had been declared.[7]

2.1.2.1. Section 9A

Notwithstanding any other provisions or rights in respect of public water, the Minister may, whenever "in his opinion" a water shortage exists or is likely to arise, "in his discretion" from time to time by notice in the Gazette control, "as he in the public interest may deem expedient" and subject to the conditions "as he may think fit", the use of water out of any public stream or natural channel for agricultural, urban or industrial purposes.[8] This section was inserted into the act in 1957,[9] during widespread drought conditions.[10]

The discretion granted to the Minister by this provision has been described as "draconic",[11] and relates to a description of early South African law, where the state was said to be *dominus fluminis*.[12] The Minister may decide whether a current water situation qualifies as a water shortage, or whether such a shortage is likely to arise. He may decide whether, as a result of the shortage, control measures are necessary. He may apply measures and conditions which he thinks fit, and, moreover, decide what the public interest is and whether such measures are in the public interest. In fact, it seems as if the minister's drought management powers are rather all-encompassing.

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7 Et vide Fuggle & Rabie 300.

8 Section 9A(1).

9 By the Water Amendment Act 75 of 1957.

10 Hall *Hall on Water Rights* 68.

11 Director of Water Utilisation (Department of Water Affairs and Forestry).

12 Vide Chapter III.III supra.

The term "public interest" (or "national interest") is frequently encountered in the Water act, but it is never defined. Although the act often leaves it to the discretion of the Minister to decide when a decision is in the public interest, this term is sometimes used as a jurisdictional fact, in order to limit his discretion. The Minister may, for instance, declare a government control area when, inter alia, the use of water in such an area "should in his opinion be controlled in the public interest".[13] He has a sole discretion as to which area should be declared as such. But after such an area has been declared, the water use *must* be controlled in the public interest. During the subsequent allocation of water rights, he is bound to the public interest, and his decision is subject to judicial review. The public interest thus restrict the minister's discretion.[14]

The discretion granted to the Minister by section 9A, is described by Coetzee[15] as "legislative",[16] because it creates binding legal rules. It is however submitted that it is

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[13] Section 59(1)(b).

[14] It is, however, often difficult to distinguish when his discretion is limited by the public interest, and when the decision of what the public interest is, also falls within his discretion. He may, for example, prohibit certain forms of water use "as he in the public interest may deem expedient" (s 9A). This might, on the one hand, mean that he may prohibit such water use as he may deem expedient *after* considering the public interest. On the other hand, it might mean that he may solely decide what prohibition would be expedient in the public interest, in which case the question *what* the public interest is, is also left to his discretion, and is not a jurisdictional fact. Et vide Fuggle & Rabie 301-302.

[15] "Administratiefregtelike owerheidshandelinge" 3-5. Coetzee describes four categories of administrative acts, viz. (i) pure administrative acts, (ii) judicial administrative acts, (ii) legislative administrative acts and (iv) quasi-judicial administrative acts.

[16] According to Coetzee, legislative administrative acts are *"handelinge van die staatsadministrasie waardeur bindende reëls geskep word met 'n algemene werking en wat sy regskrag gewoonlik verkry deur amptelike publikasie"* (4).

rather "quasi-judicial"[17] in terms of Coetzee's classification system, in that the exercising of the discretion seriously impairs existing rights.

Although unnecessarily verbose, the contents of section 9A seems rather simple, in that it empowers the Minister to control the use of public water for specified purposes. It furthermore seems to grant wide-ranging powers, so as to cover almost any action which the Minister may think fit in order to manage water sources in times of drought. The important uncertainty brought about by the terminology of the provision, is *which* water rights the Minister may regulate, and *for which* purposes he may do so.

The wording of this subsection lends itself to at least three possible interpretations :

(i) A first interpretation of the subsection is that the list of purposes of use referred to, viz. agricultural, urban and industrial uses, was specified in order to restrict the Minister in the kinds of water rights which he may impair. As to what the Minister may do after restricting the exercise of these existing rights, it is argued that he may reallocate water rights for any purposes whatsoever as he may think fit in the public interest. He may therefore even allocate water rights to users who have never had rights before.

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[17] According to Coetzee, quasi-judicial administrative acts are "*handelinge verrig deur owerheidsorgane wat die uitoefening van 'n diskresie behels en waardeur bestaande regte, voorregte, bevoegdhede of vryhede van 'n onderdaan ernstig aangetas word of waar hy 'n "legitimate expectation" het om aangehoor te word*". Cf Baxter 344-349, who rejects the term "quasi-judicial administrative action". In the recent appeal court case of *Administrator Transvaal v Traub* 1989 4 SA 731 A, Corbett JA decided that the *audi alteram partem* rule had to be applied where the holder of a right had a legitimate expectation to be heard prior to the execution of an administrative act which will affect him. The court however held that a fine balance existed between the protection of the citizen against unfair state actions, and unnecessary interference with state administration. The difference is however as yet undefined, and it is not clear when a citizen has a legitimate expectation to be heard. Vide Forsyth 388 et seq; Labuschagne 194-195; Raath 128 et seq; Carpenter "Spesifieke nakoming" 126-130; Beukes 150-157; Viljoen 277 et seq; Hlophe "Natural justice" 165 et seq; Hlophe "Legitimate expectation and student cases" 591 et seq; Robertson 157-163; Barrie 169-173.

(ii) A second possible interpretation of the subsection is similar to the first as far as the rights which may be affected are concerned, but it is argued that the Minister is restricted in his discretion by the words "control, regulate, limit or prohibit". He may therefore not disregard existing water rights or reallocate rights, but he may control the way in which existing water rights are exercised by the holders thereof.

(iii) In terms of a third possible interpretation, the purposes of use listed in the provision were so specified in order to restrict the minister's discretion as far as the purposes *in favour of which* he may control water use are concerned. He is therefore entitled to regulate *any* lawful water rights, even if they fall outside the scope of agricultural, urban or industrial purposes. He may however only regulate or control or limit or prohibit it in favour of the three purposes mentioned. This means that even if other rights exist, the Minister may prohibit the continued exercise thereof, and allocate all the available water for the benefit of the three specified purposes. In terms of this interpretation, agricultural, urban and industrial purposes are seen as emergency uses, to which all others are subject in times of scarcity.

This seemingly technical dispute as to the correct interpretation of section 9A, could be of importance, especially for users not recognised by the general terms of the act, and who usually have to rely on the discretion of the water court in the public interest, in order to obtain water rights.[18]

Example

An example of such a user sector is ecobiota. To illustrate this, a topical example, viz. that of the Sabie river in the Eastern Transvaal, will be discussed briefly.

[18] Section 11(2)(b).

The Sabie river is described as a relatively undisturbed river,[19] which originates on the escarpment in the area of Graskop and Sabie in the Eastern Transvaal, and passes through the territories of Lebowa, Kangwane, and Gazankulu, as well as through the Kruger National Park (where it is joined by the Sand river) before entering Mozambique and joining the Incomati river. No control area[20] has been declared for this river, and neither has any major impoundment taken place in its course.[21] Some irrigation[22] and forestry[23] is practised on its banks. The river has been relatively free of major disputes in the past, due to its perennial and rather strong low-flow during winter months.

In terms of the Water Act, a riparian owner is entitled to the reasonable use of his share of the normal flow of a public river.[24] A share is either obtained from someone else, or determined by the water court in terms of the criteria set out in section 52 of the act. It therefore seems as if no *ex lege* water rights exist, and that a person has to apply for a right to be entitled to use the normal flow of a public stream. This does however not represent the practical situation, where riparian owners readily make use of what they deem to be their reasonable shares, and do not approach the court unless in cases of disputes.[25] Although valid criticism can therefore be raised against the practical application of section 9(1), and although it can be submitted that the use of normal flow without an apportionment is illegal, this argument deserves a separate discussion, and for purposes hereof, the use made of such water in practice, will be deemed to be legal use.[26]

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19 Disturbance is measured in terms of human development (O'Keeffe Report 131 24 et seq). According to a catchment study which had been undertaken in respect of the Sabie river by Chunnet, Fourie and Partners (1990), the river bears a general Class 4 conservation status in terms of the TPA six-point classification system.

20 In terms of ss 28 and 59 of the Water Act.

21 Four irrigation districts however exist, as well as several private impoundments in terms of s 9B(1) permits. The only government water work is the Da Gama dam in the White Waters spruit, which serves the White Waters Main Irrigation district with irrigation water.

22 8 445 hectares of irrigated land.

23 72 100 hectares of afforested land.

24 Section 9(1).

25 Hall *Hall on Water Rights* 59. Even then, owners tend to rather refer disputes to the Department of Water Affairs, probably due to financial reasons.

26 Vide Chapter V.III infra.

Section 9 restricts the purposes for which riparian owners may use water, to agricultural and urban purposes. To become entitled to use such water for any other purposes, a water court order has to be obtained.[27] As far as the Sabie river is concerned, no such an order has been obtained under the 1956 act, although a similar court order, authorizing use for the generation of hydro-electric power by the owners of the farm Lisbon,[28] has been issued under the 1912 Irrigation Act. As far as the Kruger National Park is concerned, the use of water in rest camps does not qualify as urban use[29] and neither does ecobiotic use[30] of water qualify as agricultural use.[31] For the Park to therefore obtain water rights in respect of the water of the Sabie river, an application must be lodged at the water court in terms of section 11(2)(b)(ii). This has never been done, and the conclusion is that no water rights in respect of the water of the Sabie river currently exist in favour of the Kruger National Park. There is however a servitudal condition in terms of which the upper riparian owners of the farm Lisbon are bound to allow a constant stream of water of 1,98 cumec to pass over their weir, for use within the Park.[32] The validity of this right is however questionable, mainly because rights to use the normal flow of public streams (even rights acquired from others), may only be used for agricultural and urban purposes.[33]

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27 In terms of s 11.

28 Registration Division 297 KU Transvaal.

29 Vide the definition of "use for urban purposes" in s 1 of the act, where the existence of a local authority is required.

30 Vide Uys "Natural ecosystems" 103 for the meaning of this term.

31 Section 1 "use for agricultural purposes".

32 D 7748/33 dated 1954-12-20. The servitude of storage and abutment was registered in terms of ss 104 and 105 of the 1912 act.

33 Section 9(1). It was recently submitted by the Circle Engineer of the Department, in a report on the Sabie river situation, that this servitudal condition is no longer valid : in the relevant clause contained in the servitude, the South African Railways, as well as the rest camps Skukuza and Lower Sabie, were appointed beneficiaries of the condition. But, first, the railway is no longer operative in the Park, and secondly, rest camp use does not qualify as lawful water use in that it does not comply with the definition of "use for urban purposes" (vide n 29 supra). A third argument against the validity of the condition, is the existence of a permit in terms of section 9B(1), in favour of the farm Belfast (Saringwa Estate), an upper riparian owner, which was issued in 1980. In terms of a condition of this permit, a minimum of 1 cumec must "at all times possible" be released past the point of abstraction from the water work. This means that there will not necessarily be 1,98 cumec at the Lisbon weir which can be released to the Park. The inability to comply with the condition contained in the servitude, raises further doubt as to the validity thereof. On the other hand, it can be asked whether water released from a dam still qualifies as "public water", a "public stream" or

The situation on the banks of the Sabie river is thus that riparian owners withdraw from the river what they regard to be a reasonable share for urban and agricultural purposes, while other user sectors use what is left of the normal flow. There has never been a scarcity of water which forced the users to request a declaration, apportionment or allocation of rights.

The flow of the Sabie river had dropped to its lowest recorded level during the 1991 drought, and it was feared that this once strong perennial river would come to a standstill during the 1992 winter season. While riparian owners had been negotiating methods to mutually restrict diversion, a request from the warden of the Kruger Park to the director-general of Water Affairs, triggered the section 9A emergency procedure, in terms of which the Minister could regulate the exercise of water rights.[34] The question is what the powers of the Minister embrace as far as the allocation of water rights to the Kruger Park in terms of section 9A is concerned, and what the effect of such a notice will be on the current water use and existing water rights.

The application of section 9A

If the first of the three abovementioned interpretations of subsection 9A is correct, then the Minister is empowered to control, regulate, limit or prohibit the use of the water in the Sabie river which may legally be used for urban, agricultural and industrial purposes. Since no rights have been obtained in terms of section 11 to use water for other purposes, the Minister is empowered to control the use of all the water in the river, because all the water is available for the purposes over which he has control. If the Park *had* however obtained ecobiotic water rights by way of a water court order, then the Minister would not have been empowered to interfere with the exercise of these rights, because he may only control the

"normal flow" as defined, and, furthermore, whether s 9(1) is at all applicable to the use of such water. Be that as it may, it is submitted that the main problem which caused this uncertainty is the haphazard way in which water rights have been issued to riparian farmers, in that existing use were seldom considered when new rights were granted. This was in its turn due to the usual abundance of water in the area.

34 Notice of s 9A emergency measures was published in the Gazette on 26 June 1992, with effect from 1 July 1992. In terms of this notice, a minimum flow of 0,6 cumec had to be measured at the measuring station at Lower Sabie rest camp in the Kruger Park. It was however reported by the regional director of the Department on 16 March 1992, that there was in fact a surplus of irrigation water and that the only effect of s 9A measures would be to benefit the Kruger National Park, which experienced a shortage.

use of water for agricultural, urban and industrial purposes. This may be regarded by the affected water users as unfair, especially because the only unimpeachable right then seems to be the one which did not arise *ex lege*, but had to be obtained from the court, which was only entitled to grant it with due consideration of existing rights.

This interpretation further implies that although the Minister is restricted to interference with specified rights, he may regulate or limit or prohibit those rights for any purpose which he deems expedient in the public interest. This could mean that the Minister may allocate water rights to other user sectors who have not been entitled to water rights previously. In the case of the Sabie river, it could mean that the Minister may limit or suspend the water rights of those who use water for agricultural, urban and industrial purposes, and apportion the available water amongst all the lawful and unlawful user sectors along the river, including users for ecobiotic purposes. This is exactly what had happened with the section 9A notice, in terms of which the Kruger Park was entitled to a minimum flow of 0,6 cumec. It can thus be concluded that this interpretation of the provision is followed by the Department of Water Affairs.[35]

In terms of the second interpretation, the Minister is restricted to interference with existing agricultural, urban and industrial rights, but he is not empowered to re-allocate water rights to user sectors other than those from whom he assumed it. This means that his powers merely include the restriction of existing rights, and not the redistribution of rights or the transfer of water rights to other users. In the case of the Sabie river, this will have the effect that the Minister may control the rights of agriculture, urban use and industry by imposing restrictions such as levies, diversion-turns, maximum diversion limits or prohibitions on use, but he may not allocate water rights to the Kruger National Park, who had not previously possessed legal water rights. It therefore means that the recent measures in terms of section 9A were irregular, in that the Minister had exceeded his statutorily restricted discretionary powers by granting rights to erstwhile unlawful users.

In terms of the third interpretation, the Minister may control or regulate or limit or prohibit the use of water for *all* legal purposes. Therefore, even an ecobiotic right which has been obtained from a water court, can be affected by the control measures contained

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[35] This conclusion is confirmed by the recent draft policy statement concerning water for the natural environment, issued by the Department in January 1992 (*Water for managing the natural environment*).

> in the notice. The Minister is however restricted in the purposes for which he may institute such emergency measures. He may institute control measures for the benefit of the three specified purposes only. He is thus entitled to prohibit the use of water for ecobiotic purposes and allow all the water which remains in the river during the drought for agricultural, urban and industrial purposes. Applied to the Sabie river, and using an imaginative case where the Park *has* obtained ecobiotic water rights, the Minister may prohibit the water use of all of these, and allow only the three specified users to continue to divert water. He is not entitled to allow other users to benefit by the restrictions. The Park can therefore be severely restricted in its water rights in favour of agriculture, industrial and urban use. In terms of this interpretation, the Minister has exceeded his powers by allocating a right to the Kruger Park to 0,6 cumec of water in the recent section 9A notice.

From the above example, it is clear that the interpretation attached to the terminology of section 9A could significantly affect the water situation. It is therefore necessary to ascertain which of these interpretations is in accordance with the intention of the legislature.

In an attempt to select the most probable interpretation of section 9A(1), two main questions arise. First, were the words

> "the Minister may ... control, regulate, limit or prohibit, as he in the public interest may deem expedient ... the ... use ... of water ... for agricultural, urban or industrial purposes or specified agricultural, urban or industrial purposes",

intended to mean that the Minister may impair agricultural, urban and industrial water rights only, or that he may impair any water rights, although for the benefit of agriculture, urban use or industry only? Secondly, do the words "control, regulate, limit or prohibit" include the power to suspend and reallocate water rights, or may the Minister restrict each holder in the *exercise* of his right only, without depriving him of his right or transferring a part of such erstwhile right to another user? If the answer to the second question is that the Minister is not entitled to reallocate water rights or transfer

rights from one user to another, then the first question lapses. Such a conclusion will moreover negate both the first and third of the three possible interpretations of the subsection as discussed supra. For this reason, the second question will be attended to first.

2.1.2.1.1. The power to reallocate water rights

There are two possible views in an attempt to answer the question of the discretion of the Minister :

(i) The terms "control" and "regulate" do not necessarily include any suggestion of existing rights. In terms of such a wide interpretation, these terms imply that even where *no* lawful or apportioned or declared water rights exist, the Minister may control the use of the water in the area. Where water rights *do* exist, the Minister may suspend all such rights and control, regulate or prohibit the use of water in the area, i.e. he may exercise those powers as if no rights exist. These terms can however also be interpreted in a narrower sense, viz. requiring existing rights which can be so controlled, regulated or prohibited : just as the Minister may *control* the use of water by all the interest groups around a public stream,[36] he may also *control* the exercise of a specific existing water right, eg. by imposing levies or leading turns. Just as he may *regulate* the general water use in an area, he may *regulate* the exercise of a specific existing right, eg. by imposing periods during which the right may be exercised. But as far as the terms "limit" and "prohibit" are concerned, the Minister can limit or prohibit specified rights, but he cannot limit or prohibit the use of water unless there are declared existing rights of use. These terms therefore bear a narrow meaning. They are transitive verbs which require specific existing rights which can be so limited or prohibited. The inclusion of the words "limit" and "prohibit" in the list of powers which are

[36] The term "control" was used in this wider meaning in s 6(1) of the act.

vested in the Minister, therefore creates the impression that the legislature intended to use the two other terms in their restricted meanings, as well as to bear the same narrow application as "limit" and "prohibit".[37] It can thus be argued that it was not intended to apply the powers to a situation where no water rights existed or where the Minister has suspended all rights, but that it was intended only to apply to specified rights. His powers of control, regulation, limitation and prohibition can therefore only be exercised in respect of existing rights. The result of such an interpretation, is that the Minister is not empowered to disregard or suspend existing rights so as to reallocate water rights, thereby allocating rights to non-riparian owners or owners who previously had no water rights. He may only control each holder of an existing right in the exercise thereof, be it by reduced diversion, increased rates, turns of leading or whatever measures he deems fit. He is thus bound to restrict his actions in terms of section 9A to control the way in which existing rights are exercised.

This narrow interpretation of the powers of the Minister, is supported by the list of activities which he may so control or regulate or limit or prohibit, viz. impoundment, storage, abstraction, supply or use. It is submitted that it is not possible to control or regulate or limit or prohibit any of these activities, unless such activities are in fact being exercised by the holders of rights. In terms of section 6(1), the control and use of public water is regulated by the act. The act expressly grants rights of impoundment, storage, abstraction, supply or use,[38] and no such rights exist unless in terms of one or the other provision of the act. For the Minister to therefore be able to control these activities, he has to specifically address the holders of such rights. If there are no declared rights, or if the

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[37] Vide Baxter 406-407, who is of the opinion that the courts tend to give a strict interpretation to statutory powers where they infringe upon existing rights and activities. Various factors however influence the courts' decision to accord the powers widely or narrowly, including the wording of the provision, the extent of intended infringement of existing rights as well as the public importance of the activity which is exercised in terms of the right.

[38] Sections 7, 9, 9B, 10 and 13.

Minister suspends all existing rights, he would not be able to perform his restrictive powers. This view confirms the argument that the Minister does not have wide powers to suspend and reallocate rights : he may merely control the exercise of existing rights. If this was not the case, the necessity to enlist restrictable activities would have fallen away.

A second argument in favour of this view, is the general terminology of the subsection. If the legislature intended to vest wide-ranging powers in the Minister to suspend all existing rights and then to reallocate water rights to anyone (including erstwhile owners who had no water rights), he probably would not have chosen such restrictive terminology. To "control, regulate, limit or prohibit" the "impounding, storage, abstraction, supply or use" of water is something far removed from the suspension, assumption or reallocation of rights. If the legislature intended to grant to the Minister all-embracing powers to reallocate water rights, he would rather have used terms such as suspend, nullify, assume, reapportion, redistribute or reallocate.

A third argument which supports this view, is the specific reference to the purposes of use which can be affected by the notice, viz. agricultural, urban and industrial purposes or specified agricultural, urban or industrial purposes. The use of the term "specified", once again refers to existing rights.[39] If it is argued that the listing of these purposes refers to the purposes for which he may reallocate water rights after suspending all existing rights, then the use of the phrase "or specified agricultural, urban and industrial purposes" would make no sense. Because if he reallocates rights of water use, it cannot be for anything else than for purposes which he specifies in the notice. The last phrase is logical only

[39] It probably means that the Minister is empowered to specify in the notice that only certain existing rights are affected, and that he is thus not obliged to affect *all* agricultural, urban and industrial purposes.

if the listing of these purposes was done to specify what kinds of *existing* rights the Minister may impair in the notice.

The conclusion is that the Minister is restricted in his powers when acting in terms of section 9A. He is not allowed to disregard existing rights and restructure the position of water rights in an area, but merely to interfere with the *exercise* of specific existing rights. He may therefore not suspend an apportionment of rights, and re-apportion as if there had never been any rights. He has to maintain and respect the existence of rights, but he may restrict the exercise thereof as he deems expedient in the public interest.

If this is the correct interpretation of the powers of the Minister, then the first question lapses. If the Minister is not entitled to suspend and reallocate water rights, then there is no sense in an argument that he is restricted to certain purposes when he reallocates suspended water rights. This would make the second possible interpretation of the three mentioned earlier, the one closest to the intention of the legislature, viz. that the Minister is restricted in his interference with certain existing rights, and that he has no free discretion to suspend those rights and reallocate water rights in the area as he deems fit, but that he may only impose restrictions, however severe, on the way in which existing rights are exercised by the holders thereof.[40]

[40] Applied to the Sabie river case, the Minister is entitled to impair existing agricultural, urban or industrial water rights by controlling, regulating, limiting or prohibiting certain actions, viz. impoundment, storage, abstraction, supply or use of the water to which the holders of the rights are under normal circumstances entitled in terms of their allocated rights. He is however not entitled to suspend all existing rights and reallocate water rights in the catchment, by granting rights of use to riparian or non-riparian owners who have not previously been entitled to water rights. Therefore, the section 9A emergency procedure is no short-cut method to obtain water rights for owners who have never obtained rights by way of the normal procedure, ie. via the water court. Neither is it a method for those who are not entitled to water rights *ex lege*, to obtain water rights instead of using reserve water which usually, in good years, flows in the stream and is not utilized by holders of water rights.

(ii) In terms of an alternative view of the intention of the legislature concerning the discretion of the Minister, it can be argued that, in spite of the restrictive terminology of section 9A, the phrase "as he may deem expedient in the public interest" implies a free and wide-ranging discretion vested in the Minister to restrict existing rights in favour of *any* purposes which he may deem fit in the public interest, irrespective of whether water users who draw benefit from his discretionary reallocations have previously possessed water rights or not. This means that the terms "control, regulate, limit or prohibit" were not listed to restrict the discretion of the Minister, but rather to extend it.

This view is supported by the phrase "notwithstanding any right which any person may have in respect of public water...", which can be read to empower the Minister to disregard all existing rights and reallocate water rights. If this is the correct interpretation, it will, if consistently applied, mean that any prospective water user who is not entitled to lawful water use in terms of the act, may apply for an allocation in terms of section 9A, if he can prove the jurisdictional facts, ie. an existing or threatening water shortage.[41]

Such an interpretation however questions the very reason for granting the discretion of allocating water rights in terms of section 11, to the water court and not to the Minister : if the Minister practically has a similar discretion in terms of section 9A, his discretion will necessarily deprive the water court of its function, since it is certainly cheaper to obtain a ministerial allocation than a

[41] This is not necessarily difficult to prove : even in times of relatively good rainfall, the Park often experiences a dearth of water in its once strong and perennial rivers, mainly due to over-exploitation up-stream. Applied to the Kruger Park, it means that the Park may approach the Minister with regard to all its erstwhile perennial rivers which now experience a water shortage, viz. the Levhuvhu, Shingwedzi, Olifants and Letaba rivers, to exercise his free discretion to allocate emergency water rights in the public interest. The Minister may then control, regulate, limit or prohibit existing agricultural, urban and industrial water rights of upper riparian owners, in order to grant to the Park the right to use some of the water.

water court order.[42] Moreover, this view does not explain the necessity to restrict the Minister in his discretion by expressly listing the functions which he may exercise while making a reallocation. Neither does it explain the necessity to list the uses made by holders of existing rights which may be impaired by the Minister while reallocating water rights. It is submitted that it was not the intention of the legislature that the emergency measures of section 9A be of benefit to users who do not possess legal water rights. It was only inserted in the act in order to ensure that up-stream legal users do not, during a period of drought, exhaust public water to the detriment of lower users who also possess quotas or water rights.

It therefore seems as if any benefit which the Park may receive from the section 9A-procedure, ought to be a mere incidental result of the restrictions which the Minister may impose on the rights of others, and that the Minister is not entitled to make an allocation of water for purposes of ecobiotic use. The onus of obtaining water rights in terms of the provisions of the act, whether by agreement or in terms of a water court order, therefore rests on each claimant to water, and the Minister cannot be expected to produce water rights by exercising his emergency powers, which are rather aimed at conserving water for holders of existing rights than for providing water for those who never had any lawful water rights.

2.1.2.1.2. Conclusion

Section 9A was intended to function as an emergency measure to ensure that the holders of water rights in a specified area exercise their rights in such a way that the water is conserved to last through a drought. It was not intended to create legal protection to

[42] The only practical difference will then be the existence of a water shortage which has to be proved in the case of an application for an allocation in terms of section 9A. But certainly no one who does not experience a water shortage, will approach the water court for an allocation either.

water users who never had water rights, but who survived on the excess of water in rivers and streams.

The solution in the case of a threatening drought therefore lies in the acquisition of lawful water rights before emergency measures in terms of section 9A are being issued. Such water rights can be obtained only by application to the court in terms of section 11(2)(b). If such rights are obtained, the Minister is not empowered to suspend it when control measures are introduced in terms of section 9A. It is however submitted that the system in terms of which water rights are allocated, ought to be revised so as to accommodate the demands of all water sectors, irrespective of the purposes for which water is required. It is difficult to understand why the court has to be convinced that it will be in the public interest to grant ecobiotic water rights, while agricultural water rights are granted irrespective of the public interest, but on the mere submission of the agricultural needs.

It is nevertheless submitted that the drought control measures provided for in the Water act are insufficient, due to the restrictions imposed on the discretion of the Minister to reallocate water in the public interest. In spite of phrases such as "notwithstanding any right any person may have in respect of public water or the use thereof", and "as he in the public interest may deem expedient and in the manner and subject to such conditions as he may think fit", the Minister is restricted to specified control measures regarding specified purposes of use and specified activities. All water rights, irrespective of the purposes of use, ought to be subject to emergency state control in times of drought, which control measures ought to be all-encompassing.

2.1.2.2. Section 9B

Section 9B, which was inserted into the act in 1971[43] and amended several times, was intended to enable the Minister to control expansion of agricultural and industrial water utilization.[44] It is a contentious provision, in that it seriously impairs the *ex lege* right to impound water in respect of which section 9 or 10 water rights exist. This is especially valid for surplus water, which was otherwise intended to be available for preferential beneficial use of upper owners, irrespective of downstream water requirements.

The section provides that, notwithstanding any other provisions (but subject to subsection (1C)), no-one shall construct a water work if more than 250 000 m^3 of water can be impounded, or if more than 110 litres of public water per second[45] can be diverted from a public stream, except under the authority of the Minister, and on such conditions as may be specified in the permit.

The Minister may amend the provisions of section 9B(1) in respect of an area which is defined, and he may determine any other capacity, or prohibit the construction of a water work except under the authority of a permit.[46] Section 9B is not only applicable to normal flow, but especially to surplus water. It may be argued that it amounts to the apportionment of surplus water, which otherwise seems contrary to the spirit of the act :

2.1.2.2.1. The apportionment of surplus water

In Roman law, a distinction was drawn between *perennia* and *torrentia*. While *perennia* were permanent rivers, *torrentia* were flood rivers. This distinction is in a way related

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[43] By s 2 of Act 36 of 1971.

[44] Hall *Hall on Water Rights* 68-69.

[45] Vide Hall's comment on the impractical effect of this quantity (*Hall on Water Rights* 68-69).

[46] Section 9B(1C). This section was inserted in 1987 by s 6(c) of Act 68 of 1987.

to the South African distinction between normal flow and surplus water, in that surplus water is the water which does not occur steadily, even during the dry season. It is the water which comes down in the river bed after rain, ie. the flood water.[47] In Roman law, *torrentia* were *flumina privata*, which meant little else than that the praetor seldom interfered with the *usus publicus*. But little technical know-how regarding large-scaled storage existed, which minimized the probability of a single riparian owner intercepting all the flood water of a stream to the detriment of downstream water users.

In early South African law, no distinction between flood rivers and other streams was drawn, and the state interfered in water use in cases of disputes only. But in 1906, a distinction between perennial and intermittent streams was drawn. As far as intermittent streams were concerned, a riparian owner was allowed to abstract and impound all the water thereof which he required for irrigation, subject to a lower owner's right to apply to the water court to determine a quantity of water which the upper owner may so utilize.[48] This was the origin of the distinction between normal flow and surplus water, as well as of the confusion regarding the apportionment of flood water. In the 1912 act, a distinction was drawn between normal flow and surplus water, based on the steadiness of the source. Similar freedom of use and storage of surplus water existed for upper owners.[49] This was based on an argument that unless owners who were able to intercept flood water were allowed to do so, floods were "wasted" to flow down to the sea

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[47] The normal flow is usually determined as the water which occurs in a river during the four dryest months of the year, or the consistent flow that occurs in the stream for more than 70% of the time (Midgley, Pitman & Middleton). This way of determining the normal flow, was accepted by the water court in *Eastern Transvaal Consolidated Mines Ltd v Debakkers Enterprises Pty Ltd* TWC 12 May 1987. This is not altogether in accordance with the act's definitions of normal flow and surplus water, which is based on the capability of the stream to be applied for direct irrigation without storage. Et vide *Minister van Waterwese v Oewereienaars aan die Skeerpoortrivier* TWC4096/92 (unreported) decided on 17 March 1994 : *"Hoewel hierdie verfynde berekeningsmetode aanvaarbaar is, moet dit nie noodwendig as norm vir toekomstige waterhofsake gestel word nie"*

[48] Section 7.

[49] Section 14.

unutilized, carrying valuable topsoil along, and causing erosion.[50] But the more riparian owners obtained the means to effectively utilize and store flood water, the more did water disputes occur, and the greater was the necessity to apportion or control the common use of flood water. In 1934, by an amendment act, the roots of the current section 9B were inserted into the act, to replace the protection provisions of section 15, which applied to the water works which were constructed for the storage of surplus water.[51] It was provided that no-one was allowed to construct an irrigation work of a storage capacity exceeding 150 million gallons, unless in terms of a permit from the Minister, if the area has been declared to be a protected area. The Minister was thus now empowered to apportion surplus water amongst riparian owners, even though lower owners did not apply for it, as was the case in terms of the 1906 act. His discretion was not bound to the existence of prescribed jurisdictional facts. On application of an owner to exceed the limits, the Minister was however bound to investigate the matter prior to issuing a permit.

In the 1956 act, this ministerial discretion to restrict the free use of surplus water by upper owners, was abolished, and, in terms of the act,[52] every riparian owner was entitled to the use of so much surplus water as he could beneficially use for domestic purposes, stock-watering, agricultural and urban purposes, and to impound and store such water irrespective of the requirements of lower owners. Lower owners did however enjoy some degree of protection, in that they were entitled to apply to the water court to quantify the surplus water which an upper owner could use reasonably.[53] The state was therefore not empowered to interfere with the use of surplus water, but the users could, *inter se* and with the help of the water court, control excessive use by upstream owners.

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[50] Vide *Southey v Southey* 1905 22 SC 650. Et vide Chapter IV.II supra.

[51] Section 2 of Act 46 of 1934.

[52] Section 10.

[53] Section 19.

But, once again, the lack of state control caused user conflict, and section 9B was inserted in 1971, which re-introduced state control of surplus water, and thus re-introduced apportionment of surplus water. But this time, unlike after the 1934 amendments, no need existed for the Minister to declare a protected area before he could restrict storage. No longer is anyone allowed to store more than 250 000 m^3 of public water without ministerial permission. Moreover, since 1987, the Minister may increase or reduce this maximum capacity, and even go as far as prohibiting any storage of normal flow or surplus water. The *ex lege* restriction on the free use of surplus water came down to a form of statutory apportionment which can be controlled by the Minister in his free discretion.[54]

The question which inevitably arises, is whether the imposing of measures for the apportionment of surplus water and the ministerial state control in respect of its utilization, has not perhaps negated the very necessity for a distinction between normal flow and surplus water, at least in its current form. This question is addressed elsewhere,[55] and the conclusions made that increased state control over the common use of water necessitates an integrated water allocation and apportionment mechanism which is based not on a distinction between the origin or size or form of streams, but on its capability to be divided. This means that where the state can apportion water amongst users, such apportionment rules ought to apply to all water, irrespective of whether it has fallen or risen on one's land or occurred within known and defined channels or has been derived from steady sources of supply or rain and freshets. Suggestions as to how such a mechanism will differ from the current one, will be discussed infra.

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[54] Vide Verster who is of the opinion that the jurisdictional facts to which the Minister is bound, are the existing rights of riparian owners.

[55] Chapter V.III infra.

2.1.2.2.2. Section 9B(1C) as a substitute for control areas

Besides the function of section 9B(1C), which grants the Minister the power to interfere in the erstwhile "free" use of surplus water, it is increasingly used as an alternative to apportion normal flow which falls outside control areas.[56]

State control of water storage upstream of dams not only enables the control of inflow into government water works, but owners are restricted in their rights of use of the normal flow, which is a method of apportionment. In terms of section 9B(1), the Minister has a discretion to issue a permit for the storage of more than 250 000 m^3 of water. No prescriptions exist regarding the circumstances where the Minister may issue such a permit, but it is submitted that the Minister is bound to investigate the hydrology, as well as existing rights. It is moreover submitted that the permission granted by the Minister for an owner to exceed the capacity limit, does not derogate from lower owners' rights to apply to a water court to quantify upper owners' storage of surplus water.[57] It is however submitted that lower owners ought to make such an application before the Minister grants the section 9B(1) permission, otherwise the permit might qualify as a "right previously held" to which section 19 is subject. It would have been welcomed if either sections 9B(1) or 19 were dove-tailed, or if the *audi alteram partem*-rule[58] was applicable to section 9B(1), because the majority of lower owners who will be detrimentally affected by the section 9B(1) permit, will become aware thereof only after the dam is built, when a section 19 application can no longer be made.[59] Moreover, the

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[56] Nowadays this measure is also used to substitute control by way of control areas. This increasingly happens upstream of state water works, because data needed for s 62 allocations is not always available and is expensive to obtain. In some cases, control areas are even being de-proclaimed to make way for control by way of s 9B(1C). Vide Wessels "Deregulering" 6.

[57] In terms of s 19.

[58] In terms of this rule, the affected party has to be heard before an administrative act which might harm his rights, is exercised. Vide Chapter VI infra.

[59] Corbett JA held that *audi alteram partem* always applies where a legitimate expectation to be heard, exists (*Administrator Transvaal v Traub* 1989 4 SA 731 A).

minister's obligation to investigate the effect of the permit is not a jurisdictional fact, and the validity of his quasi-judicial administrative act can therefore not be adjudicated by the court.

2.1.2.3. Section 11(1A)

The Minister may issue a permit to the holder of an agricultural water right to use his water for an intensive animal feeding system, for power development, for the winning or washing of sand, gravel or stone, or for aquaculture.[60] Due notice has to be given to interested parties, who obtain a right to object. The reason why ministerial permission is necessary before an owner may utilize his lawful share of normal flow or surplus water for these purposes, probably lies in the nuisance which these activities may cause other owners, due to noise, odour, danger or pollution.

The provision was inserted into the act in 1980, probably due to practical problems and user disputes caused by these uses of agricultural water rights.

2.1.2.4. Section 12

No person may use more than 150 m^3 of water per day for industrial purposes, except with a permit from the Minister.[61]

The Minister has a quasi-judicial discretion,[62] in which case a legitimate expectation to be heard, exists. The forum to be heard already exists for other users, viz. in terms of

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[60] Section 11(1A)(a).

[61] According to Hall, the object of this provision is the protection of urban requirements from unfair industrial expansion. It enables the Minister "to exercise rigid control" over industrial expansion (*Hall on Water Rights* 79).

[62] In terms of Coetzee's classification of administrative acts (vide n 15 supra).

section 11(4). The water court has to grant the right to the abstraction of water for industrial purposes.

An evaluation of the ministerial discretion in the light of the court procedure prescribed in section 11(1), is considered infra,[63] and it is submitted that the discretion to allow the use of a quantity of water for industrial purposes, ought to be either judicial or quasi-judicial, and that the water court ought to be empowered to *test* the discretion of the Minister.

2.1.2.5. Sections 12B, 12C, 13 and 20

In terms of section 12B(1), the Minister may impair the right of an owner of a mine to remove the water found underground and dispose of it, or use it for mining operations or domestic purposes.[64]

In terms of section 12C, the Minister may declare an area where anyone who desires to sink a borehole should give notice of the proceedings in order to subject the proceedings to state control.[65]

In terms of section 13, a local authority may, with the permission of the Minister (and the provincial administrator), take water (which a riparian owner within its jurisdiction is entitled to for irrigation), for urban use. The local authority may however not construct water works exceeding a specified capacity without the permission of the Minister.[66]

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[63] Chapter V.III.

[64] This power of the Minister may be described as quasi-judicial, because it impairs existing rights in that private water may be utilized solely and exclusively in terms of s 5 (Coetzee 4).

[65] This is a legislative administrative discretion.

[66] Section 13(3). This administrative act is quasi-judicial, in that existing rights may be reduced.

The Minister may construct a government water work in a protected area,[67] or authorize the construction of a water work in such an area.[68]

No-one may alter the course of a public stream without the permission of the Minister.[69] The application for such ministerial permission has to be preceded by notice to all adjoining landowners, as well as in local newspapers. Objections may be submitted to the director-general within 30 days, and thereafter to the water court.[70]

In terms of sections 21 to 26, several quasi-judicial powers may be exercised by the Minister in order to control pollution. Due to these provisions not being part of the allocation mechanism, they need not be discussed here.[71]

2.1.2.6. Section 56

The Minister may construct any government water work which he may deem necessary or desirable for certain purposes of water use.[72] He may also, at any time and for such period and on such terms and conditions as he may deem fit, supply water from such a water work to any person for use at any place and for any purpose approved by him.[73] The Minister exercises rights of ownership[74] in respect of the construction as well as the

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67 Section 15.

68 Section 18. This administrative discretion is quasi-judicial.

69 Section 20(1).

70 Section 20(2).

71 Cf Fuggle & Rabie 456 et seq; Coetzee 29-36.

72 Section 56(1).

73 Section 56(3).

74 Section 56(4) and s 1 "government water work".

water impounded therein, and he also exercises control and the power to regulate or prohibit the abstraction of any water from the submerged area.[75]

This restriction represents severe state interference with *ex lege* water rights, in the sense that the Minister may assume *ownership* of the water. It constitutes a quasi-judicial act in that the construction of a government water work impairs existing water rights, especially within the submerged area, and downstream of a dam. Unless the Minister declares a government water control area and thus allocates quotas with due consideration of existing rights, the *audi alteram partem* rule is the only protection against the detriment done to the holders of such rights. No provision requiring notice or the right to object, is included in the provision.

The Minister may also construct a water work for any person and may declare any affected area to be a control area.[76] This administrative act is however subject to existing rights, a condition which does not restrict the minister's power as far as the construction of government water works is concerned. The subjection of the minister's power to existing rights, places a duty on the Minister to investigate existing rights before he commits the administrative act. This may be done by allowing objections by way of representations. The prior investigation serves as a jurisdictional fact which binds the Minister, and the consideration of such rights may be tested by the court.

2.1.2.7. Conclusion

Although water rights in respect of normal flow and surplus water outside control areas are statutorily regulated and not conferred by ministerial discretion, the state has increasingly (and by amendment of the act), become involved in the exercise of such rights. The main role of the Minister is to control quantitative and qualitative water

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[75] Section 56(5).

[76] Section 57.

utilization, especially where "reasonable" or "beneficial" rights of use in respect of normal flow or surplus water cause user conflict, or where the exercise of these rights has a detrimental effect on the conservation of the resource.

Probably the most severe interference with section 9 and 10 rights, are contained in section 9A and 9B(1C), where the Minister is empowered to reduce water rights extensively. In terms of section 9B(1C), the Minister may re-apportion public water by controlling or even prohibiting storage. The wide-ranging quasi-judicial acts which the Minister may commit to conserve the resource and administer the use thereof in the public interest, constitutes strict state control. The description of the right in respect of normal flow as a "reasonable right of use", seems not to have been sufficient to ensure peaceful common use or the preservation of the resource.[77]

State interference to effect peaceful common use and water conservation and proper resource management, may be compared to the Roman law position, where the state, by way of praetorian interdicts, interfered in reasonable rights of common use in cases of user conflict only. This principle also formed the basis of the Roman-Dutch and early South African water law, where state interference occurred in cases of user conflict only. In terms of the 1956 Water Act, riparian owners were, subject to reasonableness of use and beneficial utilization, allowed to abstract or store water to suit their needs. This has proven not to be free of conflict, due to water being a scarce resource.

In a modernised water allocation system, where the state inevitably has to play an increasingly important role to administer water as a scarce strategic resource, it ought to be kept in mind that although the principle of dispute-triggered state control has been a workable concept since the earliest history of the water allocation mechanism, water has never been subjected to such intense user pressure. ministerial discretion regarding the allocation of water ought to be maximized, while apportionment ought to be

[77] Note that several of these state control functions were inserted by amendment acts, which emphasises the gradual realization of the need for state control.

catchment-orientated. All-encompassing state control of the allocation of water might increase administrative work, which is undesirable, and therefore the possibility of the delegation of state control to basin authorities, ought not to be excluded, but rather developed or maximized.

Audi alteram partem

The principle of *audi alteram partem* has been reflected in the administrative measures of the Water Act : first, it allows aggrieved users to approach the water court;[78] secondly, it makes provision for an appeal procedure after due notice has been given to interested parties of some ministerial administrative act;[79] and thirdly, it restricts the minister's discretion by jurisdictional facts (eg. that he has to investigate existing rights).[80] Where none of these procedures is provided for, it is submitted (in the light of the decision in *Administrator Transvaal v Traub*[81]), that, whenever a "legitimate expectation to be heard" exists, the administrative act has to be preceded by hearing the aggrieved parties. Although the water court ought to deal with this,[82] it often happens that aggrieved parties raise their objections by representations to the Minister rather than to approach the court. This is probably mainly due to high legal costs and time considerations.[83] It is submitted that a notice period ought to be granted in respect of all quasi-judicial administrative acts where existing rights may be impaired, in which period objections may be submitted. Grievances originating after the permit or decision has been issued, ought to be submitted to the water court. This procedure will comply with the condition laid

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78 Sections 11(1), (2), (4), (6); 13(2); 18(3); 19.

79 Section 11(1A)(b)-(f); s 13(2); s 20. Et vide Baxter 544 et seq.

80 Section 12B(3).

81 1989 4 SA 731 A.

82 eg. ss 12, 11(1),(2),(3), 13(3)(c).

83 Baxter 552. Et vide Chapter VI infra.

down by the appeal court. Such an *audi alteram partem* procedure will, moreover, inhibit the otherwise wide-ranging discretion of the Minister.[84]

2.1.3. Within control areas

The provision which the Water Act makes for the declaration of control areas, is proof of state interference in *ex lege* water rights. The Minister has the power to declare control areas where common water use ought to be managed centrally, usually due to user-conflict or the necessity to conserve a water source or save it from over-utilization. The public interest is usually the criterion to justify such state interference,[85] although this is an undefined term which probably does not qualify as a jurisdictional fact, since the Minister may, in his discretion, decide what the public interest is, and whether the public interest requires state interference by the declaration of control areas.

The different forms of control areas have been discussed supra, and include subterranean water control areas, government water control areas, catchment control areas, dam basin control areas, government drainage control areas and water sport control areas.[86]

(i) Subterranean water control areas are declared in terms of section 28, when the Minister is of the opinion that it is desirable in the public interest that the abstraction, use, supply or distribution of subterranean water in the area should be controlled. This legislative administrative act vests a right to use and control subterranean water in the Minister, which he may exercise notwithstanding anything to the contrary contained in the act, or any right which any person has to subterranean water, yet subject to section 12B. It suspends the rights of erstwhile holders of rights to abstract water in the area unless under

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[84] eg. ss 9A, 18(2)-(4).

[85] Section 59(1)(b), (2)(a), (4)(a), 28.

[86] Vide Chapter III.IV supra.

authorization, or in terms of sections 30(1), 32A(1) or 32B(2).[87] After the declaration of the area, certain prescribed surveys and investigations have to be done, and allocations are made with due regard to the outcome of such investigations.

(ii) Government water control areas may be declared in terms of section 59(1), when an area will be or is affected by the construction of a government water work, or when the use of the water of a public stream should be controlled in the public interest. In such an area, the right to use and control water in a public stream or natural channel vests in the Minister, and no erstwhile rights of use may be exercised without the minister's permission. After declaration, water rights (quotas) are allocated according to a prescribed procedure to which the Minister is bound,[88] and no water rights may be granted otherwise.[89] Provisional water rights and rights in respect of reserve water, may be allocated in the discretion of the Minister, although the Minister is bound to conditions and circumstances and purposes of use for which such permissions may be issued.[90] Free discretions are limited. The data which must be obtained prior to the Minister being able to exercise his allocation function, is detailed, and thus costly and man-power-intensive.[91] In several control areas, allocations have not been made even within several years after declaration, because the Minister is bound to consider

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87 Section 29.

88 In terms of sections ss 62 or 63.

89 Sections 62(2C)-(2G). This is purely administrative ("the Minister *shall*"), but quasi-judicial in ss 2E(c)(i), 2E(d).

90 Section 62(2A),(2B),(2H),(2I). In a case where s 63 is applied, (which may happen when the Minister (probably in his sole discretion) applies s 63 to a government water control area), the Minister is bound to allocate water for irrigation purposes, also in a prescribed manner.

91 Wessels "Deregulering" 10.

prescribed data, which is difficult to obtain.[92] This severely restricted discretion has led to a recent tendency to rather control storage in terms of section 9B(1C), than to declare a government water control area.[93] But in spite of the restricted discretion of the Minister to allocate final water quotas, the mere declaration of a control area represents a strict form of state interference with *ex lege* water rights.

It is submitted that, due to cost-intensiveness of the section 62 procedure, the way in which the Minister may exercise his discretion, and the restraint thereof, ought to be reconsidered in favour of a more informal or delegating mechanism, eg. that of section 62(2A) and (2B), as well as storage restrictions. A prescribed formula for quota allocations leaves insufficient room for condsidering catchment considerations, and negates an attempt for basin or resource management. There ought to be a move towards integrated yet flexible[94] resource management, aimed at fair and proper water apportionment.[95]

(iii) Catchment control areas are declared in terms of section 59(2) when, in the opinion of the Minister, the flow of a public stream ought to be controlled in the public interest,[96] or when land is required for the protection of any portion of the

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92 Wessels "Deregulering" 9. Instead, rights in terms of s 62(2A) or (2B) are exercised for an indefinite period, eg. the Letaba, Nkomati and Steelpoort control areas.

93 Wessels "Deregulering" 13-14 : "*'n Voordeel wat die implimentering van beheer kragtens artikel 9B(1C) in plaas van artikel 62 inhou, is dat die Departement beheer kan dereguleer sonder om beheer oor daardie belangrike elemente in die waterhuishouding van 'n bepaalde gebied te verloor. Enige dispuutsituasie ten opsigte van die normale stroming sal in die finale geval 'n hofbesluit wees, wat hierdie soms netelige waterregte probleme bo die huidige politieke, persoonlike, sosiale of emosionele vlak plaas. Hierdie subjektiewe benadering word in talle gevalle gebruik om die Departement en sy Minister om een of ander vorm van individuele toegewing te nader.*"

94 Currently no provision exists to change an allocation, except by deproclamation.

95 Wessels "Deregulering" 9 et seq. Another problem is control *after* allocation, which requires man-power (Fuggle & Rabie 665); Wessels "Deregulering" 9.

96 For no evident reason, the term "national interest" is employed here.

catchment area of a public stream. In such an area, the Minister may cause damming, cleaning, deepening, widening, straightening or altering the course of the channel or take the steps which may be necessary for the prevention or control of silt, or for lessening flood damage to riparian land.[97] He may also temporarily suspend existing rights, and take possession to cause such works to be done,[98] or contract with the owner for such works to be carried out.[99] This quasi-judicial administrative act may affect existing rights to such an extent that it may be endorsed on the title deeds,[100] which is a relatively severe infringement of such rights. In respect of the increased emphasis on resource conservation, this power does however not seem unreasonable. However, only one such an area has as yet been declared, probably due to these areas often being administered as government water control areas.[101]

(iv) A dam basin control area is declared whenever, in the opinion of the Minister, it is in the public interest that an area be reserved for a government water work to be constructed. Although the area which may be included in the control area is limited to twice the estimated storage capacity, and therefore an area smaller than that may be declared as a government water control area, it is difficult to see why provision has been made for the declaration of such areas. The Minister should rather have been granted the power to prohibit the action in section 59(4)(b), within a government water control area which has been declared in terms of section 59(1)(a).

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97 Section 61(1)(a).

98 Section 61(1)(b).

99 Section 61(2).

100 Section 61(3).

101 Fuggle & Rabie 298.

The Minister has a quasi-judicial discretion to determine the public interest and to decide whether the declaration of a dam basin control area will meet the public interest, although he is bound by the prescribed maximum size of such an area. Moreover, he has the discretion to issue permits for the exercise of certain activities which are otherwise prohibited in such areas. He may also exercise a discretion as to the necessity to expropriate the land.[102] The Minister may also expropriate when no agreement can be reached regarding compensation for any damage suffered by owners as a result of the declaration of the area as a dam basin control area.

(v) A government drainage control area is declared if the Minister is of the opinion that the construction of water works in that area for the accumulation, abstraction, impoundment, storage or use of private water, will result in a reduction of the availability of water in any public stream. This provision was inserted into the act in 1987, in accordance with the policy of increased state control of the water resources of South Africa, including especially private water.[103]

In a government drainage control area, no-one may construct, alter, enlarge, or use a water work for the diversion of private water, except with the authority of the Minister. The section 5(1) right of sole and exclusive use and enjoyment is thus restricted to the direct use of such water without storage. Like the provisions of section 9B(1C), this is in fact a method of state control in the form of apportionment. It is submitted that this form of control advances a submission that the distinction between public and private water has become obsolete. This

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[102] Section 59(4)(c) "[I]f the Minister deems it expedient that the state shall expropriate such land, the state shall expropriate such land". The discretion to expropriate is regarded as a pure administrative act, for which no right to be heard exists. Et vide *Pretoria City Council v Modimola* 1966 3 SA 250 A; *Strydom v the State President of SA* 1978 3 SA 74 A; Wiechers *Administratiefreg* 577 n 263 who describes this as "a little short of bizarre".

[103] *Assembly Debates* 20 August 1987 4360-4361.

is because similar rules of apportionment are applicable to both classes of water, and both are (in cases where the Minister deems it necessary) subject to state control. An integrated allocation mechanism ought not to distinguish between water sources on the grounds of size, origin, steadiness of supply or purposes of use, but rather on the grounds of its capability of common use, as well as the need to conserve it for future common use.

2.2. THE WATER COURT[104]

The water court was established as a result of a recommendation by Ham Hall in his report on water management in 1898.[105] His motivation for the establishment of water courts was "to keep petty water and irrigation conflicts from growing great and finding their way into the law courts".[106] He gathered the idea from the Spanish water law, which he described as "the best of its kind found in any national or state law on the subject".[107] Water courts were established in terms of Act 40 of 1899 :

> "It shall be lawful for the Governor in any area of the Colony to appoint a Court hereinafter called a Water Court for the purpose of hearing and determining disputes in connection with the use and appropriation of water and for such other purposes as may be assigned to such court by this act or by regulations framed hereunder, and such area shall be styled a Water District"[108]

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104 Vide in general De Wet "Water" 30 et seq.

105 *Irrigation Legislation* 62.

106 *Irrigation Legislation* 62.

107 *Irrigation Legislation* 62.

108 Section 1.

The duties of the water court were to investigate, define and record water rights and to decide water use disputes,[109] and also to apportion and distribute water in a fair and reasonable way amongst riparian owners.[110]

In the 1906 act, more duties were added, viz. the power to issue permits for the use of water of intermittent streams,[111] to localize water rights,[112] to investigate applications for the removal of dams and to do any matter or thing provided in the act.[113]

In terms of the Transvaal Act of 1908,[114] the governor constituted a water court whenever a dispute had arisen amongst users regarding the diversion, use, storage or appropriation of public water.[115] These courts were thus *ad hoc* tribunals created by an administrative act of the governor, who was bound to determine whether the prescribed jurisdictional facts existed before he constituted the court.

In terms of the Irrigation Act of 1912,[116] provision was made for ordinary, extraordinary and special water courts. Ordinary water courts were constituted by the governor-general for all water districts which were proclaimed by him, and they had the jurisdiction to hear and determine disputes in connection with the use and appropriation of water in the district.[117] Special water courts were nominated by the governor-general for any

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109 Section 5.

110 Section 6.

111 Section 67(d).

112 Section 67(e).

113 Section 67(g).

114 Act 27 of 1908.

115 Section 53.

116 The Irrigation and Conservation of Waters Act 8 of 1912.

117 Section 27(1),(2).

areas not included in water court districts.[118] Extraordinary water courts were constituted to investigate and determine matters relating to two or more water court districts.

The powers and duties of all three the kinds of water courts were similar, being much broader than those of the previous provincial acts, viz. inter alia to investigate and decide disputes on water use, to investigate, define and record water rights and to apportion water, to grant permission for the use of the water of any public stream, to decide whether water is public or private, to define the normal flow, to localize water rights and to consider applications for the removal of dams.[119] It is not clear why three different water courts were necessary.

The majority of cases which came before the Union water courts, dealt with the definitions of public water, surplus water and normal flow, or with applications for apportionment orders.[120] Many unclear legislative provisions were cleared up by these courts, which made a major contribution to the development of the water law in South Africa.

In terms of the Water Act of 1956, seven water courts have been established, viz. for the Transvaal, the Free State, Natal, the Cape, Eastern Districts and Griqualand West, and

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118 Section 29.

119 Section 32.

120 *Ex parte Marseveen* 1913 Krummeck Rep 1, *Ex parte Rand Water Board* 1916 Krummeck Rep 102, *Ex parte Molteno Municipality* 1917 Krummeck Rep 158, *In re Mapochsgronden* 1917 Krummeck Rep 167, *Ex parte The Tweefontein Colliery Ltd* 1917 Krummeck Rep 177, *Union Government v Zak River Estate Ltd* 1918 Krummeck Rep 195, *In re Mooi River* 1915 Krummeck Rep 56, *Van Dyk v Van Wyk* 1917 Krummeck Rep 180, *Smartt Syndicate Ltd v Richmond Municipality* 1919 Krummeck Rep 284, 349, *Ex parte Van den Heever* 1920 Krummeck Rep 310, *Ex parte Camphor* 1921 Krummeck Rep 319, *Ball v Erasmus* 1927 Hall Rep 221, *Ex parte Municipality of Witbank* 1921 Hall Rep 1, *Ex parte West End Farms & Ranch Co Ltd* 1925 Hall Rep 112, *Great Fish River Irrigation Board v Southey* 1927 Hall Rep 166; 177, *Ex parte Breed* 1929 Watermeyer Rep 3, *Ex parte Eloff* 1929 Watermeyer Rep 7, *Ex parte Irvin* 1932 Watermeyer Rep 96, *Ex parte Transvaal United Trust and Finance Co Ltd* 1931 Watermeyer Rep 36, *Wagenaar v Du Plessis* 1931 Watermeyer Rep 75, *Allen & Louw v Tamsen & Van Biljon* 1932 Watermeyer Rep 85, *Ex parte Taylor* 1932 Watermeyer Rep 97, *Olivier v Meintjies* 1937 Watermeyer Rep, *Barber v Scanlan Irrigation Board* 1938 Watermeyer Rep, *Bloemfontein Municipality v Wedderburn* 1944 Watermeyer Rep.

South West Africa. This provision differs from both the provincial acts (where *ad hoc* water courts could, at the discretion of the governor-general, have been established) and the Irrigation Act of 1912 (in terms of which three different kinds of water courts were established).[121]

The water courts were empowered to make orders on disputes regarding water rights,[122] to investigate, define and record the rights to the use of public water, to determine water rights, to determine whether streams were public or private, to determine normal flow, to localize water rights, to consider the removal of dams, to authorize the use of public water, and to control the construction and maintenance of measuring devices for normal flow.[123] The majority of these powers (except for that of section 40(i)) coincided with those of the Union water courts.[124] The water court has no jurisdiction in itself, except for that which has been conferred to it in terms of section 40 of the act.[125]

These powers and duties have not as yet been amended. The role of the water courts has however declined to a certain extent, especially due to increased legal costs and

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121 Section 34.

122 Section 40(a)(i). Vide *Jansen van Vuuren v Van der Merwe* 1991 1 SA 124 A 130 : "*Dit is trouens moeilik om te dink aan 'n aanwending van water wat nie reeds onder die meer spesifieke 'gebruik' en 'uitkeer' van water ressorteer nie*". Et vide *Van Rensburg v Taute* 1975 1 SA 279 A 301 : "*Die bevoegdheid by artikel 40(a)(i) is van omvangryke aard...*". In this case, it was said that it included the power to make an order to remove a dam.

123 Section 40.

124 Vide *Du Toit v Ackerman* 1962 2 SA 581 A 589 : "*Artikel 40 verleen wye bevoegdhede aan waterhowe. Die bedoeling is blykbaar om, behoudens uitdruklike uitsonderings en beperkings, watersake voor waterhowe te laat dien*".

125 *Human & Human v Lourens* 1963 Vos Rep 356.

tightened state control.[126] Increased state control was not merely a matter of policy, but was in fact implemented by way of amendments discussed earlier.[127]

Many applications and disputes which were originally intended to serve before the water court, are now administratively dealt with, eg. section 9 rights (it was said supra that shares are in practice not determined by the water courts); section 12 permits (the court is seldom approached in terms of section 11(1) or (2) after a section 12 permit has been obtained); the control areas, (the Minister declared a control area to solve user disputes, and only when disputes could not be solved in terms of the section 62 quotas, was the water court approached). Other substitutions for water court procedures include the establishment of voluntary basin steering committees (eg. the Sabie River Working Group) where representatives of all the user sectors commonly address disputes); representations to the Minister; criminal charges; petitions for the constitution of irrigation boards;[128] and advisory committees.[129]

The tendency towards a more administrative water management system is also reflected in the water court decisions, where the majority these days deal with technical,[130]

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126 *Minister van Waterwese v Oewereienaars aan die Skeerpoortrivier* TWC4096/92 (unreported) dated 17 March 1994 24. The insertion of s 42*ter* into the act, in terms of which the Minister may bring certain questions before the water court, has however once again stimulated water court applications.

127 Sections 59(5), 9A, 9B(1), 9B(1C), Ch III, 11(1A), 12B, 12C, Ch IIIA, 62(2A)-(2I), 62A, and the various amendments to s 63.

128 Section 71.

129 Section 68.

130 *Kranskop Health Committee v Lubbe* NWC 3/81 of 17 August 1983, *Ex parte De Beers Consolidated Mines* 1967 Vos Rep 365, *Orighstad Besproeiingsraad v Slabbert* 1967 Vos Rep 361, *Cronjé v Minister of Water Affairs* 1962 Vos Rep 312, *S v Bekker* 1962 Vos Rep 309, *O'Okiep Copper Co Ltd & Springbok Municipality v Union Government* 1961 Vos Rep 302, *S A Industrial Cellulose Corporation v Umkomaas Town Board* 1960 Vos Rep 264, *SAR & H v Van Niekerk* 1960 Vos Rep 262.

contractual and administrative points, eg. jurisdiction,[131] expropriation,[132] servitudes[133] and damages, rather than with apportionment and the allocation of water rights in terms of the act.[134]

Due consideration ought to be given to the future role of the water court, and whether it could not possibly be replaced, as far as the allocation of water rights is concerned, by an ombudsman,[135] a small claims court,[136] or some tribunal which has an arbitration rather than an administrative function.

2.2.1. Outside Control Areas

As far as water rights in respect of normal flow are concerned, "every riparian owner is entitled to the reasonable use of such share as may have been lawfully acquired by him from any other person and of his share (as determined under section 52) of the normal flow of a public stream to which his land is riparian".[137]

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131 *Warmbaths Town Council v Warmbaths Irrigation Board* 1958 Vos Rep 236, *Van Staden v Minister of Water Affairs* 1959 Vos Rep 242, *Louw's Creek Irrigation Board v Roux* 1969 Vos Rep 409, *Mader v Minister of Water Affairs* 1969 Vos Rep 404, *Human & Human v Lourens* 1963 Vos Rep 356, *Ellis v Botha* 1969 Vos Rep 412, *Fourie v Van Rhyn* 1968 Vos Rep 393.

132 *Cronjé v Minister of Water Affairs* 1962 Vos Rep 312, *Bester v Noord-Agter Paarl* 1967 Vos Rep 377, *Van Vuuren v Minister of Water Affairs* 1960 Vos Rep 250, *Joubert & Joubert v Minister of Water Affairs* 1960 Vos Rep 226, *Von During v Minister of Water Affairs* 1969 Vos Rep 425, *Kitchener v S A Native Trust* 1963 Vos Rep 345, *Venables v Minister of Water Affairs* 1961 Vos Rep 307, *Blunt & MacKenzie v White River Valley Conservation Board & Rankin* 1960 Vos Rep 292, *Senekal v Minister of Water Affairs* 1960 Vos Rep 280.

133 *Viljoen v SAS & H* 1967 Vos Rep 367, *Ellis v Botha* 1969 Vos Rep 412, *Fourie v Van Rhyn* 1968 Vos Rep 393.

134 *Burger v Pretoria Portland Cement Co Ltd* 1961 Vos Rep 299, *J C Tecklenburg v Minister van Omgewingsake* TWC 6 August 1984 1189, *Eastern Transvaal Consolidated Mines Ltd v Debakkers Enterprizes Pty Ltd* Transvaal Water Court 12 May 1987.

135 Baxter 279-287.

136 *Minister van Waterwese v Mostert* 1964 2 SA 656 A 670 : *"Die waterhof-proses is informeel en tegniese prosedure (eksepsies en aansoeke vir deurhaling) moenie aangemoedig word nie".*

137 Section 9(1).

The required determination of a share in terms of section 9 and according to the criteria set in section 52,[138] is done by a water court, according to specified considerations.[139] The court has a discretion as to the size of the share, which discretion is bound to jurisdictional facts which require thorough prior investigation. This investigation includes the determination of the extent of irrigable land on all original riparian grants. It is not specified for what distance these calculations ought to be made, but it is submitted that it encompasses all irrigable land on the course of the stream, up to its headwaters and down to its estuary, which might be affected by the allocation of a fixed share by the water court. It cannot with any certainty be alleged that even the most remote riparian owner on a river will not be affected by such an apportionment, which means that a catchment study is in fact required before the court may lawfully exercise its discretion. This being the case, the apportionment of shares by the water court is not exercised in practice. Each riparian owner merely uses as much as he requires for his urban and agricultural needs, and aggrieved lower owners are left to search the help of the Minister or the water court. No water court reports of section 9 apportionments could be traced.

The water court is empowered to grant permission to any person to use public water for industrial purposes. In cases where an animal feeding system,[140] the development of power or the winning or washing of sand, gravel or stone or aquaculture is envisaged, it is however not necessary to obtain permission from the water court, but the minister's permission is required,[141] with a right to object to the water court within sixty days after the permit has been issued.[142]

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138 Section 52(1).

139 Section 52(1)(a)-(f).

140 Section 11(1).

141 Section 11(1A)(d).

142 Section 11(1A)(d).

It is not clear why certain purposes of use ought to be authorized by the water court, while others ought to be authorized by the Minister, especially while sufficient opportunity for potentially affected owners to raise objections against such purposes of use, exist in both cases.

The water court is not bound to any specified jurisdictional facts when considering the allowance of industrial use of water, and it is thus submitted that it has a free discretion to decide whether such permission can be granted. There are no prescribed specifications regarding the information on the negative effect of such use (pollution, noise etc.) which has to be put before the court.

In *Ex parte De Beers Consolidated Mines Ltd,*[143] Watermeyer J granted an application for the use of public water for industrial purposes, considering only the objections of parties who had reacted on the serving of notice of the proceedings. The court did not consider any possible environmental influences.[144]

It is submitted that section 11(1) cannot be read in isolation from section 11(2), in that section 11(1) specifies no jurisdictional facts to which the court is bound in considering an application to use public water for industrial purposes which may be detrimental for other riparian purposes. Section 11(2) can thus be interpreted as setting out the different circumstances in which an application in terms of section 11(1) can be brought.

The first is when the application is brought by a person who is entitled to use public water for agricultural purposes. The court may authorize the use of such water for purposes which it may determine, and impose any conditions which in its opinion will

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[143] 1967 Vos Rep 365. This was the only application in terms of this provision under the 1956 act so far.

[144] Vide *Ex parte Pietersburg Municipality* 1954 Vos Rep 182, where the court required proof of whether the use of water for tertiary purposes would be in the public interest. This was an application in terms of s 20(3) of the 1912 act.

prevent lower riparian owners from being harmed.[145] It is not *bound* to consider these considerations,[146] yet in practice notice of the application will be given to all owners who might be affected by the order, and the court *will* consider objections submitted by aggrieved parties.[147]

The second is when the application is brought by a person who is not entitled to use public water.[148] The court may permit the applicant to use a stated quantity of normal flow or surplus water at any place and for any purposes, if the court is of the opinion that the grant of such permission will be in the public interest.[149] Before granting the permission, the court is bound to determine to what extent existing rights shall be abated, provided that rights which are not exercised shall be abated first; other statutory rights shall not be abated; and domestic rights shall not be abated unless by written consent.[150] The court may grant compensation for such abatement.

It is submitted that there are two sets of circumstances which serve as jurisdictional facts to which the court is bound. The first is the determination of existing rights,[151] and the second is the determination of the public interest. As far as the public interest is concerned, it is not defined, and the court thus has a free discretion as to what the public interest is, and whether the permission will be in the public interest. It is submitted that considerations such as those regarding the qualitative effects of the use of water for the purposes for which it was applied, as well as noise, pollution and other disturbances and

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145 Section 11(6)(a).

146 "The court *may* ..."

147 *Ex parte De Beers Consolidated Mines Ltd* 1967 Vos Rep 365.

148 Section 11(2)(b).

149 Section 11(2)(b)(i).

150 Section 11(4).

151 Section 11(4).

environmental considerations, ought to be considered by the court as part of its determination of the public interest. It is submitted that such considerations ought to be specified in the act as jurisdictional facts to which the court is bound, instead of allowing the court a free discretion as to what constitutes the public interest, and whether it has been complied with.

The use of water for industrial purposes in a quantity exceeding 150 m^3 per day, must be authorized by the Minister[152] before the court may consider an application in terms of section 11.[153] It was said supra that the section 11 procedure is often not followed after a ministerial permit has been obtained, and consideration ought to be given to streamlining the procedure. The practical value of regulating the use of water for industrial purposes by a doubled administrative function, is argued elsewhere.[154]

2.2.1.1. Section 17

A riparian owner within a protected area[155] who wishes to construct a water work with a storage capacity exceeding 114 000 m^3; or which water work can divert more than 300 litres per second, may apply to the water court for permission for such a construction.[156] The court may grant permission subject to conditions which it deems necessary, but only if it is satisfied that specified existing rights are not adversely affected. Besides these jurisdictional facts to which the court is bound, it has the duty ("shall"), at the same time, to determine the quantity of water which may be impounded. To exercise this function properly, a thorough basin study ought to be undertaken, because the impoundment or

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[152] Section 12.

[153] Sections 11(3), 12.

[154] Chapter V.III infra.

[155] In terms of section 15. Protected areas were declared by the Minister under the previous act (1912) where limitations were placed on storage capacity.

[156] Section 17(1).

diversion of such large volumes of water will necessarily affect various other users, as well as ecobiotic water requirements. The *audi alteram partem* rule is applied in that every owner who is likely to be affected by the permission, is granted an opportunity to raise his objections,[157] yet the court is bound to the results of an environmental impact assessment prior to granting such permission.

2.2.1.2. Section 19

The water court has the jurisdiction to grant an order determining the quantity of surplus water which an upper owner is entitled to store, impound or divert, when a lower owner, feeling aggrieved because the upper owner uses more than is reasonable, applies for such apportionment. The court may determine this quantity in its opinion, yet the order may not interfere with rights of use previously held. It may be argued that section 10 rights of beneficial preferential use are nothing but "rights of use previously held", but since this interpretation would negate the sense of the court's jurisdiction, it is rather submitted that due consideration should be given to the terminology thereof, if the allocation mechanism is amended. More important is the fact that the court is, by this provision, empowered to apportion surplus water.[158] Although section 10(2) thus provides that an upper owner shall not be compelled to curtail his use of surplus water in favour of a lower owner's domestic, stock watering, agricultural and urban purposes, and although the section 10 right is not a right of "reasonable use" but of preferential beneficial use, a lower owner may still, on the grounds of "reasonableness", apply for a restriction to be placed on an upper owner's use of surplus water. This provision places a wide and free discretion on the water court to determine whether such use by an upper owner was unreasonable (an undefined term) and then to restrict him in his use. This discretion raises doubt as to the distinction between normal flow and surplus water, in so far as

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[157] Section 17(2).

[158] In terms of section 9B(1C), the Minister is also empowered to apportion surplus water by controlling allowable dam capacities.

both the Minister and the water court have the discretion to negate section 10 rights, and to apportion or quantify the use of surplus water in order to allow common use thereof.

2.2.3. Within control areas

The water court may make orders and awards in connection with claims for servitudes by means of which rights to use or dispose of subterranean water may be exercised. Moreover, it may enquire into and determine a right of servitude by means of which subterranean water is used.[159] The allocation of subterranean water is done by the Minister. The water court does however have the right to test this allocation discretion, in terms of section 40(a)(i), which empowers the water court to make orders regarding the use, diversion or appropriation of public water.[160]

In government water control areas, any holder of a quota in terms of section 62 or who was scheduled in terms of section 63, may approach the water court with an application

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159 Section 40(a)(iii). Vide *Human & Human v Lourens* 1963 Vos Rep 356, where the court held that section 40 does not refer to ground water *outside* control areas.

160 Vide *Jansen van Vuuren v Van der Merwe* 1992 1 SA 124, where the court decided that a permit issued by the Minister in terms of s 62(2H), was subject to invalidation in terms of the exclusive jurisdiction of the water court (in terms of s 40(a)(i)). Cf *Van Staden v Minister of Water Affairs* 1959 Vos Rep 242, where it was held that the ministerial permit is similar to a licence, and the water court has no jurisdiction to review the discretion to issue such, because it has no statutory right to review. The only question which the court may answer is whether the Minister has exercised his powers honestly and fairly, ie. reasonably, and whether jurisdictional facts have been considered properly, and have been complied with. According to the decision in the *Jansen Van Vuuren* case supra (Van Heerden JA), the question regarding the validity of the permit is merely incidental to the main question regarding water rights, and in respect of which the court does have jurisdiction. But the Minister is granted the right to the use and control of water in any public stream, or of public water in any natural channel, in a government water control area "notwithstanding anything to the contrary contained in this act and notwithstanding any existing right" (s 62(2)). The water court is not empowered to adjudicate the exercise of this free discretion. The power to make orders in respect of the use of public water in control areas, is superseded by the minister's right to control the water use. It is therefore submitted that the water court does not have the right to reconsider s 62 allocations (unless specifically empowered to hear appeals). Applied to the allocation of water in all control areas, the Minister may have a free discretion to allocate such water, but objections could be raised afterwards to the water court, which is empowered to reconsider the allocation. Et vide Baxter 409-410 : "An unfettered (free) discretion is a contradiction in terms, because it is always bound to reason and justice". He prefers reference to a "narrow" and "wide" discretion, where a wide discretion cannot be tested.

to use the water for purposes other than irrigation.[161] (A person in a government water control area who is not entitled to use public water, may similarly apply to the water court for a water right in terms of section 11(2)(b), although such an application will probably rather be done directly to the Minister in terms of section 62(2I).)

As the name indicates, government water control areas are managed by the state, and all the powers to apportion or allocate water rights vest in the Minister, while the role of the water court has been reduced.

2.3. CONCLUSION

* The Minister has a wide discretion to allocate water and also to control existing rights. This discretion is however often restricted by prescribed quota formulas or by a duty to award quotas in the public interest. Unless it is submitted that the public interest is a reviewable embodiment of administrative justice, which functions as the very substance of legality, it can be argued that because it is undefined, it does not serve as a jurisdictional fact and the the minister's discretion is unfettered.

* Various amendments of the Water Act have substantially extended the minister's control over water utilization. This includes control of subterranean water and even private water. It is submitted that his power to control the utilization of these water sources questions the very reason for a distinction between public and private water, and that little remained of the "sole and exclusive use and enjoyment" in respect of private water. The criterion for state control seems to be the capability of a water source to be used in common. This means that if more than one user can beneficially share in the water, then it is state

[161] Section 11(2)(a).

controllable, irrespective of the purposes of use, the origin thereof, the existence of original grants etc.

* It is submitted that the extended grounds for the application of the *audi alteram partem* rule (as introduced by the appeal court recently), is a proper way of controlling the otherwise wide and rather free discretion of the Minister to control water utilization. A notice period for objections ought to be granted in respect of all quasi-judicial acts regarding water rights. This will subject the minister's discretion to the rule of fair hearing, which step will benefit decisionmaking in the public interest.

* The statutory prescribed formulas for quota allocation within control areas leave insufficient room for the consideration of basin variables and thus negate any attempt of integrated basin management.

* Although extended state control and increased ministerial discretion as to water allocation and the control of water rights is regarded as historically sound and of the best practical value for the South African water conditions, ministerial power ought to be restricted rather by a defined concept of the public interest, the principles of legality, judicial review and basin conditions, than by geographical boundaries, the legal status of water, purposes of water use etc.

* The original purpose of the water court was to adjudicate disputes between water user sectors. Later on, the power to apportion and distribute water rights, was added. Increased legal costs and extended state control have gradually phased out the water court's active involvement in water allocation and distribution, so that the water court nowadays deals merely with technicalities and interpretation questions.

* The prescribed water court procedure is often ignored (eg. the duty to acquire shares in respect of which section 9 water rights may be exercised, and the industrial water rights which the court ought to allocate after the Minister has already issued a permit in terms of section 12).

* The water court does not consider basin considerations, but merely considers complaints. This impedes an attempt of basin management.

* The role of the water court in a new allocation system ought to be reconsidered. It might be a useful tribunal for arbitration and judicial review of administrative acts rather than for the administrative function of water allocation. Yet consideration also has to be given to have it replaced in totality by an ombudsman, a special small claims court or an arbitration tribunal.

* The allocation powers of the water court often overlap those of the Minister. It is argued that allocation by the water court is of value for giving affected parties the opportunity to raise their objections. Yet the increased application of the principles of legality (eg. *audi alteram partem*) will provide similar opportunities for affected parties during administrative decision making.

CHAPTER V.III

WATER RIGHTS

"Common things ... which on account of the common use
all have a right to by nature, cannot, by the law
of nations, be divided ... for without the use of
air and water no-one could
live or breathe"

Bell J
Retief v Louw 1874

CHAPTER V.III
WATER RIGHTS

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WATER RIGHTS

3.1. INTRODUCTION

In the previous chapter, it was illustrated that fresh water is subdivided and classified in a variety of classes in terms of the act, each form of water source having a different legal status which, in its turn, determines the water rights to which it is subject. It is now necessary to investigate the nature of the system in terms of which water rights are allocated to the various user sectors, and to evaluate the justifiability of each of the various water rights.

3.2. HISTORICAL ALLOCATION SYSTEMS

In Roman law, all running water had a similar legal status, viz. *res communes*. It was argued supra that stagnant water was of uncertain status, being either *res nullius* according to Marcianus' classification system, or *res publicae* in terms of that of Gaius, but nevertheless subject to the *usus publicus*.

The allocation system in respect of fresh water was reasonably simple : all water was available for reasonable common use by each and all in need thereof, subject to state control in cases of competitive use, which control was mainly exercised by way of praetorial interdicts. To make this system more effectively applicable, an administrative distinction was drawn between streams according to their common value : although consumptive use of water was of some importance for irrigation and domestic use, the main function of natural streams was that of transport, for purposes of trade and industry. Fishing was another important purpose for which fresh water streams were utilized. Therefore, non-consumptive uses of rivers caused the severest competitive use, and therefore the majority of water-related disputes amongst users. This necessitated the

government to interfere in rights of use, to obtain peaceful common use. It was necessary to apply certain rules to those rivers and streams which were subject to such heavy competitive use and which were therefore subject to user disputes. These rivers and streams were the permanent waters, such as perennial streams, while flood rivers, which were of little value for navigation or fishing, were excluded from these rules and regulations. A distinction between permanent and torrential rivers was therefore drawn to facilitate this administrative function. The distinction did not derogate from the main allocation rule that each and all was entitled to use water, as long as they did not interfere with similar rights of others.

In Roman-Dutch law, political demarcation of water occurred, so that water was no longer common to all, but belonged to the state, subject to public use by all citizens for specified purposes. These public rights, which mainly included navigation and fishing, were restricted by the state, who imposed tollage, levies and permissions. Due to the abundance of water in Holland, few restrictions were placed on consumptive uses such as domestic use and irrigation.

In earliest South African law, the inhabitants freely made use of natural fresh water in the Cape. In cases of competitive use, the government interfered by allocating water turns. In due course, owing to agricultural and urban development, disputes concerning water rights increased, and the Landdrost en Heemraden (later the courts) became burdened with the control of common water use.

Water utilization in South Africa was, due to arid conditions and the relative scarcity of well-distributed natural fresh water resources, mainly of a consumptive nature. Due to a lack of navigable rivers, trade by way of navigation made way for road and rail transport, while livestock and crop replaced fish as the main agricultural produce. Freshwater therefore adapted a new function in the economy, viz. as the object of consumptive use. It became the life-giving subject of heavy competitive use between a variety of user sectors, but mainly between irrigators. This practical situation

necessitated the courts to formulate a well-developed system of water allocation. In 1856, in *Retief v Louw*,[1] the search for a system of water rights suited to the typical South African climatological conditions commenced, which system had since been constantly adapted and polished to keep pace with the ever-increasing water needs in the South African society.

As far as consumptive use was concerned, the only rule which could rightly be adopted from Roman and Roman-Dutch law, was that water was available to all in rights of reasonable use, subject to state control. The more detailed rules contained in these systems, especially those applicable to non-consumptive use, were hardly relevant. Yet the courts did not realize this difference between the practical situations of the countries whose water law systems were being intermixed, and continued to attempt to apply Roman and Roman-Dutch non-consumptive allocation rules to the South African practice. Because the rules were inappropriate, the courts introduced foreign law, which they attempted to reconcile with Roman and Roman-Dutch law, to form an allocation system suited to the South African practice. This, unfortunately, led to uncertainties which were eventually taken up in legislation.

The main principles which the courts had developed, were (i) a distinction between public and private water; (ii) a preferential order of water use; (iii) the reservation of water rights for riparian owners.

When the water law was codified in the first decade of the twentieth century, these principles were confirmed, although valid criticism was raised by the judicature against (especially) the third one. The distinction between public and private water was refined : (i) to allow the recognition of two forms of public water, viz. normal flow and surplus water; (ii) to allow a distinction between the terms public water and public streams; (iii) to move certain forms of private water from *res communes* to *res privatae.* This

[1] 1874 4 Buch 165.

refinement created the problematic differences in the status of forms of fresh water, which complicated the allocation system. Although a refined and detailed allocation mechanism can be justified in a complex water practice consisting of various user sectors with conflicting interests, it was submitted that many water law principles survived merely as a result of haphazard or ill-considered law-making.

But instead of reconsidering and evaluating the whole basis and especially the fundamental theoretical principles of the water law, the legislature retained the old principles in the Water Act of 1956, with the justification that existing rights ought to remain intact.

3.3. WATER RIGHTS IN TERMS OF THE WATER ACT OF 1956

The formal distinction which the Water Act recognizes between forms of fresh water, is that between private water and public water. It was submitted that the legislature probably did not intend to retain other classifications as well, eg. those of the common law or previous legislation, or to recognize water which classified as neither public nor private water. From the discussions of these classifications, it however appears that many water sources do not fall within these categories, and either retained their common law status, or qualify as both public and private water, or are of unidentified status, or sort in a different class in the law of things.

Moreover, the "right of sole and exclusive use and enjoyment" which was intended to apply to all private water, and the right of "reasonable common use" which was intended to apply to normal flow, and the "preferential right of beneficial use" which was intended to apply to surplus water, seems not to be applied consistently, so that few users can ascertain their water rights beyond doubt.

The minister's power to declare a government water control area in terms of section 59(1), affects the existing statutory water rights in such an area, and rights are either restricted, or suspended and re-allocated. When water rights are therefore discussed, it is important to distinguish whether such rights exist in respect of control areas or not. For this reason, water rights in control areas will be dealt with separately.

3.3.1. Water rights outside control areas

3.3.1.1. Section 7

In terms of section 7, any person may, while he is lawfully at a place where he has access to a public stream, take and use water from such a stream for the immediate purpose of watering stock or drinking, washing or cooking, or to use in a vehicle at that place. This right was inserted to make the use of water lawful for the travelling public.[2] The question is why this right may be exercised in respect of a public stream only, and not in respect of private water, dams, lakes or pools. This restriction makes it necessary for travellers to first ascertain whether the water to which they have lawful access and which they wish to use as a matter of urgency, is a natural stream which flows in a known and defined channel, and which is capable of common irrigation. The legislature should rather have referred to public *water*, because any water found in a public stream or derived therefrom (ie. even if it occurs in a dam or channel or vlei), is public water. But the technical complexity would be solved only if travellers are allowed the emergency use of *any* water to which they have lawful access, irrespective of its legal status.[3]

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2 *Great Fish River Irrigation Board v Southey (Grass Ridge)* 1927 Hall Rep 177. According to Hall, this right was a remainder of the commmon law right of the public in respect of a trek path (*Hall on Water Rights* 57). Vide Van der Merwe *Sakereg* 481-484.

3 A good example is the pools, waterfalls and streams in the Eastern Transvaal. Many travellers make use of the water thereof for various purposes when on a visit to the water-rich area, without considering whether the water is capable of common irrigation or whether the channel is known and defined.

The same argument holds force for the right of use which is granted to road constructors in terms of section 7(b).

Cases where members of the public come in lawful contact with private water, will usually be when the owner on whose land it fell or drained or rose, did not exercise his exclusive right of use, or where he had allowed some of the water to flow down for the reasonable use by lower owners, or where it rose or fell on state land. This water belongs to nobody, and it is difficult to see why such water is distinguished from that of a public stream, and why the travelling public is not allowed to make use thereof, especially in the light of the emergency or life-essential nature of the purposes for which it may be used.

3.3.1.2. Section 8

An owner of a subdivision of riparian land is entitled to a share of the water of a public stream which used to flow on the land before subdivision. This share is determined by "the owners concerned", or by the water court. According to Hall, the owner of the subdivision is entitled to such a share only if he has "land capable of beneficial irrigation" within his boundaries.[4]

If a public stream is a natural stream of water capable of common irrigation, then "the water of a public stream", refers to a public stream, and not necessarily to any public water, because public water is not necessarily a natural stream, or capable of common irrigation, eg. the water in a hippo pool (*"seekoegat"*). The owner of the subdivision therefore vests a right in respect of the natural stream which is capable of common irrigation, and not in respect of all public water in that stream, irrespective of whether the original land had a right in respect of other public water as well. An example is a

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[4] *Hall on Water Rights* 58. This is irrespective of whether such irrigable land falls outside the watershed (s 52(1)(b)). Et vide *Ex parte Molteno Municipality* 1917 Krummeck Rep 158 on the meaning of "not riparian" in s 8(2).

dry river, which consists of occasional surplus water, ie. a flood river of which the water can be utilized only if it is stored, and then for irrigation on a single piece of land, or for common domestic use only. The original owner exercised his preferential right of beneficial use by gathering this water behind a weir in the channel. Once in a while, and in a good year, a public stream flows in the channel, so that the impounded water occurs in the bed of a public stream and is thus public water, but not a public stream. The original owner subdivides, and the owner of the subdivision is not protected by section 8(1), because the water is not "the water of a public stream". It is submitted that, once again, the terminology was badly chosen and the term "public water" would have been more suitable.

Section 8(1) was probably incorporated into the act to protect lands under irrigation, and it is submitted that where public water was once enough for the whole original farm, there is no reason why, after subdivision, one piece must lose its water in favour of the remaining piece of land, where the water is not necessarily needed.

Even if the term "public water" instead of "public stream" was used, the owner of the subdivision is not sufficiently protected : an owner of a subdivision deserves similar protection : where a stream of water rises on land and is used for irrigation and domestic purposes and for stock-watering on the farm, but is not capable of common irrigation, the water is private water in terms of the definition of the act. But if the land is subdivided, so that the stream and the spring occurs on one of them, then the other ought to be protected from losing its water rights at the expense of its crops. It is difficult to see why section 8(1) does not apply to private water as well, since private water is often utilized on single farms as economically productive as surplus water or a share of normal flow on any other piece of land.

3.3.1.3. Section 9

3.3.1.3.1. A riparian owner's share

Each riparian owner is entitled to a share of the normal flow of a public stream to which his land is riparian. This share is determined by a water court according to criteria laid down in section 52(1), including :

* the nature of the soil
* the extent of irrigable land
* other water sources on the land
* other riparian requirements
* the economical water needs of the land per unit
* any other factors necessary to arrive at a fair apportionment.[5]

The effect of the reference to a share as apportioned by the water court, implies that except where an owner obtains a share from another, he is not entitled to a share of the normal flow unless it is awarded and determined by the water court. Hall is of the opinion that "the alteration by the select committee has led to this absurdity which has never been put into operation and may be ignored".[6]

If that is the case, the question is how a share is determined. Certainly the criteria of section 52 ought to play a role, even if the water court is not in practice burdened with the determination of such a share in respect of each stream. It is submitted that the whole concept of a court-determined share is of little practical value, and was retained in the act only to supply protection in cases of disputes. Riparian owners use public

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[5] Section 52(1)(a)-(f). Prior to this, the normal flow had to be determined according to the criteria laid down in s 53.

[6] *Hall on Water Rights* 59. This view is submitted to be correct, since riparian owners use the normal flow of a public stream without applying to the water court for the determination of a share.

water according to their needs, and until downstream owners complain on the grounds of the recognized restrictions placed on the right of use of a share by the act and the case law.[7]

Be that as it may, an owner has a right of reasonable use of his share.[8] What this right encompasses, is one of the most contentious questions in the water law, which has been argued by many South African and foreign jurists.[9]

3.3.1.3.2. Reasonable use of a measured share

The right of reasonable use assumes that a share of water has already been obtained or determined by the court and is available for the owner. The first question is why it is necessary to qualify the right which an owner may now exercise in respect of his share, if the share has been apportioned to him alone, especially if it was determined by the court with due consideration of other riparian owners' shares. Is the very intention of the determination of shares not to apportion the normal flow of a river *pro divisione parte*, so that each owner may deal with his legitimate portion at will? Moreover, if he is allowed to divert and store his share, what could be the practical and enforceable reason for restricting him in the way in which he makes use of his share after diversion? The probable answer lies in the common nature of public water and public streams, and the principle of peaceful common use. But if the sharing of water rests on the integrity of each owner to make use of water in such a way as to consider his neighbour, it would

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7 Section 9(1)(a)-(c).

8 Section 9(1).

9 Et vide 554 infra; *Jordaan v Winkelman* 1879 9 Buch 148; *Olivier v Fourie* 16 SC 304; *Retief v Louw* 1874 4 Buch 165; *De Kock v Le Roux* 15 SC 252; *Hough v Van der Merwe* 1874 4 Buch 148; *Badenhorst v Chambers* 1969 2 SA 282 A; *Southey v Southey* 1905 22 SC 650; *Worcester Municipality v Meiring* 1912 CPD 421; *Smartt Syndicate Ltd v Richmond Municipality* 1919 Krummeck Rep 284; *De Wet v Estate F J Rossouw* 1926 Hall Rep 156; *Union Government v Moller* 1934 Watermeyer Rep 137; *Union Government v Zak River Estates* 1918 Krummeck Rep 195; *Ex parte Camphor* 1920 Krummeck Rep 319; *Tyler v Wilkinson* 4 Mason 410; De Villiers "The water law : secondary use" 155; "The water law : secondary use further considered" 277.

not have been necessary to determine shares, neither to restrict the right of use in respect of those shares by the restrictions laid down in section 9(a) to (c). It ought to be noted that it is not the *share* which ought to a be reasonable *share*, but the *right* in respect of that pre-determined share which has to be exercised in a reasonable *way*.

It is submitted that the restriction of the right of use to that of "reasonable use", negates the necessity of determining shares, and vice versa. Alternatively, that the restriction of the right of use to *reasonable* use, is mere lip-service to common law, and especially to Anglo-American law.[10]

It is submitted that the restrictions placed on an owner's use of his pre-measured share (which has already been measured according to principles of reasonable distribution of a common substance) is unnecessarily burdensome. This is because the necessity to apportion water originated from an incapability to enforce peaceful reasonable common use of an undivided substance. Now that each has his own share, the restriction of reasonable use has become obsolete.

3.3.1.3.3. Reasonable use : its origin

In Roman law, everyone was entitled to use running water without doing harm to his fellow-users who had similar rights. The fundamental principle underlying peaceful common use was vested in the *ius naturale*, a system of rules based on justice and equity.

In Roman-Dutch law, the role of the *ius naturale* faded as far as the water law was concerned, and citizens were entitled to common use, subject to strict state control. But these rights of use were mainly of a non-consumptive nature, such as navigation and fishing, because water was not a scarce resource or subject to heavy competitive use for consumptive purposes.

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[10] This submission will be illustrated with reference to the historical origin of the concept of reasonable use, 550 infra.

In Anglo-American law, riparian owners were common owners of public streams in *undivided* shares, in terms of the *ius naturale* and the doctrine of *cuius est solum eius est usque ad coelum et ad inferos*. Each owner was restricted to reasonable use of the water which passed his land. The fact that water shares were not allocated, and that water was in its nature difficult to apportionate,[11] necessitated restrictions on each owner's right of use which he could exercise as co-owner.[12] The principle of reasonableness was used to restrict an owner's use, based on the doctrine of *sic utere tuo ut alienum non laedas*. Criteria for reasonable use crystallized in the English and American courts (and were later accepted in South African legislation.[13] But the courts made it clear that no hard and fast rules could be laid down to determine reasonable use, but that it depended on the circumstances.[14]

The fact that neither the Roman, Roman-Dutch or Anglo-American systems had ever made provision for the apportionment of water in reasonable shares and, on top of that, that it also restricted the right of use of those shares to reasonable use, was never perceived or discussed by the South African courts, who introduced the concept of reasonable use into the South African law. It was recognized that water was difficult to apportion,[15] and the courts of the nineteenth century attempted to describe and restrict the rights of common use rather than to apportion water and allocate shares.[16] It was

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11 In Roman-Dutch law, the term "*onbegrijppelike*" was employed.

12 "The right of property in the water is usufructuary, and consists not so much of the fluid itself, as of the advantage of its momentum or impetus" (Angell IV.94).

13 Section 52(2) of the Water Act, as well as the erstwhile parliamentary regulations.

14 *Evans v Merriwether* 3 Scamm (Ill) R 492; *Perkins v Don* 1 Rooth's (Com) R 535; *Arnold v Foot* 12 Wend (NY) R 330.

15 *Retief v Louw* 1874 4 Buch 165 180, with reference to Van Leeuwen *CF* 2 1 6.

16 *Retief v Louw* 1874 4 Buch 165 176 : "Common things, which on account of the common use that all have a right to by nature, cannot, by the law of nations, be divided : thus flowing water, which, collected either from the rain or from the veins in the earth, makes a perpetual current. These things, by nature itself as it were, are attributed to, and may be occupied by, any one, provided that the common and promiscuous use is not injured, for without the use of air and water no one could live or breathe" (with reference to Van Leeuwen *CF* 2 1 6).

soon realized that reasonable common use was practically a rather far-fetched ideal in a country where water was scarce and subject to heavy consumptive competition. To compensate for this problem in the South African practice, a preferential order of use was thus incorporated, in a further attempt to make reasonable use a workable system of water rights.[17] The reason why the court retained the concept of reasonableness, instead of apportioning water, probably lay in the sustained faith in the ideal of justice and the *ius naturale* in the water law, and in terms of which water could not be appropriated.[18]

Besides the preferential order, the water courts also placed further restrictions on the right of use, eg. that the water which was used for irrigation had to be led back to the stream, or that lower owners may not be harmed by upper owners' use.

When the water law was codified in the Cape, the principle of the restriction of common rights of use to "reasonable use" was accepted, embodied in the order of preferential use.[19] But in the 1894 Transvaal act,[20] the first signs of apportionment of once indivisible water, appeared. The act provided that a riparian owner could exercise his rights of reasonable use by diverting or impounding water, and then afterwards to lead it back to the stream from which it was derived. No mention was made of the preferential order, which subtracted the emphasis from a restricted right of use, to a pre-measured share of the water. In the 1908 act,[21] however, the concept of common rights of use was re-introduced. The principle of dividing water into shares was however retained, although only as far as surplus water was concerned.[22] Such apportioned water became the

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17 *Retief v Louw* 1874 4 Buch 165 181 et seq; *Hough v Van der Merwe* 1874 4 Buch 148 153.

18 Vide Chapter VI infra.

19 Act 32 of 1906.

20 Act 11 of 1874.

21 Act 27 of 1908.

22 Section 47(1).

property of those to whom the shares were allocated. It is significant that these owners obtained ownership, so that they could, after receiving shares of surplus water, deal with it at will : they were not restricted in the use of their shares in terms of reasonableness, justice or the purposes of use.

The 1912 act[23] firmly vested both principles in the water law : on the one hand, every riparian owner was entitled to the reasonable use of the normal flow of a public stream without apportionment.[24] On the other hand, the act made provision for the apportionment of the normal flow for the purpose of storage : in certain cases, the normal flow could be apportioned by a lawful distribution, where lower owners were aggrieved by excessive storage.[25] That portion was allocated to riparian owners who could impound or store it, but it was not clear what the nature of the right was which the owner vested in respect of that measured share, ie. whether he became owner thereof and could deal with it at will,[26] or whether the reasonable right of use in terms of section 12 applied. Neither was it clear how the apportionment was to be done,[27] and under which circumstances.[28] The only clarity was that the normal flow did not have to be apportioned before it could be used : if it was not apportioned, every owner could utilize the water, as long as he did it reasonably, while criteria for reasonableness were laid down in the parliamentary regulations.[29]

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23 Act 8 of 1912.

24 Section 12.

25 Section 18. Et vide *Reid & others v Van der Merwe & others* 1927 TPD 182.

26 Section 13.

27 Probably by the water court (s 32(b)). Cf *Pretoria Municipality v Bon Accord Irrigation Board* 1923 2 TPD 115 122.

28 Probably only when an owner intended to impound the water.

29 Regulations 2-10.

What is important, is that whenever shares *were* allocated, the owners were not restricted in the use of such shares. And this was where the 1956 act deviated from the erstwhile legal position : while the normal flow now *has* to be apportioned and divided into shares before riparian owners can vest rights of use, these owners are furthermore restricted in the use of their shares by the principle of reasonableness.[30] Not until the 1912 act came into force, was water apportionable. Even when apportionment was introduced, it did not derogate from the reasonable yet common right of use of unapportioned water.

3.3.1.3.4. Reasonable use : its contents

As was said above, "reasonableness" of use was originally related to the principles of justice and equity of the *ius naturale*. In Anglo-American law, criteria were laid down to give substance to this term, which criteria were largely taken over in South African law. The courts were at first hesitant to formulate the concept,[31] but increased competition and disputes in respect of water necessitated the formulation of criteria. These were accepted in the parliamentary regulations,[32] in terms of which reasonable use did not imply apportionment, but had to be measurable in terms of beneficial irrigation.[33] In spite of the formulation of criteria to determine whether use is reasonable, the courts persisted that it was a question which depended on the facts and circumstances of each case.[34] In *Badenhorst v Chambers*,[35] the court of appeal decided that reasonableness

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30 Section 9(1). Et vide Hall *Hall on Water Rights* 59 : "Even where the rights of a riparian owner had been defined through his having been awarded a proportionable share of the water of a public stream, he might not do as he pleased with it".

31 *Hough v Van der Merwe* 1874 4 Buch 148 : "What constitutes a just and reasonable use is entirely a question of degree which depends upon the circumstances of each particular case". Et vide *Great Fish River Irrigation Board v Southey* 1927 Hall Rep 177 188.

32 Regulations 2-5.

33 Regulation 3(a).

34 *Great Fish River Irrigation Board v Southey* 1927 Hall Rep 177; *Union Government v Marais (Minister of Railways and Harbours)* 1919 AC 240.

35 1969 2 SA 282 A.

referred to the use which a specific owner made of the water in a river, and not to the volume to which he was entitled, considering the requirements of lower owners. There was thus a difference between *reasonable use* of the water of a stream by some owner, and a *reasonable share* of the water. In terms of the first concept, the owner is entitled to use the whole flow of a stream, as long as his use was *reasonable*, ie. of economic benefit. In terms of the second, an owner could use only so much of the flow of a stream as was allocated to him (but not without giving due consideration to the requirements of all the other riparian owners). As far as existing rights, which were beneficially exercised, were considered in the firstmentioned view, this view was in accordance with Roman and Roman-Dutch law.

In terms of the 1956 act, probably due to the obligatory apportionment-provision, the reasonableness of the right of use of a share lost its erstwhile emphasis and importance. Although criteria were laid down to replace the parliamentary regulations,[36] a question regarding reasonable use was never brought before the courts since the act came into force. The reason for this is probably that as long as an owner did not use anything more than his allocated share of water, little concern existed as to whether he used such share reasonably or not.

It is therefore submitted that where apportionment of the normal flow is obligatory, the restriction of reasonableness of use is redundant. In a country whith an abundance of water, reasonable common use is a workable concept, and the only criterion to measure whether an owner exercises his right of use reasonably, is the harm which he causes others. In Roman law, this was interdicted by forbidding anyone to use more water than he had used the previous year. But if water is subject to heavy competitive use, then reasonableness of use is not a satisfactory or effective way of control.[37] Almost any use of water by a single owner will necessarily deprive others of what they require. It is thus

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[36] Section 9(a)-(e); ss 52(2),(3), 53.

[37] Cf De Villiers who is of the opinion that it is nevertheless a good system, even in a dry area ("The water law : riparian ownership" 10).

necessary to formulate reasonable use by either restricting it to a preferential order of use, or by restricting the purposes for which water may be used, or by apportioning the water. Restricting the purposes of use was the method used by the nineteenth century courts, and the one incorporated into early legislation. Restricting it to a preferential order, was done in *Badenhorst v Chambers*,[38] where the court was of the opinion that "reasonable use" meant that an upper owner could use as much as he could beneficially and economically utilize, irrespective of the needs of lower owners. Apportionment was introduced by the 1912 and 1956 acts, and should be seen as a substitute for reasonable use, rather than a supplement.

3.3.1.3.5. Apportionment

It was argued supra that a riparian owner is not entitled to the use of the normal flow of a public stream, however reasonable the use, unless he has been allotted a share or portion thereof by the water court in terms of section 9 read with section 52. Such a share is determined by considering irrigation only. This means that an owner receives an irrigation quota, but he is entitled to the reasonable use of such a quota for urban and agricultural purposes. This means that, except when a riparian owner obtains a share from someone else, he cannot receive a share of the normal flow unless he can use it for irrigation. This situation is untenable in the light of the rise of claims to water for purposes other than irrigation. It has however been attempted to be tempered to a certain extent by section 9(1)(c). In terms of this section, an owner is not entitled to use his share for irrigation if he thereby deprives a lower owner who also has a right to the use of the normal flow, of water for domestic purposes and stock-watering. For such lower owner to have a right, he needs a share which was allocated to him in terms of section 9 (read with the criteria in section 52), for which he had to be an irrigator. Therefore, if he is a livestock farmer, he would not have received a share, and the upper owner, who has one, can use his whole share, even if he deprives the stock farmer of

[38] 1969 2 SA 282 A.

domestic water, because section 9(1)(c) does not apply. It therefore seems that the inclusion of section 9(1)(c) was not of much assistance in tempering the obligatory apportionment system.

The conclusion is that section 9 could not have been intended to contain the only rights in respect of normal flow, because this would mean that only irrigators are entitled to use the normal flow of a public stream. It is thus necessary to ascertain what other rights can be vested in respect of the normal flow.[39]

The first possibility of alternative rights is that of section 7, as discussed supra. In terms of this section, any person who has lawful access to a public stream, is entitled to use that water for immediate drinking, washing, stock-watering and cooking. It was submitted that this was an emergency measure. The mere diversion of water by pipes, the purification thereof and the storage thereof in tanks for domestic use, forfeits the probable intention of section 7(1), which is implied by "immediate use".

Section 11(2)(b)(1) contains another possibility of an alternative source of water rights in respect of normal flow. In terms of this provision, a water court may allow an applicant who is not entitled to use public water, to use a stated quantity of public water (whether normal flow or surplus water) for certain purposes. This subsection is specifically applicable to a person who is not entitled to public water. This is irrespective of whether it is normal flow or surplus water. People who are not entitled to *normal flow*, are those who have not obtained a share from someone else, or who are not entitled to apportionment in terms of section 9, because they do not use the water for irrigation. Those who are not entitled to *surplus water*, are non-riparian owners or owners who do not require the water for any of the mentioned purposes in section 10, eg. when they require it for nature conservation. These users may apply for water rights in terms of section 11(2).

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[39] Section 9(2)(a) refers to a "lawful distribution", which advances a submission that s 9(1) cannot be the only source of water rights in respect of normal flow.

Once again, a right in respect of the water of a public stream can be acquired through the water court only. The water court does not allocate a *right of use*, but a *portion* (quantity) of water. In this case, however, the use of the portion so allotted is not subject to reasonableness of use. As long as it is used for the purpose and at the place determined by the court, the owner can use it uneconomically, or waste it.

The court is bound to do the allotment in the public interest, but it is not bound to investigate or respect existing water rights, such as other quantities already allocated in terms of the same section, or section 9 shares. If a conservation area should apply for a water right in respect of the normal flow of a public stream, the court may regard it to be in the public interest to allocate an amount of water, although such an allocation might deprive other owners of their shares.

The question which immediately arises, is why it was necessary for the legislature to complicate the allocation system by having water quotas allocated by the water court on application, instead of setting rights of use by statutory provision. If the apportionment of water is regarded as the only workable method to obtain reasonable common use of public water, then the apportionment ought to be done in terms of a single provision, by either the court or the minister, with due consideration to all the claims in respect of the stream in question, or with consideration to existing shares which have already been allocated. It is difficult to see why irrigation shares are apportioned in terms of section 9 (read with section 52), and other shares in terms of section 11(2), although the same water is concerned. This haphazard way of allocating water rights is unsatisfactory, and it creates opportunities for disputes and legal uncertainty.

It is submitted that, to obtain peaceful common use of a stream, apportionment ought to be done in a single attempt, and in an integrated way, but subject to revision. If this is not possible, then the system of apportionment ought to be reconsidered in favour of the erstwhile system of preferential purposes, or in favour of the alternative allocation system of the act, viz. that applicable to control areas.

Example

Suppose X, a nature conservation institution, applies for a portion of the normal flow of a stream to which the conservation area is riparian, in terms of section 11(2). The court decides that it is in the public interest to allocate a quantity of water for diversion to X for purposes of veld-flooding or the maintenance of ecobiota. The court is aware of a water court apportionment for irrigation and urban purposes in terms of section 9 (read with the apportionment criteria in section 52). Because there is still water which reaches X, the court is of the opinion that the whole normal flow has not been apportioned, and there is sufficient water for X. But during a dryer period, X is deprived of his share by the upper owners who start to exhaust their allocated shares. X has no remedy, because his share was not allocated in terms of section 9, and the protective measures of section 9 are thus not applicable. If his requirements could be considered when the section 9 apportionment had been done, he would have been entitled to protection in terms of section 9.

No other rights in respect of normal flow exist under the act, except for existing rights in terms of section 4, if any.

It can thus be concluded that (unless a person is entitled to retain his existing rights in respect of the normal flow (in terms of section 4)), he is entitled to use the normal flow of a public stream, only if he has been allotted a share in terms of section 9, or if he has obtained a share from another, or if he has been allotted a quantity of water in terms of section 11(2). If no apportionment has been done, then only existing rights, the emergency rights of section 7, and rights of reasonable use in respect of shares obtained from others, exist. The rest of the normal flow is not available for use by anybody. Common law rights cannot be vested, because, in terms of section 6, the control and use of public water is regulated as provided in the act.

3.3.1.3.6. Water subject to apportionment

The next question to address, is *which* water is subject to section 9(1) rights. The normal flow is the quantity of public water actually and visibly flowing in a public stream which

can be beneficially used for irrigation without storing. This definition confirms the description of normal flow as water suitable for *irrigation*. It was not intended to serve purposes other than irrigation.

The sources subject to section 9(1) rights therefore exclude ground water (which is not visible), wetlands (where the water is not actually flowing), flood water (which cannot be used for beneficial irrigation without storage) and water unsuitable for irrigation due to its quantity, quality or some statutory prohibition. The water of these sources qualify as surplus water, because it cannot be used for direct irrigation without storage.[40] Nobody may apply for apportionment[41] in respect of any of these kinds of water, even if he intends to apply his share for purposes other than irrigation, such as urban and agricultural purposes. The reason for this is confusing : how is it possible to utilize a section 9(1) right of use of a share of the normal flow for agricultural or urban purposes, if a portion can be obtained only if the water is visibly flowing and capable of beneficial irrigation without storage? And why should water comply with the definition of normal flow, which is an irrigation-orientated concept, if such water will not be used for irrigation? Such water is surplus water, and can be used as such. Therefore, an owner who wishes to use water for agricultural or urban purposes, cannot do so if the water qualifies as normal flow, because he will not receive a portion in terms of section 9, in spite of the provisions of section 9(1).

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[40] This is public water of which the quantity is too weak for direct irrigation *without* storage, yet sufficient for common irrigation *with* storage. It is however significant that the water in respect of which a section 9(1) right may be vested, does not necessarily have to be applied for irrigation at all : it may also be used for urban use and other agricultural uses, such as stock-watering, garden-watering, water-borne sanitation and domestic purposes. (Vide the definitions of "urban" and "agricultural" use in s 1). This means that a share of water may be acquired only if the water qualifies as normal flow, ie. as water capable of direct irrigation. This further means that if an owner has water which he intends to use for purposes other than irrigation, he must still prove to the court that the water is capable of direct irrigation (ie. that it is normal flow), so that the court can apportion to him an irrigation share which is determined according to irrigation criteria (s 52). Only after this *irrigation* quota has been allotted, may he apply his share for non-irrigation purposes.

[41] In terms of s 52.

3.3.1.4. Section 9(2) : Impoundment

An owner who obtained a portion of the normal flow of a public stream, may impound and store such a portion in a reservoir which he constructed in the channel of a public stream for the storage of surplus water.[42] If he has not constructed such a dam, he may construct a reservoir outside the channel, to store his share of the normal flow of the stream.[43]

According to Hall, an owner is entitled to store normal flow in the channel prior to apportionment, if he accepts the risk of litigation for depriving lower owners of water to which they are entitled. But it is submitted that, since no water rights exist for the use of normal flow prior to apportionment, storage is not allowed either. No lower owner may therefore claim that an upper owner stores water to which he is "entitled". This is confirmed by the express provision that only an owner "*having the right* to the use of a portion of the normal flow of a public stream *by virtue of ... a lawful distribution* of such normal flow", is entitled to store it. Water which is so stored, is nevertheless subject to the right of reasonable use of the riparian owner in terms of section 9(1), and the mere fact that he is entitled to store the water, does not make him the owner thereof, or relieve him from the restrictions of section 9(a)-(e).

3.3.1.5. Section 10 : Beneficial use of surplus water

Every riparian owner is entitled to the use of so much of the surplus water of a public stream as he can beneficially use for domestic purposes, stock watering, agricultural and urban purposes, and also to impound water for such purposes.[44] This right of use is subject to other provisions of the act, as well as to existing rights. It is moreover subject

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[42] Section 10(1).

[43] Section 9(2)(b).

[44] Section 10(1).

to sections 19 and 9B. In terms of section 19, a lower riparian owner may ask the water court for the apportionment of a share to any upper owner who uses surplus water in an unreasonable quantity. It therefore seems as if the right to use surplus water is a reasonable right of use[45] of an unquantified volume[46] of water,[47] which will be apportioned in cases of disputes only.

3.3.1.5.1. Normal flow and surplus water

(i) The main difference between the reasonable right of use of normal flow, and the preferential and beneficial right of use of surplus water, lies in the obligation to have it quantified : while an owner may not use normal flow unless a share has been apportioned to him, he may use surplus water at leasure, until a third party applies for apportionment (and subject to permission for excessive storage).

(ii) A second difference lies in the purposes of use : it *prima facie* seems as if surplus water is available for a wider range of purposes than normal flow. A riparian owner can use surplus water not only for agricultural and urban purposes, but also for domestic purposes and stock watering. But in terms of the definitions of both the concepts "agricultural purposes" and "urban purposes", domestic use is included,[48] while stock watering is included in the definition of "agricultural purposes".[49] This means that both normal flow and surplus water may be used for

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[45] According to the court in *De Villiers v Barnard* 1958 3 SA 167 A, it is *not* ownership.

[46] Section 9B places a restriction on the size of a surplus water dam, in that it may not contain more than 250 000 m^3 of public water or divert more than 110 litres per second from a public stream without ministerial permission. Moreover, the minister is empowered to amend these restrictions so as to prohibit any storage without a permit (s 9B(1C)).

[47] According to the court in *Great Fish River Irrigation Board v Southey (Grass Ridge)* 1927 Hall Rep 177 189, the right of use does not allow waste, so that it ought to be exercised economically.

[48] Section 1.

[49] Section 1.

all four of these uses, and the *prima facie* difference is rather due to ill-considered draughtsmanship than to a determinable reason.

(iii) A third difference between the two rights of use, is the preference which the upper owner enjoys in the case of surplus water. While a riparian owner is entitled to "reasonable use" of the normal flow with reference to his allocated pro rata share, he is entitled to as much of the surplus water as he can beneficially use. His use of his pro rata share of the normal flow is subject to a prescribed preferential order : although he has been allocated with a quantified portion, he may not use his portion for the prescribed purposes to the detriment of certain requirements of lower owners.

Example

Suppose a riparian owner has been granted a quantity of normal flow for irrigation in terms of section 9. In terms of section 9(1), he may reasonably use this share for agricultural and urban purposes. In terms of section 1 ("use for agricultural purposes") he may apply the water for irrigation, domestic use, and stock- and garden-watering. In terms of section 9(1)(c), he may not use it for irrigation if he thereby deprives a lower owner who has a similar right of use for stock-watering and domestic purposes.[50] He is thus, in spite of the apportionment, bound to a preferential order of use in terms of which he may fulfil his domestic and stock needs prior to theirs, but he may not fulfil his irrigation needs prior to their domestic and stock watering requirements. His irrigation needs may only be fulfilled prior to their *irrigation* needs, but to the maximum extent of his quota only.

As far as the surplus water is concerned, he may satisfy his domestic and stock-watering needs prior to lower owners, just like the position is with normal flow. He may, however, also satisfy his irrigation needs prior to their domestic and stock-watering needs, unlike the position with normal flow. He may also satisfy his irrigation needs prior to their irrigation needs, just like with normal flow, but only as much as he can beneficially utilize.

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[50] This is when the yield of the stream is insufficient to fully supply all the quotas which have been allocated in respect of the stream. But then the lower owner must first try to fulfil his domestic and stock-watering needs with the irrigation water (s 9(1)(d)).

Seen this way, the difference between the rights as far as the preferential order is concerned, is not as significant as it originally appeared to be : with regard to surplus water, the upper owner may fulfil *all* his needs prior to *any* of those of the lower owners, while, in the case of normal flow, he may do the same, except that his irrigation requirements have to stand back for lower owners' domestic and stock watering requirements. In respect of both these forms of water, the upper owners are bound to a quantitative limit : in respect of normal flow, it is the allocated share, while in respect of surplus water, it is the amount necessary for beneficial use, which is determinable but not determined by the court.

(iv) The fourth difference between the section 9(1) and section 10(1) right, is the status of the water which is subject to the respective rights.

It was said supra that only the public water of a public stream which actually and visibly flows and which is capable of irrigation without storage, qualifies for apportionment, and thus for section 9(1) rights. Moreover, the water must be derived from some steady source of supply, such as seepage, springs, drainage from swamps etc.[51] If the water which occurs on or beneath an owner's land in the channel of a public stream either originates from rain, or is not flowing, or occurs beneath the surface or is not capable of direct irrigation without storage, or is impounded, the court cannot do a section 9 apportionment, and section 10(1) applies, which means that the owner does not need to consider the requirements of lower owners before using a beneficial share. His discretion as to what a beneficial share is, can however be curtailed, if an aggrieved lower owner applies to the court for quantification in terms of section 19.

(v) The fifth difference lies in the term "reasonable". The section 9(1) right is a right of reasonable use of an apportioned share, for agricultural and urban purposes,

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[51] Section 53(2).

subject to several proviso's, including a prohibition on waste, detainment and flooding;[52] an obligation to lead irrigation water back to the stream;[53] a preferential order of domestic use;[54] and the preferential rights in respect of tributaries.[55] It was submitted supra that, in the light of the apportionment of normal flow, as well as the prescribed purposes of use and the section 9(1) restrictions, it was not necessary to restrict the right of use any further, viz. by requiring reasonableness of use. In what further way can an owner use reasonably, when he already has a quantified portion of water, burdened with restrictions as to the purposes, quantities and preferential order of use?[56]

The section 10(1) right, on the other hand, is described as a right of use for domestic purposes, stock-watering and agricultural and urban purposes. In this section, no reference is made to reasonableness of use. The term is however employed in section 19[57] : a lower owner who feels aggrieved by an upper owner who uses more surplus water than "he could reasonably be entitled to use", may apply to the water court for allocation of a quantified share to the upper owner. But "reasonable" was employed in a different sense here than in section 9. In section 9, it is the *use* (ie. the way in which the owner utilizes the share of water) which must be reasonable. In terms of section 19, it is the *quantity* of water which must be a reasonable quantity, and not the way in which that quantity is used. This involves other owners : an unreasonable volume of water means that lower owners are deprived of water. But unreasonable utilization of an already

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52 Section 9(1)(a).

53 Section 9(1)(b).

54 Section 9(1)(c),(d).

55 Section 9(1)(e).

56 The right is also qualitatively restricted by pollution control provisions.

57 In *Smartt Syndicate Ltd v Richmond Municipality* 1919 Krummeck Rep 284 289, it was held that s 18 should logically have followed s 14, to which it in effect was a proviso.

allocated and determined volume of water, cannot deprive lower owners of water (in fact it is uncertain *what* they are deprived of, which justifies this restriction on the upper owner's use).

The question of the meaning of "reasonable use" in the sense in which it was employed with reference to surplus water, was discussed by the court in *Fish River Irrigation Board v Southey (Grass Ridge)*.[58] The court, with reference to sections 14 and 18 of the 1912 act, said :

> "The court has not, as in the case of normal flow, to consider similar rights of lower owners, but merely the reasonable requirements of the upper owners : and no lower owner has any ground for complaint unless the upper owner diverts or stores more than his reasonable requirements"

and

> "the use to be enjoyed is not a mere reasonable use consistent with similar rights of other owners..., but a use not in excess of the reasonable requirements for primary and secondary use".[59]

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[58] 1927 Hall Rep 177.

[59] The court in *Smartt Syndicate v Richmond Municipality* 1919 Krummeck Rep 284 added that it had to be without waste : "A right of recourse to the water court is given to the owners if an upper owner takes more surplus water than he could reasonably be entitled to use. This is tantamount to lying down that each riparian owner is merely entitled to the reasonable use of the surplus water, for if a remedy is given when he exceeds a reasonable use it can only be because he is entitled to the reasonable use and no more. Taking it then that each riparian owner is entitled to the reasonable use of surplus water, we find that the act contains no directions as to what such reasonable use consists in, whether for instance it is to be a mere proportionate share with a liability to abate pro rata or whether it means that each owner in succession from the top to the bottom of the stream may take as much as he requires" (289). The court found the solution in parliamentary regulations 18-20, and concluded : "So long as he does not waste, each owner can take all the surplus water that he requires for irrigation and primary use without regard to the necessities of lower owners, and he is not confined to a mere proportionate share, nor need he abate pro rata if there is not sufficient surplus water for all the riparian owners. Each riparian owner thus enjoys priority over all owners below him, but he is in turn subject to the prior rights of all riparian owners above him" (290).

In *Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board*,[60] the court expressed itself as follows on the question of reasonable use :

> "Veld or vlei flooding with surplus water is allowed, but without waste or leading it to places with no advantage, because that is unreasonable. And only when it may be anticipated that it will produce substantially beneficial results".[61]

In *De Villiers v Barnard*,[62] the court held that a riparian owner is entitled to use surplus water, but he has no ownership, and he may not waste the water.[63]

It seems as if the courts were not keen to give an interpretation[64] to the effect that surplus water was apportionable. The more favoured interpretation was that a riparian owner could use as much of the surplus water as he could utilize beneficially and economically and without waste. If that consisted of the total run-off of the stream, he was entitled to it, even to the detriment or exclusion of lower owners.

This view was however amended in 1956, by changing the terminology of section 14 of the 1912 act. Where section 14 read "...every riparian owner shall be entitled to use the surplus water of a public stream...", section 10(1) of the 1956 act read "...every riparian owner shall be entitled to use as much of the surplus water of a public stream ... as he can beneficially use...". This clear wording brought about quantification of surplus water : an owner was restricted to the use of a fixed quantity of water, which quantity was, unlike a share of normal flow, determined according to his beneficial needs, and not

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60 1921 Hall Rep 65.

61 72.

62 1958 3 SA 167 A.

63 With reference to ss 18 and 133(d) of the 1912 act.

64 Sections 14, 18 of the 1912 act.

according to common riparian needs. The share could, on application by a lower owner to the water court, be fixed as a reasonable share.

It can be concluded that the difference between the rights of use in terms of sections 9 and 10, as far as the reasonableness of use is concerned, lies in the meaning of the term "reasonable". In terms of section 9, reasonable use is use as qualified by, inter alia, the conditions set out in section 9(1)(a)-(e), ie. the term "reasonable" determines the way in which use is made of a fixed share of water. In the case of normal flow, reasonableness is twice relevant : first, to determine a share in terms of section 9, and secondly, to restrict the right of use of the share. The reasonableness required by section 19, read with section 10, does not prescribe the contents of the right of use of surplus water, but the criterion in terms of which quantitative use ought to be determined.

Once a volume of surplus water which is necessary for a riparian owner's beneficial domestic, stock watering, urban and agricultural purposes is determined, he is entitled to divert and store that water. But he is not entitled to use it at leisure - he remains bound to the purposes for which he may use it, as well as to beneficial use. The term "reasonable" is thus nowhere employed in the provisions regarding the allocation of surplus water to prescribe the *way* of use, yet an owner is not free to use it in an unreasonable manner, due to restrictions placed on the way of use. This indicated that if an owner is bound to a fixed share of water (which is determined according to criteria based on reasonableness), as well as to restrictions on the way in which he is allowed to use the share, it is not necessary to also employ the term "reasonableness" to describe the right of use. The right of use of surplus water is as clearly limited as the right of use of normal flow, yet without using the confusing term "reasonable use".

3.3.1.5.2. Similarities

The question as to the similarities between the rights of use in section 9(1) and section 10(1), now becomes easier to answer.

First, both rights of use are subject to the provisions of the act, as well as to existing rights. "Existing right" is defined in section 1 as any right protected by section 25(a) and (b), any right acquired by agreement or order of court, and any lawfully acquired right.[65]

Secondly, both rights vest in riparian owners only.[66]

Thirdly, both rights are restricted by a prohibition on waste.[67]

Fourthly, both rights are restricted by prescribed purposes of use, viz. urban and agricultural purposes.[68]

Fifthly, both rights can be exercised in respect of a fixed portion of public water, which portion is determined according to criteria of reasonableness (although the meaning of reasonableness varies : in the case of normal flow, the court considers lower owners' needs, while in the case of surplus water, the owner determines his own beneficial needs which can be controlled by lower owners' rights in terms of section 19.[69]

3.3.1.5.3. The intended distinction

The rights of use in terms of section 9(1) and 10(1) agree in various ways. In terms of section 9(1), a riparian owner may use his quota of the normal flow for agricultural and urban purposes, as long as he does not irrigate before all lower owners have fulfilled their domestic and stock watering needs. In terms of section 10(1), a riparian owner may

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65 Et vide ss 4, 25; De Villiers "The water law : existing rights" 3 et seq.

66 Cf ss 11(2).

67 Sections 9(1)(a), 170(1)(e).

68 Surplus water may also be used for domestic purposes and stock watering, but the definitions of urban and agricultural purposes include these uses.

69 This is moreover restricted by section 9B.

use his quota of surplus water for agricultural and urban purposes, in spite of the life-essential requirements of lower owners.

In the light of the definitions of the terms, it seems as if normal flow, being the steady part of a public stream,[70] was regarded by the legislature as the part which should be reserved for irrigation,[71] and thus to be apportioned amongst irrigators in shares. The inconsistent part of a stream,[72] being water which is derived from downpours and which needs to be stored to be of use for irrigation, was destined for common use for general purposes : where an owner can intercept this water, he can preferentially use it for a variety of purposes.[73]

This apparent intention which underlies some of the provisions of the act, does not appear consistently : normal flow, mainly being irrigation water, may not be utilized to the detriment of the domestic needs of downstream owners, while surplus water may be used by a single owner for irrigation even if his neighbours are dying of thirst. If the destination of the water is the reason for the difference in rights in respect of surplus water and normal flow, then the distinction is hardly justified, since irrigation water is subject to general needs of lower owners, while general water is subject to irrigation needs of upper owners.

Normal flow forms an inferior part of the apportionable water in South Africa.[74] This reduced importance of normal flow is mainly due to technological development, which increased the value of flood water (eg. by large-scale storage). A major part of irrigation water is nowadays derived from impounded surplus water, and it is no longer the

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70 Section 53. Vide Department of Water Affairs *Management of Water Resources* 8.11.

71 Section 52.

72 Department of Water Affairs *Management of Water Resources* 8.12.

73 Section 10.

74 Department of Water Affairs *Management of Water Resources* 8.8.

privilege of only the rich to intercept and utilize flood water. At least five hundred large government water works currently exist countrywide, for the benefit of a variety of water user sectors.[75] It is the policy of the Department of Water Affairs to increase the regulation of water use in respect of all water, irrespective of its legal status, in the interest of all water user sectors. The reservation of the steady flow of streams for irrigation, is no longer in harmony with the public interest,[76] and neither is the principle of first come first served.[77] The Department aims at an allocation mechanism in terms of which all serviceable water is fairly distributed between all user sectors, irrespective of the consistency of the source or the degree of difficulty to impound or divert it.[78] This modern policy ought to be reflected in the Water Act, to replace outdated distinctions between water types, which are based on the status of their sources, instead of the use which is made of it.

3.3.1.6. Section 9(1)(e) : Tributaries

In terms of section 9(1)(e), riparian owners to a tributary are entitled to so much of the normal flow of the tributary as they may require for agricultural and urban purposes, in preference of the rights of riparian owners to the main stream. This means that the tributary is regarded as a separate public stream for purposes of apportionment of the normal flow, and only what is left after apportionment, can be regarded as part of the normal flow of the main stream.[79]

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[75] Department of Water Affairs *Management of Water Resources* 8.8.

[76] Sections 7, 9A, 59, 9(1)(c).

[77] Restrictions on the right of use of surplus water are contained in ss 19, 9B, 9A, 11(2), 56(3).

[78] Department of Water Affairs *Management of Water Resources* 10.

[79] De Wet "Water" 47.

First, the term "reasonable" is not used in section 9(1)(e), which gives the riparian owners on tributaries rights to "so much as they may require" of the water of tributaries. There are no statutory criteria to quantify or qualify the water which such owners may use.[80]

Secondly, there is some uncertainty as to the distinction between main sources and tributaries, which had been caused by the erstwhile rule that whenever water formed the source or a part of the source of a public stream, it was excluded from the rights which an upper owner vested in respect of private water, irrespective of whether such water complies with the definition of public water or not. This point is however discussed elsewhere,[81] with the submission that this rule no longer applies in the South African law.

3.3.1.7. Section 11 : Industrial use[82]

Public water may be used for industrial purposes with the permission of the water court.[83] This permission can be granted, on application, to :

(i) a person who is entitled to the use of public water for agricultural purposes in terms of the act;[84]

(ii) a person who has acquired a right to the use of public water;[85]

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80 There is however a prohibition on wastage of water (s 170(1)(e)).

81 Chapter IV.V supra.

82 Although subsections 11(1) and (2) were interpreted as separate provisions by the Hall Commission in its proposed act, the Water Act rather creates the impression that the procedure in terms of s 11(2) represents the method used to obtain section 11(1) rights.

83 Section 11(1).

84 Section 11(2)(a).

85 Section 11(2)(a).

(iii) a person who is not entitled to use public water, if the water court regards it to be in the public interest;[86]

(iv) a person who is not entitled to use public water (ie. on non-riparian land), if all the water in a public stream will not be used on riparian land.[87]

The first group includes holders of section 9(1) and section 10(1) rights. Although holders of agricultural rights in terms of sections 62(2B), (2E)(d)(ii), (2H), (2F) and 63 are not expressly excluded, section 62(2I) is aimed at the allocation of, inter alia, industrial rights in respect of water in control areas, and they must be deemed to be excluded. The only users entitled to use public water for agricultural purposes, are riparian owners who have either obtained a section 9(1) right to normal flow by way of apportionment, or acquired it from someone else, or are entitled to a preferential right of beneficial use of surplus water for, inter alia, agricultural purposes. These riparian owners can obtain authorization from the water court to use their agricultural shares for agricultural, urban or industrial purposes, either on their riparian land, or elsewhere.[88]

First, why are only those riparian owners who are entitled to agricultural use of public water, allowed to apply for section 11(2)(a) rights? In terms of sections 9(1) and 10(1), riparian owners can also vest rights in respect of normal flow and surplus water for urban purposes - why are these owners not allowed to apply for authorization that their shares may be used for other purposes? Secondly, why must there be a separate provision in terms of which a water court order must be obtained for the use of public water, if no

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[86] Section 11(2)(b)(i).

[87] Section 11(2)(b)(ii).

[88] Section 11(2)(a). Et vide *Ex parte De Beers Consolidated Mines Ltd* 1967 Vos Rep 365, where the court held that notices have to be served on lower owners to consider their interests.

rights exist *ex lege* without a water court order anyway?[89] In terms of section 9(1), only those to whom shares have been allocated, may use normal flow for agricultural and urban purposes. It would have been so much more economically effective if the same court who apportioned the water, could also authorize the purposes of use.[90]

According to Hall,[91] the phrase "or who has acquired a right to the use of such water" refers to a non-riparian owner who has acquired the agricultural share of a riparian owner, and now wants to use that share for other purposes. It is however submitted that it rather refers to the same persons than in section 9(1), viz. those who lawfully acquired rights of use from other persons, and this group cannot include non-riparian owners. Nowhere was the acquisition of a water right by non-riparian owners ever authorized in the act.[92] And in terms of section 6, the use of public water shall be regulated as provided in the act. It is thus submitted that section 11(2)(b) is the first and only provision in the allocation of rights in respect of public water, in terms of which grant such rights may be granted to non-riparian owners. The only instance where non-riparian owners will be entitled to an order in terms of section 11(2)(a), is when they have already become entitled to public water for agricultural purposes in terms of section 11(2)(b)(i) or (ii), and they need permission to use it for other than agricultural purposes.

It is therefore concluded that the only holders of agricultural water rights in respect of public water, are riparian owners who have received such rights by way of apportionment in terms of section 9, or who have acquired it from another, or any other owner who has

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89 The probable answer why the court procedure is required, is to give interested or aggrieved parties and users the chance to raise their grievances. This however still does not explain the necessity for the doubled procedure.

90 Vide Grobler, who is of the opinion that a change of use can have an influence on the run-off, eg. because s 9(1)(b) will no longer be applicable.

91 74.

92 In fact, ss 9 and 10 are very clear on the fact that only riparian owners are entitled to water rights in respect of normal flow. The term "riparian" is used eleven times in s 9(1).

acquired it by way of a water court order in terms of section 11(2)(b). Therefore, only these holders of water rights are entitled to apply for authorization to use their shares for industrial or urban or other purposes.

A person to whom a water court has allocated water for *other* than agricultural purposes,[93] is not entitled to apply for authorization to change the purposes of use. It will however be indicated infra that such a person is not entitled to relief under section 11(2)(b) either, which places him in a very uncertain position.[94]

3.3.1.8. Section 11(2)(b)(i)

A person who is not entitled to use public water, may apply to the water court for permission to abstract a *stated quantity* of public water[95] from a public stream for use on any land for agricultural, urban, industrial or other purposes. The persons who are entitled to this permission, are not those without *agricultural* rights, but only those who have no water rights at all.[96] This excludes those who have rights for purposes other than agriculture, eg. urban rights allocated in terms of sections 9(1) and 52, and section 7 rights and section 11(2)(b) rights for purposes other than agriculture. In terms of this provision, the water court may grant permission to the applicant to use a stated quantity of public water for *any* purposes. This permission will be granted only if the court is of the opinion that it will be in the public interest.[97]

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93 In terms of s 11(2)(b).

94 Cf Hall *Hall on Water Rights* 75 who is of the opinion that s 11(2)(b) refers to rights in respect of the water in question. If a person has a water right, but in respect of *other* water, he may still apply.

95 And not a percentage (De Wet *Opuscula* 48).

96 Cf Hall *Hall on Water Rights* 75 who is of the opinion that this provision only refers to the water in respect of which the application is made. Existing water rights in respect of other water will not influence his right to make such an application. Et vide *O'Kiep Copper Co Ltd v Union* 1961 Vos Rep 302. Cf *Ex parte Senekal Municipality* 1958 Vos Rep 237.

97 In *SA Industrial Cellulose Corporation v Umkomaas Town Board* 1960 Vos Rep 264, the court laid down criteria to determine the public interest. It held that regard ought to be given to the interests

The court is not bound to consider existing or previous apportionments in respect of the stream in question. It must however consider the public interest. The problem is that what is contrary to existing rights, is not necessarily contrary to the public interest. An example is water for ecobiotic purposes. Unless under a previous permission in terms of section 11(2)(b)(i), an owner has no *ex lege* right to use public water for the maintenance of natural ecosystems.[98] On the contrary, the use of public water for purposes which are not economically directly beneficial, such as the frequent flooding of the veld, or the leading of public water onto places such as brak pans, hollows or swamps, is deemed to be unreasonable use.[99] In the light of modern conservation awareness,[100] the court will probably deem it to be in the public interest to allocate a stated quantity of water for these purposes, on application. If, at the time of application, an apportionment in terms of section 9 has already been done, and the normal flow of a certain public stream has been allocated (to the maximum yield of the stream) to riparian owners in section 9 rights, while surplus water is being utilized in terms of the rights granted in section 10, an allocation of public water could be in conflict with existing rights. The court must now weigh these rights against the necessity to allocate water for this additional purpose, to determine whether the allocation will be in the public interest. Unfortunately, the public interest is an undefined and subjective concept, and the court has a free discretion as to whether an allocation is in the public interest or not.[101] The applicant will therefore not only have to convince the court of the merits of his application, (which will probably consist of showing that the purpose of the

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of the public at large, and that their interests have to be affected by nuisance before it is contrary to the public interest.

98 ie. to supply water to maintain natural habitats of species, eg. wetlands, estuaries etc. Vide Uys "Natural ecosystems" 101.

99 Section 52(3),(4). Et vide *Minister van Waterwese v Oewereienaars aan die Skeerpoortrivier* TWC4096/92 (unreported) decided on 17 March 1994, where the court set *"ekonomiese verantwoordbaarheid"* as the criterion to determine beneficial use.

100 Vide *Water for managing the natural environment*; PC 1/1991; the Environment Conservation Act 73 of 1989.

101 Vide Fuggle & Rabie 300-302.

intended use is reasonable), but also that it will be in the public interest. It is submitted that if the act deems certain uses unreasonable, such use will hardly be in the public interest in the eyes of the water court. Although the act therefore does not restrict the water court in his discretion as to what will be in the public interest, the statutory description of "reasonable use" cannot be ignored by the court.

It is submitted that, if apportionment of streams is envisaged, there is no place for a free discretion of the court during some applications, which discretion can be exercised irrespective of previous attempts of apportionment, and irrespective of existing rights, and irrespective of the statutory definition of the reasonable use of water.[102] The allocation of water rights to users additional to those recognized in the initial allocation provisions of the act, ought to be subject to these factors, and ought to rank lower down in the preferential order of use. Instead of continually allocating new shares for new purposes, water rights for all purposes ought to be available in terms of the initial allocation system.

Apportionment could be a workable system if it is non-recurrent, as it is done in control areas. Otherwise, a system of rights such as that contained in section 10, which is in accordance with the common law, could be effective. This means that a user may divert water from a stream in such a volume as is reasonably necessary for his requirements, but irrespective of lower owners' needs. Lower owners are however entitled to complain when the upper owner wastes or diverts water unreasonably. Alternatively, the old preferential system, in terms of which an upper owner has preference of use only in so far as certain uses are concerned, might work. This will mean that he may use water for irrigation only after downstream ecobiotic requirements have been met.

In the light of the above argument that large-scaled state-initiated impoundment of both surplus water *and* normal flow has, to a great extent, negated the necessity for a

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[102] This is even more so because a share is not a fixed quantity of water, but a percentage (*Struben v Cape Town District Waterworks Co* 1982 9 SC 78; Grobler 141).

distinction, as well as this view that bit-by-bit apportionment counteracts the value thereof, it is submitted that the need for a distinction between the rights in respect of normal flow and surplus water can be questioned. According to the report of the Hall Commission, the distinction exists mainly because the attempt of the 1912 act to apportion flood water has failed. It never considered the workability of apportionment, especially in the light of the emphasis on the protection of existing rights : in terms of the erstwhile system of preferential use, upper owners could use as much water as they reasonably required for specified purposes of use, subject to all owners' rights in respect of the dominant purposes. In this way, riparian owners in the upper reaches of rivers established large irrigation practices, decreasing lower down, due to the diminishing remainder of water for secondary purposes. If apportionment was the reigning allocation mechanism instead, the riparian owners in the lower reaches would have been as entitled to irrigate on a large scale as upper owners. But, in respect of weaker streams, apportionment could deprive all the riparian owners of economically useful water. Apportionment is thus a system which is workable where a good natural balance exists between the yield of a river and the total water requirements along the course thereof, or where an artificial balance occurs, eg. by increased water availability, caused by impoundment. If this ideal situation does not exist, apportionment could work detrimentally. This is especially true where existing rights are protected, which rights were vested in terms of the erstwhile system of preferential use. The replacement of the system of preferential rights with apportionment, could hardly work without harming existing rights, unless such rights are bought out.

One possible solution could be to reserve apportionment for control areas, and leave other streams to beneficial rights of use. An alternative is to re-allocate water rights along streams outside control areas, irrespective of the existing rights. A third possibility is to extend the declaration of control areas. A fourth is to manage catchments in an integrated way, by way of steering committees consisting of representatives of all water user sectors. These steering committees should allocate water quotas, which are subject to revision as a result of changes in water availability or demand. In terms of the current

system, demands for water will probably increase, although water in South Africa is regarded as an increasingly scarce strategic resource. Existing rights remain, irrespective of water availability, and the court has a free discretion to add shares in respect of water, irrespective of either water availability or existing rights.

3.3.1.9. Section 11(2)(b)(ii)

The same category of people as those referred to in section 11(2)(b)(i), viz. those not entitled to any water rights, can apply for permission to use reserve water[103] for agricultural, industrial and urban purposes at any place during the period when such a reserve will be available.

The first practical problem with this section, is that of satisfying the court that all the water of a public stream will not be used during a certain period. As far as normal flow is concerned, this is not very problematic, since normal flow has to be apportioned before it may be utilized. In adding the shares allotted in terms of section 9 and section 11(2)(a), the total part of the normal flow which will be used in any period, can be ascertained, and the reserve in respect of which a section 11(2)(b)(ii) right can be applied for, can be calculated with respect to the total of the normal flow in that stream. But since surplus water is not apportioned, and every riparian owner is entitled to so much as he can beneficially use for the prescribed purposes, it is hardly possible to predict in advance whether there will, during a certain period of time, be an excess. Moreover, the nature of surplus water, viz. generally consisting of flood water which is derived from heavy rain in the catchment, makes it difficult to appropriate - an owner will have to construct a dam in advance, and apply for permission before the rainy season. But even then, besides the expenses involved, it will hardly be possible to

[103] This term is used herein to refer to normal flow and surplus water which will not, to the satisfaction of the court, be used on riparian land.

convince the court that there will be an abundance of surplus water which will not be utilized in terms of section 10.[104]

3.3.1.10. Section 12

In terms of section 12(1), no person shall use more than 150 m^3 of water per day for industrial purposes except under a permit from the minister. Read with section 11(1), (1A), (2) and (3), it seems as if a permit to use water in excess of 150 m^3 is required over and above the permit required to use water for industrial purposes. A permit in terms of this section is however required before an application in terms of section 11 will be considered, where the section 11 application involves a quantity of water exceeding 150 m^3.

An applicant who therefore wants to use water in excess of 150 m^3 per day, should first apply for a section 12(1) permit to use more than 150 m^3 of water per day, and then apply for a section 11(1) permit to be entitled to use that quantity. A section 12(1) permit is thus subject to a section 11 permit,[105] and therefore section 12 is not part of the allocation mechanism,[106] because it does not provide for or grant a right of use. The minister, when granting the section 12 permit, is not bound to consider existing rights, because the section 12 permit per se cannot impair existing rights. The task of investigating existing rights, and the influence of granting a section 11(1) permit, as well as in fact allocating a right of use to the holder of the section 12 permit, rests on the water court. The question is why the minister is allowed to grant section 12 permits if no right of use exists, and what the function of the water court's discretion to grant rights is, if the minister, who is not bound to consider existing rights, may determine the extent

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[104] *O'Kiep Copper Co Ltd & Springbok Municipality v Union Government* 1961 Vos Rep 302; cf *Ex parte Senekal Municipality* 1958 Vos Rep 237. Et vide s 11(1A)(a).

[105] Section 12(3).

[106] Vide *Combrink & Nezar v Rodeon Village Council* 1957 Vos Rep 220. Cf *SAR & H v Van Niekerk* 1960 Vos Rep 262, where it was held that a s 12 permit is required for a *new* undertaking only.

of such rights. The question is thus what the value and effect of section 11(4) is : if application is made to the water court for a right to use more than 150 m^3 of water for industrial purposes, which application is accompanied by a permit in terms of section 12(1),[107] - is the water court empowered to either refuse the application or to restrict the allowed quantity, if he finds, in terms of section 11(4), that there is no abatable water rights, ie. that the required water is not available?[108]

This doubled effort, expenses and time involved, can rightly be questioned, and it is not difficult to understand why the procedure is not followed in practice, because, after receiving a permit in terms of section 12(1), applicants usually do not go to the trouble of obtaining permission in terms of section 11(1) as well.[109]

It is submitted that the discretion as to the allocation of industrial water rights should be fully vested in either the minister or the water court. For example, the discretion to allow such a water right should vest in the minister, who must consider existing water rights prior to granting any rights of use, irrespective of the quantity involved. The water court should then have the discretion to test the minister's decision, or to deal with objections.

3.3.1.11. Section 12B

The owner of a mine may remove underground water if he is of the opinion that it is necessary for the efficient continuation of mining operations or for the safety of employees. He may use the water for connected domestic purposes, subject to the

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[107] Vide s 11(3).

[108] The probable intention is to allow affected parties to raise complaints, although it is submitted that the rules of natural justice (*audi alteram partem*) and the public interest ought to be sufficient to protect the interests of such aggrieved users. Vide Chapter VI infra.

[109] Cf s 12(6)(a), where it is provided that no-one is exempted from the section 11(1) permission by the acquisition of a permit in terms of section 12.

discretion of the minister,[110] or, under a ministerial permit, use it for other purposes or dispose of it.

3.3.1.12. Section 13(1)

The act grants a wide-ranging right to municipalities to assume water rights.[111] These bodies may, subject to permission of both the minister and the administrator, "expropriate" the water rights of a riparian irrigator, who is entitled to such rights, but who lives within the jurisdiction of the local authority.[112]

A local authority may not construct or alter a water work to store more than 125 000 m^3 of water or divert more than 500 m^3 per day without a permit from the minister.[113]

A water court will not consider an application by a local authority to use public water in excess of the section 13(2)(a) volumes, unless the application is accompanied by a permit.[114] Although this subsection does not specifically refer to the provision which makes it obligatory to apply to the water court for the uses mentioned, it is concluded that it refers to section 11(2), to which all other provisions of the act were subjected.[115] In terms of section 11(2), a water court may authorize users or non-users to use public water for purposes other than agriculture. This subsection obscures the issue of the legal position regarding urban use.

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110 Et vide ss 12 and 21, to which it is also subject.

111 Section 13(1).

112 Section 13(2). Compensation is payable, which is either agreed upon, or determined by the water court. Vide *Kitchener v South African Nature Trust* 1963 Vos Rep 345, where the principles were laid down for the determination of the compensation payable. It was held that such compensation was mainly based on fair land value.

113 Section 13(2)(a).

114 Section 13(2)(c).

115 Section 9B(1)(a).

Every riparian owner is entitled to reasonable use of his share of the normal flow of a public stream for agricultural and urban purposes.[116] For his share to be determined, a water court order is necessary,[117] and the court is bound to irrigation-oriented criteria when shares are determined. It was thus argued supra that it is impossible for an owner to receive a share and thus a section 9(1) right, unless he is an irrigation farmer.

To obtain urban water rights, it would be a better option to rather apply to a water court for a right of use in terms of section 11(2), ie. as if he has no right. In a case where the property for which urban water rights are applied for, is not a subdivision of an original riparian farm, the necessity to make use of the provisions of section 11(2) is the only way. When a local authority requires the water, it represents both riparian and non-riparian owners, and a section 11(2) order is thus necessary. But if the quantity of water required is more than the section 33 maximum, a ministerial permit is required over and above the water court order, and the water court is not empowered to grant a right of use unless the permit accompanies the application.[118]

Section 13(3)(d) refers to "rights and servitudes" which are still required, notwithstanding the acquisition of the ministerial permit. It therefore seems as if section 11(2) is not the only method to obtain urban rights. Other ways are by way of section 13(1) (expropriation), section 9(1) (*ex lege* rights), servitudes or rights acquired by others (section 9(1)).

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[116] Section 9(1).

[117] In terms of sections 9 and 52.

[118] The objective of section 13(3) is to co-ordinate the state's planning for effective utilization of public water with s 11(2) rights (Department of Water Affairs *Management of Water Resources* 8.12-8.13).

3.3.1.13. Section 14

The South African Railways (now Spoornet) may apply to a judge of the supreme court for a temporary order permitting it to use a stated quantity of public water.[119] The judge may issue such an order notwithstanding any existing rights,[120] although adversely affected rightholders must be compensated.[121]

This provision, in terms of which the judge who acts is deemed to act during the water court proceedings, is aimed at emergency aid for cases where the railway administration is adversely affected by a lack of water. For this reason, a judge, and not the water court, may be approached, and the compensation may be determined afterwards.

In the light of the fact that the judge is not bound to consider existing water rights, but may determine a quantity irrespective of the detriment to other users, it is not clear why this task, which seems to be purely administrative and not requiring arbitration or legal skills, was not rather granted to the minister, leaving the consequential dispute as to the affected water rights, to a water court.

3.3.1.14 Section 56 : government water works

The control of any government water work[122] and the power to regulate or prohibit the abstraction of any water from any area submerged as a result of the construction of such

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[119] Section 14(1), (2).

[120] Section 14(3).

[121] Section 14(4). The amount of compensation is to be agreed upon, or determined by the judge.

[122] A *government* water work is a water work which is constructed, acquired or maintained by or under the control of the minister, and it includes the water impounded and stored in such a work, while a water work is a construction used for inter alia the impoundment, storage, control or abstraction of water, or the use of water for any purpose, or the conservation of rain water (s 1). It is interesting to note that a water work refers to the structure alone, while, in the case of a *government* water work, reference is also made to the water contained therein.

work, vests in the minister.[123] He may supply and distribute the water thereof to any person, on any conditions, to use at any place and for any purpose.[124] Moreover, the rights and privileges of ownership in such a water work vest in the state and are exercised by the minister.[125] Subsections (3), (4) and (5) seem to jointly vest in the minister extensive powers to deal with the water of a government water work as he deems fit. While subsection (4) determines the status of such water works, subsection (5) describes the contents thereof, and subsection (3) gives details of the practical powers which the minister may actually exercise. It is not necessary for the minister to declare a government water control area in order to regulate water use from government water works. He is the *ex lege* owner of the water in such a water work and may deal with it as he deems fit.[126]

3.3.2. Water rights within control areas

The previous paragraph dealt with the allocation mechanism of the act as far as water outside control areas is concerned. The state may however resume control of water resources in specified areas and under certain conditions. This is done by the declaration of control areas. In such areas, the control of water vests in the state, and the minister is empowered to regulate and allocate water rights notwithstanding the position prior to the declaration of the area as a control area. The system in terms of which water rights are allocated and controlled in control areas, will thus be regarded as an alternative allocation mechanism, apart from the *ex lege* mechanism contained in sections 7 to 14.

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123 Section 56(5).

124 Section 56(3).

125 Section 56(4).

126 Et vide Chapter V.II supra.

3.3.2.1. Sections 29-33 : subterranean water

The right to the use and control of subterranean water[127] vests in the minister, and no one may abstract it or build a water work for its abstraction, except with the required permission.[128]

The minister may abstract any quantity of subterranean water by means of a government water work, and supply it to anyone for any purpose, if he is convinced that there is sufficient subterranean water in the area.[129]

In terms of section 30, the rights of use of subterranean water, which have been exercised during a qualifying period,[130] may be continued to be exercised, subject to restrictions imposed by the minister, eg. adjustments to an existing water work, the limitation of abstraction quantities, etc.[131]

After declaring a subterranean government water control area, the existing use of underground water in the area and on each piece of land is determined,[132] as well as an estimated quantity which, on a basis of consistency, will annually be available in the area.[133] The minister then allocates a quantity of water to all pieces of land in the area

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127 Subterranean water is water naturally occurring underground or obtained from underground, in an area declared to be a subterranean government water control area in terms of s 28 (s 27).

128 Section 29.

129 Section 32E. He may also grant permission for the abstraction of subterranean water for any purpose and to any person (s 32A).

130 This is a declared period of a maximum of 36 months immediately preceding the declaration of a subterranean government water control area.

131 Section 30(1), (2).

132 Section 31(1).

133 Section 32B(1).

which an owner of land may annually abstract if available.[134] The allocated quantity may not be less than the quantity in use during the qualifying period, plus any amount granted in terms of section 32A(1),[135] or it must be a quantity which in the opinion of the minister will be adequate for use for domestic purposes and for the watering of stock.[136] The minister may impose conditions of use.

In terms of section 32C, the minister may authorize the construction or alteration of a water work used to abstract the subterranean water to which a holder of a right to abstract subterranean water, is entitled.[137]

Nobody may convey subterranean water (which he has a right to abstract) over the boundaries of the land, unless under the authority of a permit.[138]

In times of a water scarcity, the minister may regulate, curtail or prohibit the abstraction or use of subterranean water in the public interest for any specified purpose. This he may do notwithstanding any existing rights.[139]

Because the normal legal status of underground water is that of "deemed private water",[140] and because as such it is subject to the sole and exclusive right of use and enjoyment of the owner who abstracts it, it is possible for a single owner to exhaust an aquifer to the detriment of surrounding owners as well as of the source of supply. To intercept the "catastrophic results" of the over-utilization of underground sources, due to

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134 Section 32B(1)(b).

135 Section 32B(1)(b)(i).

136 Section 32B(1)(b)(ii).

137 Section 32C(1)(a)

138 Section 32D.

139 Section 32F.

140 Unless it is derived from a public stream.

improved drilling techniques and the development of mechanically driven abstraction systems, the legislature found it necessary to introduce state control measures.[141] These measures probably represent the most drastic interference with rights in respect of private water, in that the subterranean water is being apportioned amongst all the owners in a certain area. Prior to the declaration of the area, a single owner was entitled to sole and exclusive use and enjoyment of all the water which he could get hold of,[142] without considering even the domestic needs of neighbours. This apportionment of private water amongst all in need of it, is more in line with the historical principle of all running water being *res communes*, available for reasonable common use. This step, confirming the policy of increased state control over all the water resources of the republic, rightly poses the question whether there should be a distinction between public and private water.

3.3.2.2. Section 33B : precipitation[143]

The state may carry out operations that will affect or modify precipitation.[144] This right may not be assumed by anyone else, except under the authority of an exemption in terms of section 33B(3), or a licence in terms of section 33C and a permit in terms of section 33D.[145]

In so far as precipitation and clouds are viewed as the sources of streams, it could, in terms of the decision in *Du Toit v Krige*,[146] be viewed as a part of the public stream. But

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141 *Assembly Debates* 20 August 1987 4358.

142 Cf the argument on the definition of "use" supra.

143 Vide in general Rabie & Loubser 177 et seq. They describe the provisions of chapter IV of the act as still dormant, but potentially effective, given satisfactory administrative control.

144 Section 33B(1).

145 Section 33(2). Or in pursuance of a right received from the holder of a permit. Et vide Rabie & Loubser 186 et seq.

146 Unreported no 10/70 of 22 October 1971.

in terms of the definition of the term "public stream",[147] clouds do not qualify as either private water, public water or public streams. As soon as these clouds however condense and fall on land in the form of precipitation, it is private water, unless it is capable of common irrigation.

To qualify for a licence in terms of section 33C, a person should, in the opinion of the minister, possess adequate technical knowledge and skill. It is submitted that the modification of precipitation could possibly have detrimental effects, and that "technical knowledge and skill" ought not to be the only criterion to obtain a licence. An application for a licence ought to be accompanied by the results of an environmental impact assessment. In other words, modification ought to be either preceded or accompanied by the necessary investigation of the possible environmental effects.

3.3.2.3. Government Water Control Areas

The minister may declare an area to be a government water control area, if the land within the area will be affected by the construction of a water work, or if it will be in the public interest to control the abstraction, utilization, supply or distribution of the water of any public stream.[148] He is not bound to declare a government water control area whenever a new water work is to be constructed : he may make use of his powers to expropriate or temporarily use any property to enable him to construct access roads to a government water work or if he requires such property in connection with the water work.[149]

All rights of use and control of water in any public stream *or* public water in any natural channel in a government water control area vest in the minister, notwithstanding any

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147 Obiter confirmed in *Le Roux v Kruger* 1986 1 SA 327 C.

148 Section 59(1)(a), (b).

149 Section 60. Probably for cases where land will be submerged as a result of the construction of a dam.

existing rights.[150] Therefore nobody may abstract, impound, store or use such water except in terms of a right which is granted in terms of the act.[151] Neither may anyone construct, alter, enlarge or use a water work for the abstraction, impoundment or storage of such water, except in terms of a right granted by section 62(2A)(a),(b), (2H)(a),(d)(ii),(iii) or (3)(b). The only existing rights which remain in force, are agricultural rights which are lawfully used for other than irrigation purposes and for which purposes a water work is not used.[152]

An agricultural water right is a section 9(1) right, ie. a right of a riparian owner to use his apportioned or acquired share for agricultural purposes. The first question is whether non-agricultural purposes are included in this proviso, or whether the proviso refers to non-irrigation agricultural purposes only.

The phrase "a right to use public water for agricultural purposes ... in so far as *that right authorizes* the use of public water for other purposes than irrigation purposes" is not clear. It seems as if the agricultural right must authorize these non-irrigation uses. Nowhere in the act does a right authorize the use of water, since "to authorize" is a function of an official empowered with the necessary jurisdiction, and the right is the object of the authorization. This unfortunate language may be corrected by replacing the term "authorizes" by either "includes" or "was altered to include". In the case of the first alternative, it can be argued that the right to use water for agricultural purposes *per definitionem* includes non-irrigation rights, viz. domestic use, water-borne sanitation, and stock- and garden-watering.[153] If the legislature thus intended to refer to these uses, the phrase "in so far as that right authorizes the use of public water for other purposes than

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[150] Section 62(2). S 4, in terms of which existing rights are protected, expressly excludes such protection against the assumption of control in terms of s 62.

[151] Which right can be granted in terms of subsections 62(2A), (2B), (2I), (2F).

[152] Except for water works which are specifically permitted.

[153] Section 1 "use for agricultural purposes".

irrigation purposes" is redundant, and means little more than what is the very definition of "use for agricultural purposes". It will then make more sense to accept the second alternative, viz. "was altered to include". This would mean that rights of use for purposes other than agricultural purposes for which one may apply section 11, are intended. This could include industrial use and ecobiotic use. But if this is the case, then, first, non-irrigation agricultural uses are excluded, because no application is necessary in terms of section 11 to apply an agricultural right for stock-watering or other forms of farming than irrigation. Secondly, it is doubted whether the legislature intended to exclude industrial and ecobiotic and other unspecified non-agricultural rights from being affected by re-allocation in terms of section 62. From the wording of the proviso, it is hardly possible to make any conclusion as to the intended purposes of use which are protected from the section 62 procedure. It is submitted that the proviso was probably intended to refer to the uses included in the definition of "agricultural purposes" (other than irrigation) but only in so far as the water was either abstracted directly from the river, or where an existing or authorized water work was used. These uses[154] are small-scale uses for which limited quantities of water are usually drawn. They represent negligible yet essential utilization in comparison to irrigation quantities, and therefore deserve protection in the re-allocation procedure. If this is the correct meaning of the proviso, then the legislature could have expressed himself more clearly.

3.3.2.3.1. Section 62(2A) : a provisional right of irrigation

From the time when a control area is declared by the publication of a notice in terms of section 62(2F), existing irrigation is provisionally allowed to continue on conditions concerning quantities of diversion as imposed by the minister.[155]

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[154] Ie. domestic use, stock watering, sanitary use and the watering of gardens.

[155] Section 62(2A)(a),(b).

3.3.2.3.2. Section 62(2B) : permission to irrigate

Permission can be obtained from the minister to continue or commence irrigation on a piece of land in the control area, until the notice in terms of section 62(2F) is published. The minister may impose restrictions on the qualities of water which may be used, as well as other conditions which he deems fit.

3.3.2.3.3. Section 62(2C) : irrigated and irrigable land

As soon as possible after declaration of the control area, the minister has to determine the amount of hectares suitable for the cultivation of crops under irrigation for each piece of registered land which has section 9, 10 or existing rights.[156] He also has to determine the amount of hectares of land lawfully or unlawfully under irrigation during the qualifying period.[157] A list of these irrigated or irrigable areas has to be published in the gazette, and divided amongst owners in order to allow objections to the minister and then to the water court.[158]

As soon as possible after the procedure in terms of section 62(2D) has been completed, the minister has to estimate the quantity of public water which, on a basis of consistency determined by him, will annually be available in the control area, and he has to determine the portion of such quantity which may annually be utilized for irrigation purposes.[159] He also has to determine the quantity which, in his opinion, is annually adequate for the irrigation of one hectare of land.[160] An allocation is then made of a

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156 Section 62(2C)(a)(i).

157 Vide n 130 supra.

158 Section 62(2D). Objections to the minister must be raised within 90 days, and those to the water court within 60 days thereafter.

159 Section 62(2E)(a). The so-called stochastic model is used to determine the risk of the yield of a stream.

160 Section 62(2E)(b).

quantity of water for each piece of land (after determining the portion of land which was lawfully irrigated) which was lawfully irrigated in the qualifying period.[161] An allocation is also made to other pieces of land (ie. which are not irrigated, but irrigable[162]) in so far as enough water remains after the section 62(2E) allocation has been done.[163]

A list of all the pieces of land to which allocations have been made, is then published in the Gazette.[164] The minister may authorize the beneficiaries of the allocation to construct, alter, enlarge or use a water work for the abstraction, impoundment or storage of that quantity of public water.[165]

3.3.2.3.4. Section 62(2I) : inconsistent water

Apart from that quantity of water which, on a basis of consistency determined by the minister, was estimated to be annually available in the control area, the minister may also allocate water which is incidentally in excess in a certain year due to floods, seepage, the construction of a government water work or the fact that the holders of quotas do not exhaust the quantities of water allocated to them (probably due to sufficient precipitation). Permission to abstract, impound store or use this water can be granted to anyone for any purposes within the control area or for urban and industrial purposes outside the area. He may also allocate the water for irrigation on any pieces of land within the area, additional to the areas for which quotas have been allocated.

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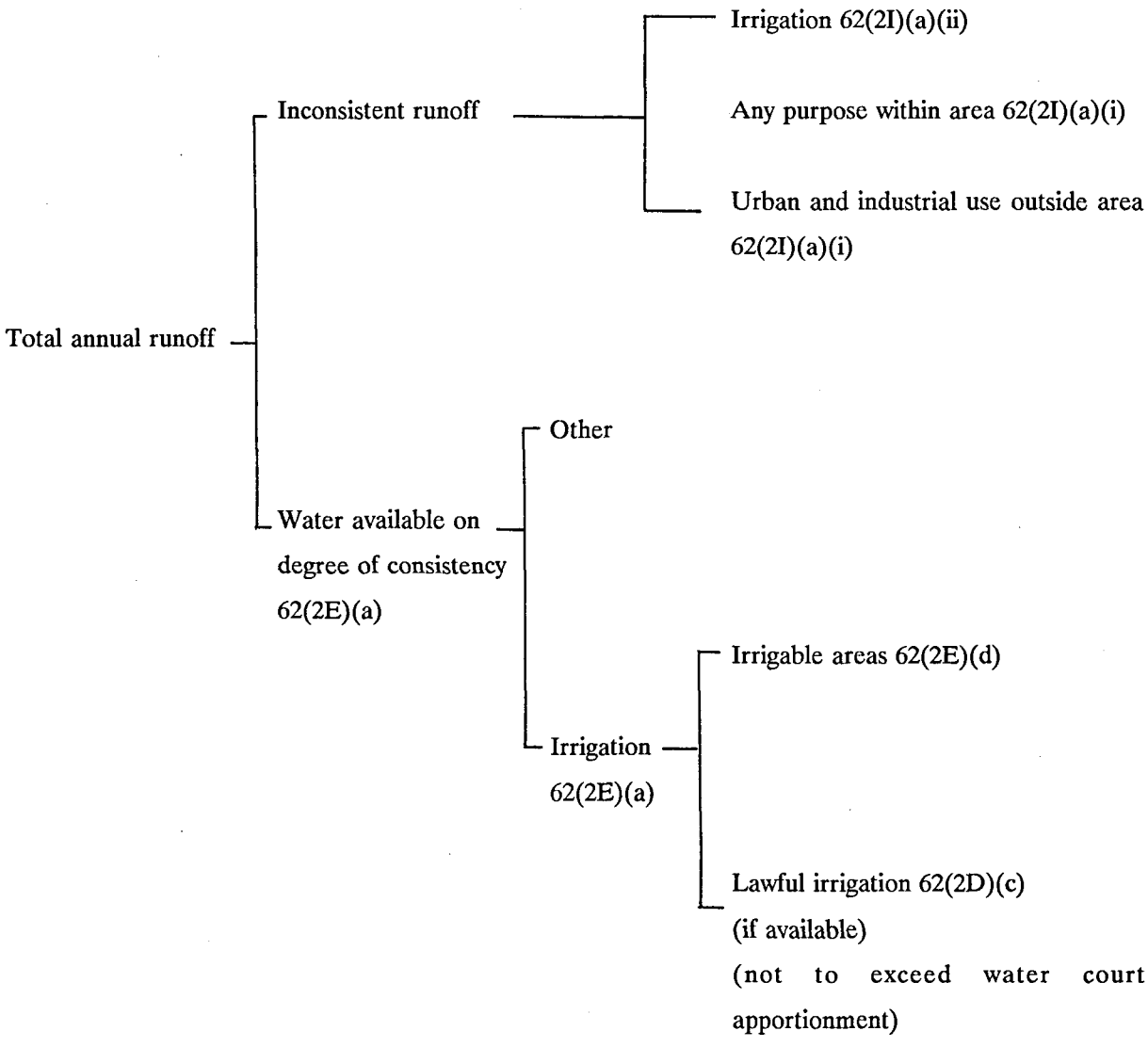
161 Section 62(2E)(c).

162 Section 62(2C)(a)(i)(aa),(bb).

163 Section 62(2E)(d).

164 Section 62(2F).

165 Vide Findlay "Water Rights" 345 : "With due respect to the Department the whole formula is a masterly failure, and is tolerated today because no-one worries about the permits and no-one can check whether they are being honoured".



Viewed from the perspective of the various water demands in an area except for irrigation, this long and detailed allocation system is unsatisfactory. This will be illustrated by means of an example :

Example

Although no government water work is intended or under construction in a certain area, the minister is of the opinion that the abstraction, utilization, supply or distribution of the

water of a certain stream ought to be controlled in the public interest. A government water controlled area is thus declared. The current users of water from the stream are the following :

(a) 200 farmers, each irrigating 50 hectares (total 10 000 ha)
(b) a town with 3000 inhabitants
(c) a rural area on the banks with 10 000 inhabitants, keeping live stock
(d) a national park
(e) afforestation of 50 000 ha.

In terms of section 62(2), the right to control the use of water in the stream vests in the minister, and no-one may use water except in accordance with a grant in terms of section 62(2A), (2B), (2F), (2I) or (2H).

No agricultural water right authorizing water use for non-irrigation purposes exists.[166]

The director-general determines that there is 1 000 ha of registered land with section 9 or 10 or existing rights which is suitable for the cultivation of crops under irrigation,[167] and 10 000 ha of lawfully and unlawfully irrigated area.[168]

The minister estimates the quantity of public water which, on a basis of consistency, will annually be available in the area on 80 000 000 m^3.[169] 60 000 000 m^3 may annually be used for irrigation. He determines that the quantity of water which is annually adequate for the irrigation of 1 ha, is 5 000 m^3. He determines that 9 000 ha was lawfully irrigated,[170] and allocates to each hectare 5 000 m^3 which may annually be abstracted or stored in the area if available.[171] The total quantity of water so allocated is 45 000 000 m^3. This means that

166 Section 62(2)(proviso).

167 Section 62(2C)(a)(i).

168 Section 62(2C)(a)(i).

169 Section 62(2E)(a).

170 Section 62(2E)(c)(i), (2G)(a).

171 Section 62(2E)(c)(ii).

there is 15 000 000 m^3 of irrigation water left, plus 20 000 000 m^3 of the total consistent water. In terms of section 62(2E)(d), 10 000 000 m^3 of the 10 000 000 m^3 is allocated to the 10 000 ha irrigable land which was determined under section 62(2C)(a)(i). 5 000 000 m^3 of water thus remains unallocated.

The minister is convinced that 15 000 000 m^3 of water will be available in a certain year due to floods, seepage and unused quotas. He decides to allocate it to urban and industrial use within the control area, for industrial use outside the control area (a pipeline is to be laid) and for the rural area in the following proportions :[172]

urban use :	8 000 000 m^3
pipeline :	2 000 000 m^3
rural :	5 000 000 m^3

Nothing is allocated in terms of section 62(2I)(a)(ii). Nothing is allocated to the national park, because the minister was of the opinion that all the reserve water was required for the above uses, to serve the public interest.

Four main questions arise :

(i) What happens to that part of the consistent water which was not set aside for irrigation in terms of section 62(2E)(a), ie. 20 000 000 m^3 ?

(ii) What happens to the remaining 5 000 000 m^3 after the section 62(2E)(d) allocation has been made?

(iii) What are the rights of the other erstwhile lawful users of water, ie. holders of water rights in terms of section 11(2)?

(iv) To what extent does the public interest restrict the minister in exercising his allocation discretion?

As regards the first question :

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172 Section 62(2I)(a)(i).

No provision is made in section 62 for the allocation of that quantity of public water which is reckoned will be available annually on a basis of consistency, but which is not reserved for irrigation in terms of section 62(2E). It may not be abstracted or used or impounded or stored unless in accordance with ministerial permission.[173] The minister is however not empowered to allocate such water, and the question is what the reason is for the minister's obligation to reserve a certain quantity of the consistent flow for irrigation. Of course he may decide to use all the consistent flow for irrigation, but what is the purpose of granting him a discretion if he is not empowered to allocate the remainder?[174]

It can be argued that the non-irrigation water forms part of the reserve which the minister may apportion in terms of section 62(2I). But it is submitted that the section 62(2I)-reserve is water which was not considered when the minister made the estimation in terms of section 62(2E), and which unexpectedly occurred due to extraordinary wet conditions, or the unforeseen quantity of water available after impoundment. This aspect of unforeseen water becoming available, will most probably occur often, since the estimated quantity in terms of section 62(2E) is a fixed quantity,[175] based on a statistical mean annual runoff - it can thus be expected that the actual annual runoff was what the legislature had in mind when section 62(2I) was enacted. The non-irrigation part of the fixed quantity is however something quite different, being part of the estimated consistent flow, and not part of the section 62(2I) incidental reserve. It is therefore submitted that the minister is not empowered to allocate the non-irrigation part of the consistent flow, and neither may it be utilized by anyone. This water is due to flow to the ocean. This is an unsatisfactory position, and it is submitted that the minister should be empowered to allocate the water for specified non-irrigation purposes.

As regards the second question :

It was said supra that the minister is bound to determine quotas according to the formula laid down in section 62(2G)(b), ie. to multiply the quantity determined in terms of section 62(2E)(b) (ie. water required per hectare) with the amount of lawfully irrigated land. It could, in terms of this formula, happen that not all the water which was reserved for irrigation, is so allocated. If that is the case,

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173 Section 62(2).

174 Baxter 386 : "public authority has no powers other than those which have been conferred upon it by legislation".

175 Probably conservatively fixed.

the minister may use the same formula to allocate quotas to irrigable land,[176] ie. including land which was previously unlawfully irrigated. Since he is once again bound to the formula, it could again happen that not all the remaining consistent irrigation water is so allocated. The question is what happens to such remaining water. Once again, it may not be utilized without ministerial allocation : but the minister is nor empowered to allocate it to any user sector. In practice, it would therefore be advisable for the minister to first determine the section 62(2E)(b) figure as well as the irrigated and irrigable land, multiply the two figures, declare the total to be the consistent flow, and declare the whole consistent flow to be available for irrigation. Although such a figure will not comply with section 62(2E)(a), it will at least be equitable. It is submitted that the legal position is unsatisfactory, and that the minister ought to be statutorily empowered to allocate all the consistent flow as determined.

As regards the third question :

The question as to the rights of users who lawfully used water for non-irrigation purposes, is connected to the first two questions. The use of public water is possible for other than agricultural purposes : in terms of section 9(1), a share[177] of normal flow may be used for either agricultural or urban purposes. Surplus water may be used for agricultural, urban or industrial purposes.[178] Public water may be used for any other purposes under the authorization of a water court.[179] When a control area is declared, the minister is not entitled to allocate the consistent flow to any other than agricultural purposes while he may allocate the incidental excess of water for urban and industrial uses outside the control area or for any purpose within the area. He is not bound to consider rights which lawfully existed in the qualifying period. He may in fact disregard existing rights and allocate water to another user sector, as he has done in the example, supra.

In favour of the holders of non-irrigation water rights, is the concept of "public interest" in section 59(1)(b), which ought to be the motive behind the declaration of a control area. The minister ought to be of the opinion that the use of the water in the relevant public stream should be controlled in the public interest. Apart from the court's opinion that any ministerial discretion ought to be in the

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176 Section 62(2E)(d).

177 As acquired from someone else or the water court.

178 Section 10.

179 Section 11(1), (2).

public interest, these express words act as possible protection for erstwhile holders of water rights, in a case where the minister deprives them of rights of use when an allocation in terms of section 62(2I) is made. But since the water so allocated is the reserve, ie. incidentally available over and above the fixed consistent flow, the allocation of rights to make use thereof will occur annually, depending on whether such reserve is available or not. It is thus an inconsistent right of use, which is hardly a proper replacement for the erstwhile right of use.

It is however submitted that, even if the minister allocates the reserve water with due consideration to erstwhile beneficially exercised rights, these users receive unfair treatment due to such water not being available consistently. A more satisfactory position is possible if the minister is entitled to allocate the non-irrigation part of the consistent flow to these users who are otherwise deprived of their water rights.

When determining the consistent flow, the minister ought to be bound to consider *all* existing rights, and not only irrigation, and then divide the consistent flow into quantities available to all the various user sectors. He should then be empowered to allocate to each user sector a fair amount of water in the circumstances. Any water remaining after allocations have been made, ought to be available for further distribution in the public interest.

As regards the fourth question :

It was said supra that the minister may declare a government water control area in two instances, viz., first, when an area is likely to be affected by the construction of a government water work, or when the abstraction, utilization, supply or distribution of the water of any public stream should in his opinion be controlled in the public interest.[180] In the case of the declaration of a control area in terms of section 59(1)(b), it is submitted that the control and allocation of the water in the area should be in the public interest, according to the motive for declaration, ie. the minister is bound by the public interest when he exercises his discretion.

As far as *irrigation water* is concerned, the minister is bound by the prescribed mechanism contained in section 62, and he is not empowered with a discretion which he can exercise in the public interest. The only instance where he has a discretion, is in terms of section 62(2B) and (2E)(a). But as far

[180] Section 59(1)(b).

as water for other purposes is concerned, the minister has a free discretion[181] to allocate any reserve which is available after the section 62 allocation has been done, to any person, for any purpose. Read with section 59(1)(b), this discretion is the only one which can be affected by complying with the public interest. In fact, it seems as if the legislature predetermined the public interest, in favour of which water ought to be allocated in the case of the declaration of a control area in terms of section 59(1)(b), by enacting that irrigation is the preferential user sector, to whom a share ought to be reserved and allocated before any other water is allocated.

The minister does not have the discretion to deprive irrigators of this beneficial claim to water in a control area, irrespective of what he deems to be a fair allocation serving the public interest. He is merely empowered to apportion the non-consistent flow as he deems fit. It is submitted that the public interest, having been a motivation for the declaration of the control area, limits the minister in his discretion to apportion the water. He is therefore not entitled to disregard either erstwhile beneficially exercised rights or valid claims to water by those in need thereof for purposes of survival. The public interest will not tolerate the allocation of all the available water to a single user or some user sector(s) to the detriment of others with demands of a non-economical character, or the other way round.

This interpretation of the role of the public interest is however not in accordance with the wording of section 62(2I)(a), where the minister is empowered to grant permission to anyone, to use excess public water in a control area, *or* to determine the areas which may be irrigated with public water. He is therefore not obliged to consider non-irrigation purposes, but have the discretion to allocate the available water either to applicants, or to irrigation. He may allocate all the water to irrigation in spite of the demands of other water user sectors.

Moreover, he may allocate any quantity of the reserve water to an applicant, without considering the requirements of others. It is submitted that the minister ought to be bound to the public interest, when he allocates water in terms of section 62(2I). He may not allocate all the water to irrigation, unless the demands of other user sectors have been considered. On application by a certain user for water in terms of section 62(2I)(i), the minister should consider existing rights, or give notice in the Gazette of an intention to allocate excess water as such.

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[181] "If the minister is convinced that sufficient public water is available ... he may ... (i) grant, on such conditions as he may determine, ... permission ... to abstract... (ii)... according to a basis determined by him ..." (s 62(2I)).

3.3.2.4. Section 63

The provisions of section 63 are aimed at the allocation of water which is impounded in Government water works, for purposes of irrigation.[182] Such water may, at the discretion of the minister, be used for other purposes as well. This discretion is exercised in terms of section 56. Whenever the minister applies the provisions of section 63 to a government water work within a government water control area,[183] which is done by notice in the Gazette,[184] he shall determine the irrigable land[185] and make a determination of the allowable water per morgen.[186] This determination ought to be

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182 Department of Water Affairs *Management of Water Resources* 8.14.

183 The minister is not obliged to declare a government water control area whenever a government water work is being constructed. Even without doing so, he is empowered to expropriate land which will be affected by such construction (s 60(1)), to take the right to temporarily use property (s 60(1)), to control water utilization in areas which are submerged as a result of the construction (s 56(5)) and to control entrance to the water work and its surroundings (s 56(6)). Moreover, ownership of the dam and sole control of its water (s 56(4)) vest in the state and is exercised by the minister. He may declare a dam basin control area, where water rights, the right to construct water works even in private streams, and normal farming operations may be restricted or suspended (s 59(4)). If the minister however decides to declare a water control area, he is not obliged to apply the provisions of s 63 to the area, but may continue allocating water rights in respect of the water in terms of s 56(3). It is not clear why the minister is empowered with a discretion whether to apply s 63 or not, because there is little sense in declaring a government control area unless it is done with the purpose of applying s 63, since s 56(3) may be applied irrespective of whether a control area is declared or not. It is therefore submitted that the minister will declare an area to be a government water control area only if he intends to make the allocation mechanism of s 63 applicable.

184 Section 63(1)(b).

185 This is land which *may* be irrigated. In the Afrikaans version of the act, the term "may" is translated as "*kan*", so as to read "*wat besproei kan word*". It can be argued that the minister does not have a discretion as to the extent of land which may be irrigated, if the term "may", like the Afrikaans term "*kan*", refers to the maximum possibility of the land. But in practice, the minister has a discretion as to how much land he will allow to be irrigated, irrespective of how much land *can* be irrigated. In the same sense, he may decide how much of the yield of the dam will be allowed to irrigate such land, and he is in practice not regarded as being bound to allocate all the available water in the dam for irrigation, which could be argued to be the meaning of the Afrikaans term "*kan*" in s 63(2)(b).

186 Section 63(2)(a),(b). Although the act has not been amended to refer to the now official decimal measures, "hectares" is used when the determinations are made.

done with due regard to any existing rights which are beneficially exercised.[187] It is submitted that such existing rights refer to those which have been allocated in terms of section 56(3), prior to the declaration of the area as a government water control area, or prior to the application of section 63 to the area.

For purposes of the application of section 63, any public water or water found in or derived from a natural channel is deemed to be water released from a government water work.[188] This means that such water, even if it complies with the definition of private water, is excluded from water rights in terms of the other provisions of the act, and the minister may take such water into account when he makes the determinations for irrigation. In the case of otherwise private water in the area, this clause may work unfairly against owners on whose land such private water occurs, especially if they have not been used to utilizing the water for irrigation purposes.

The determinations which have been made in terms of section 63(2), have to be published in the Gazette as well as in a local newspaper. Any amendments to the determinations which are done in terms of subsections (2B), (3) or (5), also have to be published.[189] The determinations also have to be scheduled, which schedule is to be drawn up as prescribed by the act,[190] and which schedule has to be revised annually so as to accommodate changes which have been made and published in the Gazette during the previous year. Only the extent of land forming part of each land which may be irrigated, as well as land which is intended for land settlement purposes, has to be included in the schedule.[191] It thus seems as if only irrigation land in respect of which determinations have been made in terms of section 63(2), may be scheduled, while land

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187 Section 63(2)*pr.*

188 Section 63(2A).

189 Section 63(4).

190 Section 63(7).

191 Section 63(7)(a)(v),(vi).

on which water from the government water work is to be used for other purposes, is not scheduled, but apparently dealt with *ad hoc* and in terms of section 56(3).

The determinations may be amended or renewed in cases of a change in the practical situation in the area, eg. an increase or reduction in the water contents of the dam, a change in ownership or a change in the quality of the water, which could result in wastage or unbeneficial use of the water for irrigation.[192]

3.3.2.4.1. Drought measures

When there is a temporary shortage of water, the minster has the power to reduce the extent of the land which may be irrigated,[193] or temporarily suspend the determination and allocate *any* water available in the area as he deems fit.[194] Several questions arise from these drought measures contained in subsections (3) and (5) :

The first question is which water rights may be affected by drought measures in terms of these sections. According to the clear wording of the act, only irrigation determinations which have been awarded in terms of section 63(2), may be affected. In terms of subsection (3), the minister may reduce the extent of land which may be irrigated. It is submitted that the subsection expressly deals with the amendment of determinations which have been awarded in terms of section 63, and that, in respect of a government water work to which section 63 was made applicable, all irrigation quotas are issued in terms of section 63, replacing previous ones which might have been issued in terms of section 56 prior to the declaration of the area as a government water control area. The only land which may thus be irrigated in a control area to which section 63 has been made applicable, is land in respect of which section 63(2) determinations have

[192] Section 63(2B)(a), (3).

[193] Section 63(3).

[194] Section 63(5).

been made. Therefore it can be argued that the phrase "the minister may ... temporarily reduce the extent of the land which may be irrigated whenever there is a temporary shortage of water" refers only to land in respect of which determinations have been made in terms of section 63(2). This argument is confirmed by the reference to subsection (3), which is contained in subsection (5), in the phrase "the minister may, instead of reducing the areas which may be irrigated *in terms of such determination...*" This phrase clearly refers only in respect of land to which determinations have been made and not to any other land which may be irrigated in terms of any other rights. As far as subsection (5) is concerned, the wording is clear, referring to land in respect of which determinations in terms of section 63(2) are in force, and providing that the minister may suspend *that determination* in order to reallocate the water in the dam.

If this is the case, viz. that the minister is only empowered to impair irrigation rights in case of a water shortage or threatening shortage in the government water work or in the area, then it necessarily implies that the minister is not empowered to use subsections (3) or (5) to also restrict the water rights of users to whom rights have been allocated for other uses than irrigation, in terms of section 56(3). If the minister wants to restrict these other water rights as well, he is bound to the conditions in terms of which he has issued such water rights. If an authorization in terms of section 56(3) contains a condition that the minister is empowered to suspend or restrict the water right before the period for which it was issued lapses, then he will be entitled to place such a restriction on the right. Such a restriction or suspension is however not imposed in terms of the drought measures of section 63(5), but in terms of the condition in the authorization. If no such a condition was included in the authorization, then it may be argued that the minister is not empowered to suspend or restrict the water right which he has issued prior to the lapsing of the period for which it has been issued.

The problem with the fact that the drought measures of subsections (3) and (5) of section 63 are not applicable to section 56(3) water rights as well, is that both the irrigation rights in terms of section 63, and other water rights in terms of section 56(3)

exist in respect of one and the same water source. It is not clear why it was necessary to retain two different water allocation mechanisms to allocate the water of a single source, which allocations are subject to different powers and conditions and drought measures. When water allocation in terms of sections 63 and 56 is done, which is usually done during the planning phase of the water work, the capacity of the dam is divided into quantities (and not into percentages) which will accrue to each of the claimants to water rights in respect of the dam. The quantity, in cubic metres, which is intended to be made available for purposes of irrigation, will then be apportioned in terms of section 63(2). The rest of the water will be apportioned in terms of section 56(3) for purposes other than irrigation. When the level of the dam drops to such a point that the minister deems it necessary to apply the emergency measures of subsections (3) and (5), he can no longer deal with quantities of water in order to reallocate the water, because he is empowered to suspend the irrigation rights of the dam only. This could mean that nothing remains for irrigation purposes, unless the section 56(3) quotas are accordingly reduced or suspended. He will have to deal with percentages, which cannot be done unless he may also impair the other rights, otherwise it will be impossible to determine which portion of the water, which no longer occurs in the original quantity, belongs to irrigation. Therefore, he ought to be empowered to control the entire contents of the dam and suspend and allocate all the existing rights, irrespective of the purposes of use for which these rights have been allocated, or in terms of which section they have been awarded.

It is therefore submitted that the emergency measures of subsections (3) and (5) of section 63 ought to apply to all water quotas in respect of the water in the dam.

In practice, quotas are often issued subject to the minister's right to restrict or suspend it in cases of a water shortage. But the minister's emergency powers ought to be

statutory and not contractual, in order to obtain a fair situation and the maximum control for the state to assume water rights in the public interest.[195]

The second question is on whose behalf or under which circumstances the minister is empowered to impose water restrictions or suspensions. In terms of subsection (3), the minister may reduce the irrigation areas "whenever there is a temporary water shortage". It can be argued that a water shortage in the lower reaches of the public stream which has been impounded, may convince the minister to impose reductions, irrespective whether the area where the shortage occurs falls within the control area or not, or whether it possesses section 56(3) water rights or not. For instance, a control area to which section 63 was made applicable, is declared in the upper reaches of a public stream, and the water thereof is impounded in a government water work in the control area. A rural area or conservation area outside the control area experiences a water shortage as a result of the river coming to a standstill during a dry period, which river had, prior to the construction of the dam, never come to a standstill, even in dry periods. Due to the shortage, the minister decides to reduce the irrigation areas within the control area, in order to be able to release water for the sake of this user sector. This is done in spite of the fact that there is no water shortage in the dam itself, and that there is still sufficient water to maintain the determinations. In terms of the wording of subsection (3), this administrative act is not irregular. It therefore seems that a reduction of irrigation quotas may be imposed even on behalf of user sectors who are not in possession of either section 63(2) or section 56(3) water rights, and even user sectors who fall outside the boundaries of the control area. As far as subsection (5) is concerned, the position is not the same. The provision reads "whenever a water shortage is or is expected to be experienced *in any area in which a determination is in force...*". This means that the users in the lower reaches of the stream, even if the water shortage which they experience is a direct result of the impoundment, are not entitled to claim from the minister that a temporary suspension of irrigation rights in the control area be imposed.

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[195] In Roman law, the praetor had the discretion to impose any measures to control water rights, and was not bound to contractual conditions or prescribed criteria.

Users who are in possession of water rights in terms of section 56(3), and who are situated within the *control* area in which a determination is in force, may be argued to be entitled to claim a suspension of irrigation rights in terms of subsection (5). But the problem is that subsection (5) does not refer to the control area, but merely to the *area in which a determination is in force.* This could mean that, where a rural area is far removed from the irrigation area, but the users are in possession of section 56(3) rights, they are not situated within the area in which the determination is in force, and may thus not claim that suspensions are imposed. It is however submitted that the legislature intended to refer to the *control* area, and not the physical area where the land is situated. However, the fact that users who are in possession of section 56(3) water rights in respect of the dam, may claim suspensions on section 63(2) irrigation rights, seems unfair, in that the minister is bound to the suspension of irrigation rights only. The ideal would be that a water shortage which is experienced by any user sector in the area, should enable the minister to suspend all the water rights which are exercised in respect of the dam. But once again this criticism is merely theoretical, because first, the minister does have contractual rights to suspend section 56 water rights as well, and secondly, a water shortage will hardly be experienced only by some of the user sectors, unless the portion of the water which has been reserved for irrigation, was unreasonably large compared to the portion which was allowed for allocations in terms of section 56. If that is the case, then it could happen that the section 56 users experience a water shortage while the irrigators have sufficient water to continue their irrigation practices in times of drought.

It is concluded that as far as subsection (3) is concerned, reductions may be imposed on behalf of any user who may benefit from the reductions, irrespective of whether he is in possession of an irrigation quota himself, and irrespective of whether he is situated within or outside the control area where the determinations are in force. But in the case of subsection (5), only users who are situated within the control area in which the determinations are in force, may claim that suspensions be imposed.

The third question is who may receive the benefit of a re-allocation of water in terms of subsection (5). The subsection provides that the minister may temporarily suspend the determination *and allocate any water available in that area in such a way as he deems fit.* It is not clear whether the water which is made available due to the suspension, may be allocated only to those from whom the water was taken, or to all user sectors who are in need of water. Moreover, it is not clear whether such water may also be made available to user sectors in the lower reaches of a river, who are not situated within the control area. In terms of the express wording of the subsection, the minister is empowered to grant temporary water rights to any user sector, irrespective of the purposes of use or of its location. This means that irrigators' water rights may be suspended to benefit users who have never had either section 63 or section 56 water rights. This could happen where a new user sector is vested in the control area, eg. a conservation area, or a rural area with rapid population growth and thus ever-increasing water demands. A water shortage as far as this new water user sector is concerned, may convince the minister to suspend irrigation rights and re-allocate water rights so as to accommodate this new or enlarged user sector. This very wide power of suspension can be argued to be unfair against irrigators, who seem to be the only users whose rights are curtailed to benefit those who experience a water shortage. This advances an argument that all water rights in respect of government water works ought to be controlled in terms of a single allocation mechanism, and be subject to the same emergency measures, restrictions and control.

A fourth question is what the value is of the emergency measures in subsections (3) and (5) of section 63, in the light of the extensive emergency measures contained in section 9A, which were inserted into the act in 1967. In terms of section 9A, the minister may, notwithstanding any provisions to the contrary in the act or in any other law or notwithstanding any right which any person may have, whenever in his opinion a water shortage exists or is likely to arise, control, regulate, limit or prohibit (as he in the public

interest may deem expedient, and subject to the conditions which he may think fit), the use of water out of any public stream or natural channel for specified purposes.[196]

Although this section seems to vest all-encompassing powers of emergency control in the minister, there are mainly two restrictions on his powers. The first regards the purposes for which water may be re-allocated. This restriction is dealt with elsewhere.[197] The second regards the water sources in respect of which the section 9A restrictions may be imposed. The minister is limited to imposing restrictions or suspensions in respect of the water of "public streams or natural channels". The wording of this phrase contained in section 9A(1) is clear. In the light of the definition of "public stream", standing water in dams or impoundments is expressly excluded.[198] Water impounded in this way does not comply with the definition of "public stream", and neither is it water in natural channels.[199] Therefore, section 9A is not applicable to impounded water. Section 63(5), on the other hand, deals with the water which is part of and deemed to be part of the water impounded in a government water work only, and not with water in natural channels and public streams, unless such water is found within the control area to which section 63 was applied by notice in the Gazette.

It is therefore submitted that the emergency measures of sections 9A and 63(5) do not overlap, and that section 9A may not be used to restrict or suspend water rights in respect of government water works.

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196 Section 9A(1).

197 Chapter VI infra.

198 Vide Public Chapter IV.II supra.

199 In the light of s 63(2A), where any public water in the control area, as well as any water in or derived from a natural channel is deemed also to be water released from a government water work, and thus subject to the provisions of s 63 (including s 63(5)), it can be argued that both the emergency measures of ss 9A and 63(5) apply to such water, but the standing water within the water work cannot be argued to be subject to s 9A.

The above questions necessarily raise a further question, viz. what the function is of having two separate systems in terms of which water of the same source is allocated (viz. that of section 56(3), and that of section 63). The integrated nature of the water in a dam necessarily requires a single system in terms of which rights in respect of the water are allocated and controlled. It may be argued that the function of section 63, as a separate mechanism specifically for irrigation, was introduced into the act because the majority of government water works were constructed to advance irrigation works, which was the main and fastest developing water user sector. To make provision for the structured control of such irrigation rights in respect of these water works, a specific mechanism was formulated. The growth of other user sectors gradually created competitors for irrigation, so that the preferential treatment which irrigation enjoyed, lost its right of existence. Currently, all competitive users are considered during planning phases of developments, and the yield of the planned dam is distributed amongst all these user sectors. Similar control is exercised during droughts or the exceptional availability of an abundance of water during a good rainy season. No longer is irrigation seen as a user sector which deserves preferential water rights, although this is still the position which is reflected in the act. It is therefore submitted that the minister's powers to control water rights in respect of impounded water in government water works, ought to be granted by a single allocation mechanism, so as to give him consistent powers, irrespective of the purposes of use.

3.4. CONCLUSION

* The Water Act grants to members of the public a right to use public streams for specified emergency purposes. This right of use ought to be extended, to be applicable to all sources of water within lawful public access, irrespective of its capability of common irrigation.

* Owners of subdivided land are protected from losing their water rights in respect of public water during subdivision. The same risk however applies to private water, and the protection ought to be extended.

* Each riparian owner is entitled to the reasonable use of a share of the normal flow of a public stream for urban and agricultural purposes. This share ought to be determined by the water court with reference to irrigation considerations. In practice, shares are not allocated by the court, and each riparian owner merely uses water according to his needs. Apportionment by the court is moreover (in the light of the condition that use must be reasonable) superfluous as well as historically unsound.

  (i) Reasonable use depends on the circumstances, although criteria had evolved in the courts, which were eventually formulated by a statutory preferential order of use.

  (ii) Although section 9 does not in effect provide non-irrigation water rights, no other provisions in the act are aimed at granting general *ex lege* water rights, which means that all other users must apply to the water court to use public water.

  (iii) A riparian owner does not acquire ownership in his apportioned share of water, even after it has been diverted, because his use thereof remains subject to reasonableness, as well as to the restrictions contained in section 9(a) - (e).

* A riparian owner may use and impound so much surplus water as he can beneficially utilize for domestic purposes, stock-watering, agriculture and urban purposes, subject to a lower owner's right to apply to the water court for apportionment when he uses an unreasonable quantity. The minister may also

control such use by controlling the right to impound. He may even prohibit impoundment, which has the effect of negating existing rights.

* Public water may only be used for industrial or other purposes, or on non-riparian land, only with the permission of the water court. The water court is bound to the public interest when allocating such water rights.

* Permission to use water which remains in the stream after *ex lege* water rights have been exercised, may be granted by the water court for industrial, agricultural and urban purposes. It is however difficult, in advance, to convince the court that such an excess will be available, since the use by upper owners and the precipitation will then need to be predicted.

* A permit is needed to use more than 150 m^3 of water per day for industrial purposes. This ministerial permit is a precondition to an application for a right of use in terms of section 11. The purpose of the court procedure is to allow affected parties to raise complaints. It is submitted that if this duplicated procedure is united in the minister, the *audi alteram partem* principle will provide sufficient protection for affected parties.

* Ownership of water in government water works vests in the minister. It is submitted that in terms of a system of state-controlled *res communes*, it is unnecessary to make an exception for ownership of dam water : the power of control will remain, irrespective of its legal status or classification in the law of things.

* The declaration of subterranean water control areas is yet another way in which increased state control of water use has infringed on the exercising of sole and exclusive use of private water. In a system where all water is state-controlled *communia*, the declaration of control areas might be unnecessary. If ground

water and surface water are of similar legal status, yet subject to state control, the minister will be entitled to allow or prohibit the exploitation of ground water and the utilization, conveyance etc. thereof as he is entitled to do in terms of sections 30 et seq, but without the need to set criteria as to when ministerial control is required.

* Government water control areas are, in the majority of cases, declared when the minister deems it to be in the public interest that the common utilization of water within an area ought to be controlled in the public interest. The declaration of such areas generally implies the assumption of control, the suspension of existing water rights and the imposing of water quotas in terms of prescribed statutory formulas, mainly for agricultural purposes. It is submitted that water utilization in a country where water is scarce, ought always to happen subject to state control and in the public interest, and that in principle it should not be necessary to declare a control area in order for water to be utilized according to the public interest. Moreover, the declaration of control areas implies the segmentation of water resources according to purposes of use, areas of competitive use and the nature of the source. But segmentation (and the consequential segmented control measures) is fundamentally unsatisfactory, in that control measures in one segment necessarily affect run-off and user practices in others. This is because the water of rivers is perpetually moving, and the water within a basin, whether in tributaries, headwaters, main streams, underground sources, wetlands or springs, is interconnected, and constitute a unity which should be controlled as such. Consideration ought to be given to basin management by representation, which could be a workable concept if all water is of similar status.

* Water allocation within control areas is effected either under section 62 or section 63. Section 63 is usually applied where apportionment is effected in respect of a government water work. Allocation is done according to strict statutory prescriptions, aimed mainly at irrigation. In case of apportionment (in terms of

section 62), water for other uses may be allocated from the surplus after provision has been made for irrigation according to the prescribed formulas. No provision is made for the allocation of water for purposes other than irrigation in the case of section 63 scheduling, and it is submitted that section 56 be used for such allocations. The minister ought to have a discretion to allocate water from a stream or dam to any user sector which has a claim which is in accordance with the public interest, and in accordance with basin considerations.

* Drought management is effected either in terms of section 9A or section 63(3) and (5), or according to section 56(3) permit-conditions. While section 9A measures are not applicable to stagnant water, section 63 measures are applicable only to areas where section 63 scheduling has been made applicable. It is not clear to what drought management provisions areas which receive water from government water works to which section 63 has *not* been made applicable, are subject. It is submitted that the minister should have uniform powers to control water utilization in times of drought, irrespective of the legal status of the water concerned and irrespective of whether it is running or impounded, within or outside a control area and irrespective of the purpose of use of the water. It ought to be applicable to all user sectors for the benefit of all, ie. in the public interest.

CHAPTER VI

THE PUBLIC INTEREST

"When we are dealing with the handing out of a public asset
in the public interest we must have some basis
and the claimants must have some way of
knowing what they are entitled to do"

G Findlay
1969

CHAPTER VI
THE PUBLIC INTEREST

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THE PUBLIC INTEREST

6.1. INTRODUCTION

The term "public interest" can be regarded as a key with which the current water law principles may be linked to ecobiotic water requirements. This is because the public interest is a concept of which the origin can be traced back to the Roman law *ius naturale*, which formed the very basis of water apportionment, and in terms of which each and all in need of water was entitled to it, irrespective of whether it was human or not. It had been indicated in a previous chapter[1] that the function of the *ius naturale* has never been entirely excluded from the water law during its development process. Nevertheless, all that has remained of it in the current South African water law, is the generous use of the concept "public interest" scattered through the provisions of the Water Act, which concept is nowhere defined. It may be argued that the function of the concept in the act is to restrict the discretion of the minister or water court to allocate public water. It has even been submitted supra[2] that the uncertainty as to what the public interest is, due to the lack of a definition, may imply that the minister has an unfettered discretion as to what the public interest is and whether his allocation discretion is exercised in the public interest. He is not necessarily bound to consider the interests of any specified user sector or affected user. Yet it was submitted that the court ought to be empowered, during judicial review, to adjudicate whether a discretion has been exercised in the public interest. This will be possible only if the public interest is formulated to serve as a jurisdictional fact.[3] In the light of this uncertainty of the

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1 Chapter III supra.

2 Chapter V.II.

3 Findlay "Water Rights" 340-341 : "When water is claimed for various purposes, and by different people for the same purpose, it makes not the slightest difference whether it is the state or minister awarding the water to persons who have the "basic right" to ask for it, or whether the claimants are treated as riparian co-owners and would-be industrialists who come forward *de communi dividundo*, and who ask for it on some proposed principle of competition. Plainly the minister, as much as any

meaning of this concept, it is necessary to investigate its origin, meaning and conceptual use, in order to use it as a cornerstone of a revised allocation mechanism. Since water allocation is subject to the public interest, and the public interest is based on the natural law principle that water belongs to each and all in need of it, the exclusion of statutory protection for ecobiotic water requirements should no longer be legally possible.

In this chapter, the public interest will be evaluated and analyzed in the light of its role in the Water Act, and with reference to its roots in the *ius naturale* and its relevance in the administrative law. It will be attempted to define the concept and to attach a meaning and function to it which will be of practical use in a revised allocation system, where a fair balance will exist in the protection of the water requirements of all water user sectors.

6.2. THE PUBLIC INTEREST IN THE WATER ALLOCATION MECHANISM

6.2.1. The occurrence of the concept in the Water Act

6.2.1.1. Outside control areas

The minister has, by amendment of the act, been granted extensive jurisdiction to intervene in rights of common use of water. The "public interest" is employed prima facie to limit this very wide discretion of the minister. The minister may control, regulate, limit or prohibit the use of public water "as he in the public interest may deem

court, must act in the public interest and in order to do that, in order to decide who shall get the water, and in what proportionate quantity, and for what particular purpose in preference to other purposes, a basic criterion of rights is necessary. And if a water court must find a proper principle it will certainly govern the minister's discretion as well" and "When we are dealing with the handing out of a public asset in the public interest we must have some basis and the claimants must have some way of knowing what they are entitled to do" (346).

expedient".[4] It is significant that this restriction[5] has not been imposed on the minister's discretion to restrict or suspend storage rights in terms of section 9B(1C).

The water court has the jurisdiction to grant rights to use public water for specified purposes which are not allowed *ex lege* and even to persons who have no *ex lege* water rights in respect of public water at all. In terms of some of the provisions regulating this discretion, the water court is restricted to act in the public interest,[6] while in others it is not.[7]

It may be argued that the duty to consider the public interest is statutorily imposed only when existing rights of other users might be affected by the exercise of the discretion by the minister or the water court. But first, section 9B(1C) may impair existing rights no less than section 9A, while the minister is not restricted in his section 9B(1C) discretion by the public interest. Secondly, the use of agricultural water for industrial purposes may qualitatively affect existing rights, yet the water court is not bound to the public interest when granting permission to use water in such a way,[8] while he is so bound when quantitative harm may result from an allocation.[9] Thirdly, protection for existing rights have been provided for those affected by section 11(2)(b)(i),[10] yet consideration of the public interest has, on top of that, been inserted as a restriction on an otherwise wide discretion. Fourthly, the court's discretion in terms of both sections 11(2)(a), (b)(i) and

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4 Section 9A(1).

5 The question might be asked whether this is really restrictive, or whether it is what is often called "a free and unfettered discretion".

6 Section 11(2)(b)(i). The *audi alteram* principle is also applicable in respect of s 11(2)(b)(i).

7 Section 11(2)(a), 11(2)(b)(ii).

8 Section 11(2)(a).

9 Section 11(2)(b)(i).

10 Section 11(4).

(b)(ii) has been restricted by measures which protect existing rights,[11] which negates an argument that only the section 11(2)(b)(i) discretion might be harmful to other users' rights.

It is therefore submitted that the insertion of the concept of public interest was not necessarily done to impose a duty on the discretion of the minister and the water court to consider existing rights. If that is the case, then it is difficult to argue with certainty what the true function of the concept in these provisions is.

6.2.1.2. Within control areas

A subterranean water control area may be declared by the minister *if he is of the opinion that it is desirable in the public interest* that the use of subterranean water be controlled. Subject to specified existing rights, the use and control of subterranean water vest in the minister. It is submitted that, because the declaration of a control area is done because it would be in the public interest to do so, the control of the water therein must also be in the public interest. The minister is bound to the public interest when allocating subterranean water. He is however also bound to statutory prescriptions regarding the allocation of such water.[12]

A government water control area may, inter alia, be declared when the utilization of water should, *in the opinion of the minister, be controlled in the public interest.* The minister's opinion that water utilization in an area ought to be controlled in the public interest, necessarily binds him, in the exercise of his discretion, to allocate such water in the public interest. This is because it is not the *declaration* of the area which ought to happen in the public interest, but the motive behind such declaration, ie. the allocation of the water. Although the minister has the right to use and control public water in a

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[11] Section 11(4), (6).

[12] Section 32B(b).

government water control area *notwithstanding anything to the contrary in the act and notwithstanding any existing rights*, it is submitted that the minister is at all times during such control, bound to the public interest.

A catchment control area is declared, inter alia when, *in the opinion of the minister*, the flow of a public stream should be controlled for specified purposes in the "national" interest. What the difference between the public and the national interest is, is not certain, as this term is nowhere else employed in the act, and neither is it defined. Prima facie it seems to be a broader concept, but for purposes hereof it will be regarded as having a similar meaning than public interest. Once again, the motivation for the declaration of such an area, is the need to control water utilization in the public interest, which, it is submitted, binds the minister in his managing discretion.[13] He may cause to be carried out such works as he may deem necessary in connection with any of the specified purposes. Works may however not be carried out *even* if he deems it necessary, if it will not serve the public interest. He may also suspend all or any of an owner's rights for a specified period and enter upon land to carry out such works.[14] This is also not allowed if such suspension is not in accordance with the public interest.

A dam basin control area is declared when the minister *is of the opinion that it is in the public interest* that an area should be reserved for a dam. In this case, it is not provided that the minister may declare such a control area when it *will* be in the public interest, but only when it will, *in his opinion*, be in the public interest. Even if the public interest was a defined term which served as a jurisdictional fact to which the minister is bound, it is not the case here, since he may subjectively determine whether his act will be in the public interest, and this opinion is not subject to revision. It is not clear why, in the case of dam basin control areas, the minister is less bound. In a dam basin control area, any town planning activities are subject to ministerial permission, and it is submitted that this

[13] Section 61(1)(a).

[14] Section 61(1)(b).

permission is granted in accordance with the public interest. The minister is therefore not empowered to arbitrarily issue permits before he has determined whether it will be in the public interest. This is because the public interest will not benefit from the mere declaration of the control area, but from the very management actions encountered after such declaration. The insertion of the necessity for the minister to only declare such a control area when it will be in the public interest, thus necessarily burdens him with a duty to manage the water utilization in accordance with what he, in his opinion, has decided to be the public interest.

A government drainage control area may be declared without the necessity to consider the public interest. This means that the minister has a free discretion and does not need to act in accordance with the public interest. It is however not clear why the declaration of this area was set free from the obligation to consider the public interest.

If the control of water utilization in the abovementioned control areas has to be exercised in the public interest, then it may also be submitted that the related provisions which prescribe ministerial powers, eg. that of expropriation,[15] the allocation of water quotas,[16] scheduling,[17] the control of the construction of water works,[18] imposing rates and charges,[19] also have to be exercised in accordance with the public interest.

It seems as if the allocation mechanism, especially within control areas, ie. where water utilization is managed by the state and not in accordance with *ex lege* water rights, has, to a large extent, been subjected to the public interest. Sometimes the minister is obliged to exercise his administrative functions in the public interest, sometimes he is

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15 Section 60.

16 Section 62.

17 Section 63.

18 Section 62A.

19 Section 66(1).

granted the free discretion to determine what the public interest is (in his opinion) and then to act accordingly, and sometimes he may proceed with management of water utilization without the obligation to consider the public interest. Nowhere is the public interest however defined, and nowhere are criteria laid down according to which the public interest ought to be determined.

It is necessary to investigate what the general meaning of this concept is, in general, and what the legislature probably intended with the insertion thereof in the water allocation mechanism.

6.2.2. The origin of the concept of "public interest" in the water law

The first trace of the concept of *public interest* in the South African water law, was when a provision was inserted in the 1912 Irrigation Act by amendment in 1934.[20] The effect of the amendment provision was that a riparian owner, who wished to use surplus water for tertiary purposes, could apply to a water court who could authorise such use *if it would be in the public interest.*

In the Water Act of 1956, this concept is often used.[21] It was not derived from the proposed legislation of the Hall Commission. In its report, the Commission merely referred to "*die belange van die staatshuishouding*",[22] and "*die nasionale belang*".[23] Yet the *spirit* thereof was derived from the proposals of the Commission, in that the Commission suggested increased state control over the water resources in order to be able to control water utilization for the benefit of the whole nation and all user sectors, and not only for

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[20] Section 4 of the Amendment Act 46 of 1934, which substituted s 20. In the original form, the 1912 act contained a few indirect references to the common good, viz. s 37 (the water court may order *as it thinks just*) and s 46 (the governor-general may make an order *when it appears expedient*).

[21] Vide par 4.2.1. supra.

[22] Clause 66(1)(b).

[23] Clause 66(2).

riparian owners. This idea was referred to by the Minister of Irrigation as a move away from the English principle of riparian ownership, and back towards the old Roman-Dutch principle of the state being *dominus fluminis* :

> *"Gedurende die gesagvoering van die NOIK in die Kaap, is die beginsel wat in Nederland gegeld het, streng toegepas op die water van alle strome binne die gebied van die Kompanjie in die Kaap. Die staat was dominus fluminis. Niemand mag sonder die toestemming van die staat water uit 'n openbare stroom neem nie. Die staat het absolute en algehele mag en beskikking oor alle waters gehad... In hierdie wetsontwerp breek ons verder weg van die idee van die oewereienaarsregte en nader aan die toepassing van die dominus fluminis gedagte, sonder om egter enige van die bestaande regte aan te tas"*[24]

and

> *"Met veranderde ontwikkeling in die land, waar stede en industrieë steeds toenemende eise aan ons waterhulpbronne stel, en 'n behoorlike verdeling tussen hierdie verbruikers en landbou verg, is dit soms nodig dat die kontrole oor 'n river of 'n gedeelte daarvan in die staat gevestig word. Die staat kan dan die water verdeel op die mees voordelige manier in belang van die land en sy ontwikkeling as geheel, en nie net in belang van die oewereienaars nie"*[25]

The concept of the control of the water in the general interest of the nation or the broad public, was thus probably the idea behind the insertion of the concept of "public interest" in several provisions of the Water Act. The legislature probably intended to rather express the spirit of the recognition of the national interest in water allocation, than to use the term "public interest" as a jurisdictional fact or specific restriction on the discretion of the minister or water court.

The courts, however, have not accepted this concept in such a general sense, but interpreted it as a jurisdictional fact with which administrative acts have to comply.[26]

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[24] *Assembly Debates* 5 June 1956 7244.

[25] *Assembly Debates* 5 June 1956 7247.

[26] *Ex parte Pietersburg Municipality* 1954 Vos Rep 182, *SA Cellulose Corporation v Umkomaas Town Board* 1960 Vos Rep 264, *O'Okiep Copper Co Ltd v Union Government* 1961 Vos Rep 302. The

It is submitted that, in the light of the earlier questioning of the existence and nature of the so-called *dominus fluminis* principle, the concept of public interest can be traced even further than the Roman-Dutch law, viz. to Roman law. Although neither the Minister of Irrigation (during the parliamentary session) nor the Hall Commission ever referred to Roman law or even to our own judicature, many principles which were accepted by way of the insertion of the term "public interest" in the water law (and together with it, increased state control in the national interest) was in fact standing law in Roman water law.

In Roman law, water belonged to each and all in need of it in common use, subject to state control, which control was exercised by praetorian interdicts. Running water was classified as *res communes,* which indicated that it could not be appropriated, but belonged to all. Gaius however classified it as *res publicae*, which is a further indication of the public interest being an underlying principle to the Roman water law. Moreover, the *ius naturale*, which sought justice and equity for all, also underlay the water law. This means that water belonged to each and all in need of it according to natural justice, and that no-one was entitled to use water in such a way that he harmed another user who had similar rights of use. When he did however do such harm, he was accountable in terms of normal remedies, and when peaceful common use became unworkable due to over-utilization by co-users, the praetor would interfere to restore peaceful common use and justice and equity. In that sense, the principles of natural justice were involved in the water allocation mechanism as a guide-line, and in such a way the public interest was significant in the water law.

In Roman-Dutch law, the use of water was restricted to citizens of Holland, and the utilization of water became a national interest. The state still had the power to control the common use thereof, so much so that some authors held the view that water was a

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Pietersburg case was an application in terms of s 20(3) of the Irrigation Act (as amended by s 4 of Act 46 of 1934). Although the term "public interest" was not used in the statutory provision, the court considered whether the application was in the public interest, yet without defining the term.

royal asset. Yet the majority of jurists regarded water as *res publicae*, ie. it belonged to all *citizens* in common. To a certain extent, this classification negated the role of the *ius naturale* in the water law, since principles of justice to all, irrespective of citizenship or the purposes of use, did no longer apply. It can, on the other hand, be argued that the public interest was not connected to natural justice, and that a system in terms of which water was only available for use by citizens, was perfectly in accordance with the then view of what the public interest was. This is however to be doubted, since Grotius and Voet both advocated the *ius naturale*, and it is difficult to believe that these authors intended the public interest to be based on political principles rather than on principles of natural justice.

In the early Cape government, water was still regarded as a common resource which could be used by all in need of it, subject to state control, which control was exercised in the national interest (eg. for the sake of the proper functioning of a corn-mill). This principle of state control of a public resource in the national interest, was confirmed by several courts in the nineteenth century, which was the most important development period of the South African water law :

> "There may be and there must be allowed of that which is common to all a reasonable use... The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common use, nor into an extravagant looseness which would destroy private rights".[27]

and

> "[T]he principle which in that [English] law is the very foundation of the doctrine upon the natural and artificial uses to which the proprietors of land on running streams are confined in the use of their water, viz., the general good of all, must prevail to regulate the use of these streams in a country like this..."[28]

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[27] *Retief v Louw* 1974 4 Buch 165 179.

[28] *Retief v Louw* 1874 4 Buch 165 180-181.

Bell J also referred to the doctrines *sic utere tuo ut alienum non laedas* and *in invicem vicini* to emphasise the principle that water utilization was subject to the public interest or common good.[29]

With reference to *Linlithgow v Elphinstone*,[30] De Villiers CJ in *Hough v Van der Merwe*[31] quoted :

> "A river which is in perpetual motion is not naturally susceptible for appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is authorised with respect to every subject that is best enjoyed separately, but barred with respect to every subject that is best enjoyed in common. Water is scattered over the face of the earth in rivers, lakes etc. for the use of animals and vegetables. Water drawn from a river into vessels, or into ponds, become private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it into the power of one man to lay waste a whole country. A river may be considered as the common property of the whole nation; but the law declares against separate property of the whole part"[32]

The judge also referred to *injustice* as a criterion to limit water use, with the doctrine of *sic enim debere quem meliorem agram suum facere ne vicini deteriorem facere*, and his view that water could be used in "just and reasonable" proportions.[33]

In this case, the court clearly held the view that the classification of water as common to all, is a manifestation of the recognition of the public interest, which refrains anyone

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29 182.

30 3 Kame's Dec 331.

31 1874 4 Buch 148.

32 153.

33 154-155.

from appropriating water. The court also connects this view of the role of the public interest to justice and reasonableness of use, which use is required to accommodate the requirements of other members of the public.[34]

In *Van Heerden v Weise*,[35] the court based its distinction between public and private water on the public rights, in that public streams were those where riparian rights were subject to public rights *jure naturae*.[36] He implied that by natural law, public rights restricted riparian owners' rights. To support his view, the court quoted *Mason v Hill*[37] with reference to public water :

> "[A]ll might drink it or apply it to the necessary purposes of supporting life",

and continued

> "The rights of the public were established long before those of the different proprietors were defined".

The court also relied on Roman law and English law to state that rights in respect of running water arise from its nature as being common to all. The court was however not willing to officially recognise the public interest as a determining factor to allocate water, yet it neither disregarded the public interest :

> "Although argument of public convenience cannot be allowed to affect the law, yet as the court was told that the dismissal of the appeal would frustrate all attempts of irrigation, I would remark that seeing that numbers of homesteads and cultivated lands are often placed near the banks of such rivers, so as to enjoy the advantage of the flood, and waste water would periodically come down such streams, a judgment which enabled the upper

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34 Et vide *De Wet v Hiscock* 1880 EDC 249 256.

35 1881 1 BAC 5.

36 8-9. On 9, he also said that, in respect of public water, rights are limited by the "natural rights of the public". This is a view very close to that held by the minister in the 1956 parliamentary debate, viz. that riparian ownership was inhibited by state control in the public interest.

37 5 B & AD 24.

> proprietor to divert the whole course of such a stream at all times onto his own land, would probably have the effect of impoverishing a crowd of lower proprietors..."[38]

Although the term "public interest" was not always employed, the courts based their views on the allocation of water rights on various criteria such as the common good or public convenience, "natural" public rights, natural law, justice, reasonableness, or the principle of *sic utere tuo ut alienum non laedas*. The nature of running water as a commodity which belongs to the public at large and is difficult to appropriate, was nevertheless generally relied on. This view of the public interest was often used to temper individual interests and claims for private water rights.

That water cannot be appropriated and should belong to all, was stressed by Ham Hall in his report in 1989 :

> "(6) That, as a fundamental principle, it should be laid down in the water laws that the waters of all rivers, streams, water courses, lakes, lagoons swamps and marshes belong to the people of the country, and hence are naturally the ward of the Crown"[39]

and

> "There can be no satisfactory workable systematization of Irrigation until there is a rational administration of waters and water courses. Such administration must be based on some principle - have a starting point of action. The right starting point is, that the waters belong to all the people, and that even though private rights to use every drop may have been established, they are still the ward of government, and, as such, subject to administrative control".[40]

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[38] 17. Et vide *Greeff v Keller* 16 CTR 511, *Southey v Southey* 1905 22 SC 650 at 673 (where the common interest of only *riparian* owners was considered); *Southey v Schombie* 1881 1 EDC 286 311 : "The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness subversive of common use, nor into an extravagant
notion which would destroy private rights".

[39] 62. Note that he did not only refer to running water.

[40] 63.

Eventually, Hall recommended that this principle be incorporated into legislation, with a duty on the government, as administrator, to manage common water use "in the peoples' interest".[41]

In spite of Hall's recommendation, and the strong emphasis which the courts placed on it, the concept was not incorporated into subsequent codifications (being that of 1899, 1906, 1908 and 1912) of the water law. In fact, very little emphasis was placed on state administration of water. Water rights were statutorily regulated, and a water court was established to handle disputes. The broad public interest was therefore not represented in the form of powers vested in the state to interfere in common water utilization, as it was in Roman and Roman-Dutch law, and in accordance with the spirit of nineteenth century judicature.[42]

Another factor which contributed to the negation of the public interest in the codified water law, was the emphasis which was placed on irrigation. In an allocation system where irrigation had always received preferential treatment, there was hardly any space for the interests of the broad public. In *Southey v Southey*,[43] the court applied the "common interest" to riparian owners only.[44]

In terms of the 1912 act, the water court had the discretion to make certain orders as it thought just.[45] The reference to justice reminds of the occasional use of this concept in nineteenth century judicature, yet whether it may be connected to the public interest, will be investigated infra.

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41 68.

42 Vide supra, where it was submitted that the very function of a distinction between public and private water was to demarcate state control. This function, by lack of any form of state control, was negated.

43 1905 22 SC 650.

44 673.

45 Section 37(1), (3).

Only one reference to the public interest in the water law prior to the enactment of the 1956 Water Act, could be found. This was in the water court case of *Ex parte Pietersburg Municipality*.[46] In this case, which was an application for industrial water rights in terms of section 20, the court considered whether permission to use water as such, would be against the public interest, although the court was not statutorily bound to consider the public interest. It however decided not to hear evidence on whether the public interest (which would have been served by the water rights) outweighed individual rights, eg. by loss or prejudice to interested parties as a result of the proposed dam.

6.2.2. Conclusion

In Roman law, the public interest was represented by the classification of water in the law of things, in that it belonged to each and all in need of it according to the *ius naturale*, yet subject to state control for the sake of peaceful and reasonable common use. In Roman-Dutch law, the state had similar yet even stricter administrative powers to regulate the common use of water. Water belonged to all citizens and could not be appropriated. In early South African law, this system of running water being *res publicae*, was retained, yet the role of state control declined. The courts of the nineteenth century however placed strong emphasis on the fact that public water could not be appropriated, and ought to be available for all in need of it according to natural law. Yet despite this view, public water was increasingly that of the riparian owners, to the exclusion of other water user sectors. The public interest or common good played an increasingly insignificant role in the water allocation system, in spite of principles that water was common to all, which some of the courts attempted to maintain, and in spite of the express recommendation of Ham Hall that water ought to be administered by the state for the benefit of the public at large. Only in 1956 did the concept of public interest re-appear in legislation. Neither Hall in his Commission report, nor the minister during the assembly debate, referred to the existence of the public interest as an underlying

[46] 1954 Vos Rep 182.

principle in Roman law or early South African law. Nevertheless, the erstwhile recommendation of Ham Hall that water ought to belong to all in common subject to state control in the public interest, was incorporated into the new Water Act. It was motivated merely by a "modern" need for administrative control of the scarce water resources of South Africa for the benefit of the public at large, to counteract the unbalanced over-emphasis of water needs for irrigation.

It is submitted that this re-incorporation of the recognition of the requirements of a wide spectrum of water user sectors, in the form of state control in the public interest, was nothing new, but merely the acceptance of an effective Roman law system which was phased out by the ever-increasing irrigation water needs in the nineteenth and twentieth century.

It is moreover submitted that the regular use of the term "public interest" in the Water Act was intended to merely convey the new state policy, viz. that the water needs of all water user sectors were to be accommodated during water allocation, and that the state was appointed as the trustee with the duty to regulate common use of public water in such a way that the public at large was served. It was probably not intended to serve as a jurisdictional fact which restricted the otherwise wide ministerial discretion of the minister to allocate and apportion and regulate and control public water as he deemed expedient.[47] The legislature probably intended to grant to the minister an unfettered discretion to determine the most suitable way in which water resources ought to be apportioned.

The concept of public interest has, in recent years, undergone a metamorphosis, in that it has been grasped by the advocates of the rapidly developing field of administrative law. No longer does the concept merely represent a spirit of common good, but attempts have been made to formulate it, to serve as a defined jurisdictional fact which can restrict

[47] Et vide Fuggle & Rabie 301-302.

administrative bodies in exercising quasi-jurisdictional discretions. The effect of this development on the use of the concept in the Water Act, will be investigated infra.

6.3. NATURAL LAW IN THE WATER LAW[48]

> "The better world of the future which men are seeking to build for themselves and their posterity rests squarely upon a foundation of natural law"[49]

It was said supra that the classification of running water as common to all had, since Roman law, been linked to the principles of natural law. Since the public interest was reflected in the classification of water, it could not be separated from the principles of natural law. Yet nowhere in the history of the South African water law was the two concepts "public interest" and "natural law" intentionally connected or equalised.

6.3.1. History[50]

In Roman law, water was *res communes* subject to state control for the sake of peaceful common use, ie. in the public interest. The classification of water as common to all, was however a consequence of the applicability of the *ius naturale* :

> *Et quidem naturali jure omnium communia sunt illa : aer, aqua profluens et mare*[51]

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48 Vide 664 infra for the meaning of the concept of natural law.

49 Weeramantry 197.

50 Fuggle & Rabie 302; Uys "Natuurbewaring" 375 et seq.

51 *D* 1 8 2 1.

The *ius naturale* was advocated to be the underlying principle of many legal rules in Roman law. It was the embodiment of justice and equity which was fundamental to all rules.[52]

It was submitted supra that the right in respect of water was an extraordinary kind of *ius in re aliena*, called *(ius) usus publicus*, allowing members of the public the right of use of water, which right was not conferred by civil law procedures, but by the universal principles of justice and equity of the *ius naturale*. The probable reason for the existence of this right of *usus publicus* in respect of water, was that water was a natural and life-giving resource which was required by each and all, so that it was in the public interest or the common good not to allow appropriation thereof. It had to be available to all in reasonable rights of common use, to comply with simple justice. Natural law thus prescribed the *usus publicus* of water in the interest of the public at large.

If natural law represented justice and equity, and the public interest required the equitable sharing of natural resources, then the public interest and the *ius naturale* must have been going hand in hand. To determine whether the *ius naturale* necessarily supported (endorsed) the public interest, and thus whether the classification of water as common to all in need of it in terms of the *ius naturale*, was a principle which was in accordance with the public interest, can only be determined after the true nature and function of the *ius naturale* in the legal history and specifically the water law has been determined. The tangent points between the *ius naturale* and the public interest could moreover assist in determining the value and function which may or should be attached to the current reference to the public interest in South African water law.

The *ius naturale* was submitted to have lost its function in Roman-Dutch water law. This was due to water being classified as *res publicae* or even *regalia*, belonging not to each and all in need of it in rights of use, but only to the citizens of Holland. No longer was

[52] Vide Chapter III.I supra.

the simple principle of "justice for all" the criterion during the allocation of water rights, but water rights were restricted to political boundaries despite the water requirements of non-citizens or non-humans. It was however submitted supra that the Roman-Dutch water allocation system served the public interest. The conclusion is either that the criteria for *justice* have changed since Roman law, or that the *ius naturale* and the public interest were not concepts as closely related as in Roman law. Once again, the similarities between the two concepts, as well as the determination of the reason for the deviation from the Roman law position where the two concepts were closely related, could assist in determining the roles of justice and the public interest in the current water law.

In earliest South African law, where the water law was neither codified nor regulated by the judicature, no reference was made to the role of the *ius naturale*. Water allocation was a practical system in terms of which each used readily from the available natural streams in the Cape, until disputes occurred, which were referred to the authorities.[53] No lawyers or academics philosophised about the role of the *ius naturale* in the water law, yet it may be argued that the administrative water allocation system served the public interest, and government decisions were probably intended to serve principles of justice and equity.

In Anglo-American law, the *ius naturale* formed the basis of the principles of the water law. The natural movement of water over pieces of land, as well as the fact that water and land were regarded as inseparable, was the basis of the rule that the landowner obtained a real right of private property (hereditament) in respect of "the advantage of the momentum or impetus" of the water.[54] The right had to be exercised reasonably, because the object in respect of which it was exercised was common to all whose land it passed and who vested similar rights in terms of the *ius naturale*. The *ius naturale*,

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[53] First to the Political Council and later to the *Landdrost and Heemraden*.

[54] Vide the discussion of Anglo-American law in Chapter III.III supra.

which ordained that water was a natural commodity which ought to be available to all in need of it, was also the basis of the rule that so-called public water[55] could not be appropriated.

In Anglo-American water law, a rule existed that the beds and banks of rivers belonged to the riparian owners in ownership, *usque ad medium filum fluminis*. If the *ad coelum* principle was applied, it meant that the water flowing in rivers could not be appropriated, and belonged to riparian owners in proprietary rights. This principle of ownership in respect of running water was not necessarily in accordance with the *ius naturale*, in terms of which water belonged to each and all and could not be appropriated. The principle of riparian ownership was therefore contrary to the principles of the *ius naturale*.

The principles of the *ius naturale*, in spite of its incorporation into Anglo-American water law rules, were once again revived in the nineteenth century. In *Retief v Louw*,[56] the court based its decision on "the universal and immutable principles of sound reason and general justice".[57] Bell J quoted Van Leeuwen[58] :

> "Common things ... which on account of the common use which all have a right to by nature, cannot, by the laws of nations, be divided : thus flowing water, which, collected either from the rain or from the veins in the earth, makes a perpetual current. These things, by nature itself as it were, are attributed to, and may be occupied by, any one, provided that the common and promiscuous use is not injured, for without the use of air or water no-one can live or breathe".[59]

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55 This was water below the co-tidal line, ie. within estuaries.

56 1874 4 Buch 165.

57 180. Bell J relied on *I* 2 1, *D* 43 20, Van Leeuwen *CF* 2 1 6, as well as foreign law extracts.

58 *CF* 2 1 6.

59 176.

In *Hough v Van der Merwe*,[60] the court based its statement that "appropriation is authorised with respect to every subject which is best enjoyed separately, but barred with respect to every subject which is best enjoyed in common", on "the laws of all polished nations".[61] But when the judge illustrated the point, he heavily yet disguisedly relied on Roman law principles of natural justice, and he expressed his ideas regarding justice with the term "public interest" :

> "Water is scattered over the face of the earth in rivers, lakes etc. for the use of animals and vegetables; ... to admit of [such] property with respect to the river itself, considered a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country. ... A river may be considered as the common property of the whole nation; but the law declares against separate property of the whole or part ... No individual can appropriate a river, ... but every individual of the nation ... are[sic] entitled to the use of water for their private purposes".[62]

Moreover, when discussing common rights of use, the court based its view, inter alia, on "the just and equitable interest" of Roman law, expressed in the doctrine of *sic enim debere quem meliorem agram suum facere ne vicini deteriorem facere*.[63] The judge was clearly hesitant to create the impression that he regarded the water law as one based on the *ius naturale*, yet he repeatedly searched support for his views in Roman natural law principles such as justice, equity and the common use of water as a natural resource.

In *De Wet v Hiscock*,[64] the court ascribed the origin of water rights to the *ius naturale* :

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60 1874 4 Buch 148.

61 153. For this view, support was found in *I* 2 1 1, as well as the English case of *Linlithgow v Elphinstone* 3 Kame's Dec 331.

62 153.

63 155.

64 1880 EDC 249.

> "[B]ut the true doctrine undoubtedly is that a right to water is not by a presumed grant from long acquiescence, but if it exists at all, is *jure naturae*; and if this be the case in respect of running water, *a fortiori* the right, if it exists at all, in the case of subterranean percolating water, is *jure naturae* and not by presumed grant"[65]

This was the first decision where the *ius naturale* as the basis of water rights was directly incorporated into the South African water law.

In *Van Heerden v Weise*,[66] the court once again based the distinction between private and public water on natural law :

> "[W]hereas in the case of the former [public streams] the rights of each riparian proprietor are limited by the rights of the public and of the different riparian proprietors *jure naturae*, in the case of the latter [private streams] the rights of each riparian proprietor are only limited by such rights as long usage may have conferred on the remaining riparian proprietors"[67]

It is submitted that the reference to the *ius naturale* in this sense, was probably done to emphasize the fact that public rivers belonged to all in common rights of use, according to the principles of justice and equity as contained in natural law principles.[68]

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[65] 259.

[66] 1881 1 BAC 5.

[67] 8-9. On 16, the court indicated that water rights are based on the principle of water being common to all. The rights of all in respect of water in terms of the *ius naturale*, thus underlies the water law.

[68] Vide 9 (the reference to *Mason v Hill* 5 B & Ad 24 as well as the "natural rights of the public" and Vinnius *Ad Inst* 2 1 1).

In *Southey v Schombie*,[69] Buchanan J held that "there may be and there must be allowed of that which is common to all a reasonable use", yet he subjected this principle to "a reasonable reference to public convenience and general good".[70]

In *Colonial Government v Pietermaritzburg Corporation*,[71] the court held that riparian owners had a "natural right" to reasonable use of the water of public streams. Such natural right attaches to the land itself.[72]

In *Southey v Southey*,[73] the court quoted a passage from *Chasemore v Richards*[74] as being "based on the same principles as our law" :

> "The right to running water has always been properly described as a natural right, just like the right to the air we breathe. They are gifts of nature, and no-one has a right to appropriate them".[75]

Only a few years after the 1912 Irrigation Act had come into force, did the court again refer to the influence of the *ius naturale* in our water law[76] The court, in an attempt to solve a dispute on the interception of subterranean water, thoroughly discussed the origin of our water law, and especially the influence of English and American law. From

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69 1881 1 EDC 286.

70 311. Note the slight distinction between natural law principles of reasonable common use and the public interest, in that the reasonable common use is *subjected* to the public interest. This indicates that the judge does not regard natural justice necessarily to be in accordance with the public interest - in fact they may contradict, in which case preference is given to the public interest.

71 1900 NPD 287.

72 291.

73 1905 22 SC 650.

74 1859 HLC 7.

75 674.

76 *Union Government v Marais (Minister of Railways and Harbours)* 1919 AC 240.

Bradford Corporation v Ferrand,[77] he quoted what he referred to as "the doctrine of the law", being the *ius naturale* as the very foundation of water rights :

> "What is *ius naturae*? I have come to the conclusion that *ius naturae* is used in these cases as expressing that principle in English law which is akin to, if not derived from, the *ius naturale* of the Roman law. English law is of course quite independent of Roman law, but the conception of *aequum et bonum* and the rights flowing therefrom which are included in *ius naturale* underlie a great part of English common law, although it is not usual to find the 'law of nature' or 'natural law' referred to in so many words in English cases. I am therefore introducing no novel principle if I regard *ius naturae* on which the right of running water rests, as meaning that which is *aequum et bonum* between the upper and lower proprietors. Each has his rights *iure naturae*."[78]

From *Chasemore v Richards,*[79] the court quoted Lord Wensleydale :

> "It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae*, belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner ... His right in no way depends upon prescription or the presumed grant of his neighbour."[80]

Maasdorp JA eventually came to the conclusion that the principles of the law of water rights which were established in England and America, and which were built on the *ius naturae*, are similar to those recognised in the South African water law.[81] He also

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77 1902 2 Ch 655.

78 263-264.

79 1859 HLC 7.

80 349.

81 Eventually, the judge used this conclusion of the similarity of the water law foundations in the Anglo-American and South African law, to apply Anglo-American decisions to the matter in question, and so to use it as support for his view.

referred to the Institutes,[82] in terms of which running water is common to *mankind* (and not only to citizens, as in Roman-Dutch law), and continued :

> "Certain rules of law have been laid down to regulate the rights to and uses of running water, and they are all said to be based on *ius naturae*. From these rules have sprung up the recognised legal modes of using the water of public streams ... In my opinion, it follows from the legal principles governing the use of water running in defined channels, and capable of general use by riparian owners, that no riparian owner can abstract from the stream more than his reasonable share of the water, whether he does so by surface flow, or by means of underground percolations"[83]

It seems as if, according to Maasdorp, the whole system of water rights was based on the principles of justice and equity of the *ius naturale*, in terms of which water belonged to all mankind, to use it reasonably.[84] The connection which Maasdorp drew between justice and equity, the *ius naturale*, the South African water law and reasonable rights of use, may be regarded as significant in an investigation into the role of any of these factors in the water law. Yet of these, the concept which since then, especially due to codification, dominated the water law ever since, was the concept of reasonable use. It is thus important to note that the modern concept of reasonable rights of common use of water was, during a long development process, derived from the Roman law *ius naturale* as the basis of the law and specifically the water law.

In *Butgereit v Transvaal Canoe Union*,[85] the court recently discussed the origin of water rights again, referring back to its Roman law origin. With reference to a great number

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[82] *I* 2 1 1.

[83] 276.

[84] It is however noteworthy that the judge, at first, referred to *all mankind*, but later on to *riparian owners* only.

[85] 1988 1 SA 795 A.

of authorities,[86] Rabie ACJ said that the Roman law position was that water belonged to all in common in *usu publico*, yet subject to state control for the benefit of the public,[87] and that common water rights were derived from the *ius gentium*. The judge proceeded to say that in Roman-Dutch law the public had similar rights to use the water in public rivers, "save to the extent that such right was restricted by measures taken by those in authority".[88] Based on these principles, the court eventually held that the river in question was a common law public river and that it was available for common use for canoeing. Although the court referred to the Roman law classification of water as common to all in terms of the *ius gentium*, it never discussed the meaning of the principle or the nature and contents of the *ius gentium*. It moreover never referred to the Roman law texts in which the *ius naturale* was said to underlie the common nature of water, or to the difference between the *ius gentium* and the *ius naturale*. The Roman law principle of common use of water seems to be alive in the South African law, which emphasises a need to determine its nature and function in a modern water allocation system.

After codification, however, the principle of the *ius naturale*, that water belonged to all in common rights of use, was transformed to a statutory provision that public streams were subject to reasonable rights of use by riparian owners. In spite of the courts which still sometimes relied on the *ius naturale*, water was no longer common to all mankind, but to riparian owners only; the common nature was no longer applicable to all running water, but only to what was defined as public streams; the state could no longer interfere with common use in the interest of the public at large, but water rights were exercised according to statutory rights; common use was no longer regulated by justice and equity, but by statutory rights.

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[86] *D* 1 8 1, 43 12 3, 50 16 5, 43 20 1 41, 43 12 2, 39 3 10 2; *I* 2 1 2, 2 1 4; Van der Keessel *Dict* [no reference, but possibly 2 1 17]; Vinnius [no reference, but possibly *Comm ad Inst* 2 1 12]; Groenewegen [no reference, but possibly 2 1 2 and 2 1 23]; Grotius *Inl* 2 1 25; Voet 41 1 6.

[87] 767.

[88] 768.

Only in 1956 were some of the old principles re-introduced by legislation : the state (the minister) was granted extensive powers to intervene in the exercise of statutory water rights of reasonable common use, if it was in the public interest. This means that statutory water rights do not necessarily always serve the public interest, although such rights ought to be exercised reasonably or in respect of reasonable shares of public water. To address this, the state may now intervene in the public interest.[89] It therefore seems as if the loss of the principles of justice and equity of the *ius naturale* in the codified water law, and its replacement by a statutory allocation mechanism in terms of which water rights are exercised reasonably and in respect of specified shares and purposes, in the long run proved to lack justice for all, to such an extent that the administrative role of the state in the public interest had to be re-introduced. Whether the insertion of discretionary powers for the minister and the water court was the correct step in the interest of a just and equitable water allocation system, once again depends on exactly what is meant by "the public interest".

6.4.7. Conclusion

It seems that the concept of "natural law", and its role in water law, has undergone a long development process since Roman times. While its role in Roman law was to justify the classification of running water as *communia*, in the interest of just and equitable *usus publicus* of a natural resource, its role in Roman-Dutch law has faded due to political demarcation of water rights. Yet state control in the public interest remained, which created the impression that the *ius naturale* was no longer necessarily closely related to the public interest, which degrades the *ius naturale* to a theoretical ideal of justice and equity, while upgrading the public interest to a practical criterion to determine water rights. But, under the influence of Anglo-American law, the *ius naturale* revived in the water law which was formulated by the courts. The function of natural law in this new water law created by the courts, was fourfold :

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[89] Vide Fuggle & Rabie 660 : "It is submitted that the conservation of rivers in the public interest can be satisfactorily effected only if full control is vested in the state".

(i) Justice and equity

Some courts based their views of the allocation of water, on "natural justice", being the cornerstone of the *ius naturale*,[90] yet sometimes without any reference to the *ius naturale*. The term "common good" or even "public interest" was often used as justification for a view that the water law was based on simple justice for all.[91] Justice and the public interest was even used as synonyms.

(ii) *Ius naturale* as the origin of water rights

Some courts referred to the *ius naturale* as being nothing else than the very source of water rights : water rights were thus not derived from grant, agreement or statute, but directly from the *ius naturale* in terms of which natural resources belonged to all in common rights of use.[92]

(iii) *Ius naturale* as justification for the distinction between public and private water

Some courts justified the distinction between public and private water with the *ius naturale*. Public water was, due to its capability of common use, regulated by the principles of the *ius naturale*, in terms of which all riparian owners and members of the public had similar rights of use in respect of such water, which restricted an owner's use thereof. Private water, on the other hand, was not burdened by

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90 *Hough v Van der Merwe* 1874 4 Buch 148, *Union Government v Marais (Minister of Railways and Harbours)* 1919 AC 240.

91 *Southey v Schombie* 1881 1 EDC 286.

92 *De Wet v Hiscock* 1880 EDC 249; *Union Government v Marais (Minister of Railways and Harbours)* 1919 AC 240.

the *ius naturale*, in that only rights of long user restricted an upper owner's sole and exclusive right of use in respect thereof.[93]

(iv) Reasonable common use

Some courts based their view that running water cannot be appropriated but belongs to all in reasonable rights of common use, on the *ius naturale*, being a "natural right" attached to the land, which may be compared to the common rights of use in respect of air. These resources are viewed as a gift of nature to all life which, for that reason alone, may not be appropriated but must be shared.[94]

In some way, these factors are all interrelated, as was set out in *Union Government v Marais*. What the courts probably intended, was not to accept the *ius naturale* in its full philosophical context[95] as the beginning and the end of the water law, but to regard the underlying elements of the *ius naturale*, being justice and equity,[96] as the foundation on which a water allocation system ought to be built, so that all in need of water may have a reasonable right of use, and so that the common good is served.[97] In this sense, natural

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93 *Van Heerden v Weise* 1881 1 BAC 5. Et vide Fuggle & Rabie 665 who submit that the distinction is contrary to the public interest. Cf the discussion on the evaluation of the distinction between public and private water in Chapter IV.II supra.

94 *Colonial Government v Pietermaritzburg Corporation* 1900 NPD 287, *Van Heerden v Weise* 1881 1 BAC 5, *Southey v Southey* 1905 22 SC 650, *Union Government v Marais (Minister of Railways and Harbours)* 1919 AC 240, *Butgereit v Transvaal Canoe Union* 1988 1 SA 795 A.

95 Being a divinely inspired system of ideal rules based on timeless justice and equity. Et vide Weeramantry 185.

96 Cf Findlay "Water Rights" 343 : "Of course the general principles continue that men should be treated equally, in the sense that they be not subjected to unreasonable or whimsical discrimination. But water claimants are not and cannot be equal".

97 Findlay "Water Rights" 343 : "Of course the entire allocation of water ... must be in the public interest. That surely speaks for itself. But how is the public interest to be measured in comparing one grant with another?" Et vide Weeramantry 186 : "Human law must be created by man within the limits which natural law prescribes, and cannot override it". This author however advocated a distinction between natural and human justice, while human justice is closer related to the public interest. Et vide Fuggle & Rabie 302 : "Although the term national or public interest is nowhere

law may be equated to the public interest, although very few courts have gone so far as to draw the connection.

The practical value of natural law in modern legal systems is illustrated by Weeramantry as follows :

> "Natural law now enters upon the most important phase in the grand sweep of its career, for it moves over from the realm of mere philosophical speculation into that of positive enacted law. Specific principles based upon the general doctrine of natural law were now beginning to find their place in national documents authoritatively enshrining the principles on which states were to be governed."[98]

6.4. CONCEPT ANALYSIS

6.4.1. The public interest

6.4.1.1. The public interest as an objective of the law

The public interest, or the common good[99] is, in general, described as the ideal or purpose of the law, although it is not always obtained by the application of legal rules and principles.[100] The concept features more specifically in public law, which is aimed at promoting the interests of the public, although also in private law,[101] which serves

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defined, it refers to the principle that running water is a national asset which, in terms of man's sense of justice, should not be withheld from any party in need of it".

98 189.

99 Rabie "Public interest" 221.

100 Aquinas 13; Wiechers *Administrtiefreg* 2, 9, 239; Van Warmelo 23 par 58.

101 Rabie "Public interest" 223.

individual interests.[102] In the administrative law, the purposes of administrative actions is to advance the public interest,[103] yet Baxter regards this as a theoretical ideal :

> "It is simplistic to assume that the general interest of the public is automatically represented by the public authority concerned just because the latter has been established in order to further the public interest".[104]

One possible reason for this scepticism is that it is sometimes in the public interest to allow individual interests to take precedence over collective goals.[105] St Thomas Aquinas put it this way :

> "It would seem that the law is not always directed to the common good as to its end. For it belongs to law to command and to forbid. But commands are directed to certain individual goods"[106]

Rabie regards the public interest as a moral goal or ideal or a normative concept subject to interpretation by a particular body, rather than something which is empirically verifiable. It is the very basis on which administrative and judicial decisions and legislation is founded.[107] This view of the public interest, being merely a normative purpose of the legal process, raises a question as to its definition. Because a purpose can

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102 Wiechers 9; Rabie "Public interest" 220-221. There is an irrebuttable presumption that any enactment promotes the public interest (Wiechers *Administratiefreg* 185; Rabie "Public interest" 222.

103 Wiechers *Administratiefreg* 239; Rabie "Public interest" 220 et seq.

104 Baxter 57-58. Et vide Fuggle & Rabie 132.

105 Cf Rabie "Public interest" 221, who submits that in cases of conflict between individual and public interests, "it seems reasonable that the public interest should predominate".

106 13.

107 Pretorius describes it as *"'n juridiese belange-integrasienorm wat die staat in sy publiek- en privaatregtelike regshandhawing bind tot inagneming van die verskeidenheid en gelykwaardigheid van regsbelange op sy territorium"* (108).

hardly be strived at or a foundation can hardly be built upon unless it is known and defined.

6.4.1.2. Origin of the public interest

Pretorius, in a philosophical analysis and evaluation of the concept "public interest", relies on the doctrine of *salus reipublicae suprema lex*, for his definition of the public interest as a juridical norm which binds the state to consider the equality of legal interests during the administrative process. Its objective, as a constitutional norm, is to materialise the regulative idea of the public interest, and to protect the public law against a state-orientated "axiological[sic] universalism".[108]

The doctrine was probably derived from the work of Cicero, who regarded the *salus publicae* as a universal norm of justice, being the very essence of the legal system. He moreover regarded the *res publicae* as a *communio utilitatis*, founded on a common legal conviction (*consensus iuris*). Cicero therefore closely linked the *communio utilitatis* or *salus publicae* to justice.[109] Of this, Pretorius remarked :

> *"Die salus publica was derhalwe in die denke van Cicero juis bedoel om die idee van die bewerkstelliging van 'n optimale ewewig van belange weer te gee"*[110]

(In the meantime, the doctrine has been differently interpreted, to ensure the safety of the state and its interests, often irrespective of human rights.)[111]

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[108] 100-101.

[109] He was of the opinion that man's social bonds underlie justice (Van Zyl *Justice and Equity* 74).

[110] 101.

[111] Pretorius 101-104.

Du Plessis[112] moreover links Cicero's view of justice to his view of the natural law, and describes the connection as "*'n onmiskenbare interafhanklikheidsrelasie*". Cicero himself described nature as the origin of virtues such as justice and equity.[113]

> "For there is one form of law (*ius*), by which the community of men is bound and which constitutes one all-embracing law (*lex*). This law is right reason (*recta ratio*) which is directed at commanding and prohibiting. The person who is ignorant of it, whether it be recorded somewhere or nowhere, is unjust (*iniustus*). But if justice (*iustitia*) is in compliance with written laws and institutions of the people and if, as those same people declare, all things must be measured in terms of expediency (*utilitas*), then the person who believes that this matter would be profitable to him will disregard and violate the laws, if he is able to do so. It hence follows that there is no justice at all if nature (*natura*) does not exist and if that which is established by virtue of expedience is destroyed by that very expediency. And if law should not be confirmed by nature, (moral values) will be eradicated. For where will generosity (*liberalitas*), affection for one's country (*patriae caritas*), piety (*pietas*), the desire to deserve well in respect of another or to convey gratitude (*gratia*) be able to exist? For these virtues arise from the fact that we are disposed, by nature, to love our fellow-man - a propensity which is the foundation of law (*fundamentum iuris*). And it is not only services for the benefit of men, but also veneration for and religious observances in honour of the gods which are destroyed. I am of the opinion that these things should be preserved, not as a result of fear, but by virtue of the union existing between man and God".[114]

Justice was thus a moral virtue which accommodated community interests (or the public interest) and which eventually enables man to live in harmony with nature.[115] The essence of justice is "to give to each his own" (*suum cuique tribuere*).

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[112] 127.

[113] *Fin* 2 18 59. Vide Van Zyl *Justice and Equity* 77.

[114] Translation from Van Zyl *Justice and Equity* 78.

[115] Van Zyl *Justice and Equity* 75.

6.4.1.3. Definition

In an attempt to philosophically determine the place and function of the public interest in the legal system, Pretorius quoted Luhman & Hennis, who indicated the problematic nature of an attempted definition of the term :[116]

> *"Die bekende Duitse regssosioloog, Luhman, het eenmaal opgemerk dat pogings om 'n begripsbepaling van die openbare belang te maak, vergelyk kan word met die waagmoed van diegene wat altyd maar weer sal probeer om die noordelike rotswand van die Eigerberg uit te klim. Hennis het met ewe veel ironie verklaar dat dit steeds as 'n sekere teken van wetenskaplike naïwiteit beskou word as 'n outeur sou nalaat om 'n begrip soos die openbare belang nie ten minste in aanhalingstekens te plaas nie"*[117]

Pretorius, owing to his study of the history of philosophical attempts to define the term,[118] eventually questions the right of existence of the concept in the legal system. He concludes that unless the public interest is viewed as a regulative legal principle in terms of which the diversity of legal interests are recognised in equal value, the public interest is not definable and thus of little practical value.[119] Pretorius therefore recommends the statutory definition of norms to which the administrative managers of legislation are bound. It is submitted that such norms may differ between legal fields, and that the vague definition which Pretorius suggests, is satisfactory as an all-encompassing definition, yet the concept "public interest" ought not to be incorporated in an act unless the norms by which it is regulated, are stipulated.

The majority of lawyers have reached a similar conclusion, viz. that the concept of the public interest cannot be defined :

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[116] Pretorius 88 et seq.

[117] 89.

[118] As well as to ideological misuse thereof, the criticism from positivists and social reductionism.

[119] 100, 102.

Fuggle & Rabie describes the public interest (in the Water Act) as a jurisdictional fact without substance :

> "It is therefore submitted that the term "public interest" should be defined in order to serve as an objective jurisdictional fact to which the minister is bound whenever he exercises his allocation discretion".[120]

and

> "It has been shown that the advancement of the public interest is almost invariably entrusted to public bodies... However, it is simplistic to assume that the public interest is automatically represented by the public authority in question merely because the latter has been established in order to further the public interest."[121]

Findlay remarked that "[p]lainly the minister, as much as any court, must act in the public interest. And in order to do that, ... a basic criterion of rights is necessary."[122]

Rabie describes the public interest as a vague concept which resists precise definition. Not only is it uncertain what the interests of the public constitute, but also exactly who the public is whose interests are to be advanced by the law. He regards it as a flexible concept which differs from time to time and place to place. He is however of the opinion that much of the vagueness of the concept disappears when it is applied in a specific context. It may therefore be described as a collective noun for a variety of economic, strategic, administrative, social and legal interests which are worthy of legal protection. But this is the closest one may come to circumscribing the concept.[123]

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120 301-302.

121 132.

122 "Water Rights" 340-341; 343-344.

123 Rabie "Public interest" 220.

Rycroft, in his opinion of the difficulty to define the public interest, warns against it becoming "an impenetrable shield or an unchallengeable sword".[124]

Viljoen states that the public interest is "rather a vague concept and it cannot be defined in absolute terms".[125]

Carpenter is of the opinion that the public interest demands "that the interests of the community as a whole as represented by the administration, should be in equilibrium with the interests of the individual; ... and also that the administration itself should not be unduly hampered in its task of determining policy and implementing policy decisions...[yet] this must always be subject to the principle that the administration does not exercise powers on its own account, but in the interests of the general public - its function is to serve, not to rule".[126]

Very few of these authors have however, in their evaluation of the concept, attempted to define it (or at least its boundaries), yet Rabie is the only one who denies the possibility of defining it at all. This is because, according to him, definition would narrow the concept and make it impracticable.[127]

Pretorius, in his attempt to formulate the concept to comply with the need for a regulative legal principle in terms of which the diversity of legal interests are recognised equally, suggests that the concept be statutorily defined so as to bind the administrators of legislation. His eventual definition of the public interest, viz. "*'n juridiese belange-integrasienorm wat die staat in sy publiek- en privaatregtelike regshandhawing bind tot*

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[124] 172. Et vide Steyn 284.

[125] 93.

[126] 266.

[127] "Public interest" 220. Cf Pretorius who, on the other hand, feels that the lack of a definition makes it impracticable and a rather useless concept (89, 109).

inagneming van die verskeidenheid en gelykwaardigheid van sy regsbelange op sy territorium",[128] does however not address the contents thereof, but provides a basic framework which leaves room for flexibility in respect of time and legal fields. He suggests that the contents of the concept be formulated with reference to the doctrine of legality,[129] which will bind it to reasonableness, fairness, equality and freedom from arbitrary administrative action and *ultra vires*.[130] The principle of legality moreover ensures that public interests are formulated by the legislature and applied by the administration and judiciary as statutory grounds of justification :

> *"Die legaliteitsbeginsel verseker derhalwe dat statutêre publieke belangenorme vir owerheidsoptrede 'n konstitutiewe betekenis verkry en dus self as regmatigheidsvereistes vir owerheidshandelinge in praktiese regmatigheidstoetsing tot sy reg kom*"[131]

Baxter regards "policy" as an expression of the public interest, and thus does not necessarily suggest that the concept be confined to, or defined in, legislation.[132] He defines policy as a general plan of action, designed to advance or protect "some collective goal of the community as a whole".[133] In this sense, the public interest may be viewed as reflected by the public policy, yet departmental policy does not necessarily endeavour only public interests, but often also individual interests.[134]

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128 108.

129 ie. the principle that an administrative act must be authorised by law, and express certain minimum principles of justice. Vide par 4.4.2. infra.

130 Baxter 301.

131 106.

132 180.

133 Et vide Rabie & Glazefski 314 et seq, who use the terms "public interest" and "public policy" as synonyms, and on the other hand refer to statutory departmental policy of the Environment Conservation Act.

134 An example is the allocation of water only for user sectors specified in the acts, in spite of the requirements of other users. Et vide Van Warmelo 23; Aquinas 13; Wiechers *Administratiefreg* 2.

According to Rabie, a proper measure of the vagueness of the concept disappears when it is applied in practice and described as a collective noun for a variety of interests which are worthy of legal protection. Because of the need to keep the concept flexible in variable times and fields, specific statutory definition may unnecessarily bind the concept in its application.[135]

In *SA Industrial Cellulose Corporation v Umkomaas Town Board*,[136] the court held that the public interest refers to the interests of the public at large, and not only those of the parties who are directly affected.

If it is agreed that the concept calls for definition, then the proposal of Pretorius is the only one which addresses the need for the definition of the contents of the concept. Although he does not extensively elaborate on the nature and contents of the principle of legality, much has been written thereon. It is thus necessary to investigate this principle to ascertain its workability as a criterion in defining the public interest.

6.4.2. Legality

The principle of legality implies that all administrative acts must comply with the conditions of the law.[137] Originally, an administrative act was said to be legal if it was not ultra vires, ie. if it was formally exercised according to statutory prescriptions. The English principle of "rule of law" however brought the facet of *justice* along, as a further condition to legality. The continuous addition of conditions to legality by the courts, brought about a constant refinement of the concept,[138] so that the principle of legality

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135 Rabie "Public interest" 220.

136 1960 Vos Rep 264.

137 *LAWSA* 31-32; Wiechers "Legaliteitsbeginsel" 309, 313; Baxter 301, 78; Wiechers *Staatsreg* 141; Wiechers *Administratiefreg* 324-325, 316, 309, 313.

138 Vide Boulle 140-141, who regards the ultra vires-system of review as outdated, and the constant refinement of grounds of review according to principles of justice, as necessary, viz. that

currently encompasses the following grounds of revision : ultra vires, natural justice, the rule of law,[139] the public interest, justice, equity,[140] the presumptions of interpretation,[141] reasonableness and expediency. In short, legality is the criterion to determine whether an administrative action may be reviewed by a court of law, or not.

The grounds of review as mentioned have often formed the subject of academic debate, which liquified the definitions and caused them to often overlap to such an extent that the classification of these grounds became a subject in itself :

> "Administrative lawyers have a tendency to pigeonhole the various grounds of review upon which administrative action may be set aside. The practice is understandable : the process of classification helps them to pin down their slippery subject. But it becomes positively dangerous when the various classifications calcify into rigidity. The danger lies in the inevitable obfuscation of the close relationship between certain grounds of review. Occasionally there is a salutary reminder that the grounds are all concerned with the objective boundaries of administrative action; that most of them have to do with abuse of discretion; and that many of them overlap considerably"[142]

Carpenter, one of the most recent South African authors to address the subject, concludes that all these grounds of review serve a single purpose, (which is at the same time the very purpose of the law), being the public interest :

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discretionary decisions must be tested by a court of law.

139 The rule of law implies the absence of arbitrary exercise of authority, respect for personal freedom, judicial equality, and unbiased and independent courts (Wiechers *Staatsreg* 135, 14).

140 Baxter 301; Wiechers *Administratiefreg* 262-263.

141 Wiechers "Legaliteitsbeginsel" 324.

142 Plasket & Hoexter 33-34.

"The serving of the public interest remains the end; the specific rules constitute the means"[143]

With this, she casts doubt on the justifiability of several distinctions :

(i) between substance and procedure :

"There seems to be an inherent fallacy in demanding a fair process but not a fair result"[144]

(ii) between fairness and reasonableness :

"Come to think of it, what is fairness but reasonableness? Of course one could make a nice distinction between the two and say that reasonableness may have a wider connotation in certain circumstances, that fairness is primarily an objective criterion whereas reasonableness may relate both to a subjective state of mind and to an objective condition of rationality, and so on. But then consider that Wiechers takes the view that ... reasonableness ... refer not to a subjective state of mind, ... but to an objectively determinable reasonableness; such a reasonableness, it seems to me, is pretty well synonymous with fairness (or justice)"[145]

(iii) Between reasonableness and rationality.[146] It seems as if the modern tendency is to search for simplified criteria to determine whether an administrative action may be reviewed, while the public interest is considered as a suitable possibility, which encompasses all the recognised grounds of review. This means that if an administrative act does not serve the public interest, it is subject to revision by a court of law. This makes sense, because if the purpose of legality is to serve the

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143 "Reasonableness in Administrative law" 266.

144 267.

145 262.

146 262.

law (in that it implies that all administrative actions must comply with the law), and the purpose of the law is to serve the public interest, then legality must necessarily imply compliance with the public interest. Moreover, such a view may give content to the vague and slippery concept of the public interest : the public interest will then imply reasonableness, justice, equality, the principles of the rule of law, ultra vires, expediency and the presumptions of interpretation. But before this is submitted to be the solution to the search for the contents of the public interest, it is necessary to investigate each of the grounds of review.

6.4.3. The presumptions of statutory interpretation

Presumptions of interpretation are common law legal rules which qualify and determine the exercise of inter alia administrative discretion and legislation,[147] and which form an important element of the doctrine of legality.[148] Although these rules were originally formulated to assist in statutory interpretation, Wiechers[149] submitted (in 1967), that they be employed to determine the contents of legality, ie. to control the nature, contents and extent of administrative acts in general :

> *"Dit is glad nie vergesog om te beweer dat die vermoedens van uitleg die vlees en bloed van die legaliteitsvereiste in die administratiefreg is nie"*[150]

They have the purpose of tempering the result of administrative acts from being unfair, unreasonable and unjust.[151]

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147 Wiechers *Administratiefreg* 41.

148 Wiechers *Administratiefreg* 263.

149 Wiechers "Legaliteitsbeginsel" 324.

150 "Legaliteitsbeginsel" 324.

151 Wiechers *Administratiefreg* 262. In this sense, it is hard to distinguish it from the rule of law.

In terms of these presumptions, injustice may not be done to anyone; no-one may be burdened in respect of his rights, privileges and freedom; the results of actions may not be absurd or impossible; no detrimental distinction may be drawn in respect of colour or race;[152] the public interest must be advanced;[153] natural justice must be observed;[154] actions may not interfere with legal administration; provision may not be made for exceptional cases, and actions may not have retrospective results.

These presumptions are aimed at a balanced relationship between administrative bodies and legal subjects, so as to advance the public interest by requiring just decisionmaking in both procedure and substance.

6.4.4. The ultra vires doctrine

Control of administrative actions by the courts (ie. judicial review) was introduced in South Africa by the court in *Central Road Board v Meintjies* in 1855,[155] when the court assumed jurisdiction to review administrative actions.[156] The purpose of the doctrine is to determine whether an administrative body acted legally or regularly, ie. within its powers, and to test the contextual merits of a decision.[157] Factors which are considered

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[152] Wiechers *Administratiefreg* 263-264.

[153] Wiechers "Legaliteitsbeginsel" 324. That the doctrine ought to be used to control whether administrative discretions are exercised in the public interest, is specifically emphasised by Wiechers : "*Dit is vandag onbetwisbaar waar dat die staat die gemeenskapslewe op alle terreine as aktiewe diensleweraar en versorger betree. Die dae is verby dat staatsoptrede as 'n bedreiging gesien mag word. Die eis wat aan die juris gestel word, is om staats- en administratiewe optrede in die lig van die openbare belang en algemene welvaart te beoordeel*" (324-325). Et vide Baxter : "The principle of legality may now be said to imply the following more specific principles : ... the power to act must not be exercised unreasonably; the decision to act must be taken in a fair manner" (301, 78).

[154] Baxter 570.

[155] 1855 2 Searle 105.

[156] Baxter 303.

[157] Vide Mureinik : "Conduct which falls under any recognised head of abuse of discretion is *ipso facto* ultra vires and void" (628).

by the courts to determine whether an act was ultra vires, are : irrelevancy (there is a duty to consider all relevant factors), improper or ulterior purposes, bad faith, failure to apply his mind, vagueness and uncertainty and gross unreasonableness, and non-compliance with the principles of natural justice.[158] If the court finds any of these elements, then the administrative body has exceeded its legal powers and has acted ultra vires. According to Wiechers, the ultra vires doctrine does not only encompass formal compliance with legal rules, but also general compliance with the principles of the law.[159] Yet he distinguishes it from legality, in that legality encompasses both the ultra vires doctrine and the prohibition on unreasonable and improper and arbitrary actions. It is however to be doubted how "general compliance with the principles of the law" which he regards as part of the ultra vires doctrine, is to be distinguished from reasonableness, proper and non-arbitrary action. This may be ascertained after a consideration of what the law is.

It is submitted that the ultra vires doctrine means that an administrative body may not act unless in accordance with its legal powers, but that this only implies formal procedures, and not the merits of his decision.[160]

The question is whether the court may review such an act where there are no clear prescriptions as to the procedure to be followed, eg. where a so-called "quasi-judicial discretion" is granted by statute. This lack of defined statutory restrictions necessitated the courts and lawyers to extend the limits of the ultra vires doctrine to subject such "free" discretions to revision. A view of ultra vires such as that of Wiechers, or even the

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158 Barrie only recognises bad faith, ulterior purpose and the failure to consider, and says that unreasonableness proves all three of these elements ("Public administrator" 118 et seq). Et vide Wiechers "Legaliteitsbeginsel" 322 who adds justice or a fair investigation (326). Et vide Van Dorsten 381 et seq, 398.

159 182-183. He describes ultra vires as a generic term which encompasses all the grounds of invalidity of administrative actions.

160 But if no formal prescriptions exist, then he must act reasonably, in the public interest, according to natural justice, according to the rule of law and fairly.

view that the ultra vires doctrine is only a part of the all-embracing doctrine of legality, and the inclusion of factors such as natural justice and unreasonableness into the doctrine, was probably a result of this loophole.

6.4.5. The rule of law

The concept "rule of law" was derived from English law, and implies the absence of arbitrary administrative actions, respect for personal freedom, equality amongst all during judicial proceedings and unbiased and independent courts.[161] It is, in other words, a doctrine which functions to inhibit arbitrary administrative discretion on the one hand, and to protect human rights on the other, in which sense it has a strong moral connotation.[162] It is sometimes used as a synonym for the concept *regstaat*,[163] which is a state which advances and protects the freedom of its subjects, and the general well-being of all inhabitants. In this sense, it is criticized as being a theoretical and idealistic and impractical concept,[164] and it is suggested that the function of the doctrine should merely be to support the doctrine of legality, ie. to inhibit arbitrary administrative action.

The moral element of the rule of law has strong bonds with justice :

> *"Die reg moet, volgens hierdie uitgangspunt* [rule of law] *ooreenstem met sekere morele waardes. Dit is die natuurreggedagte wat weer na vore kom"*[165]

and

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[161] Wiechers *Staatsreg* 135.

[162] Wiechers *Staatsreg* 140-141; Van Warmelo 163; Baxter 78 (according to this author, it has a minimalist and normative meaning).

[163] Baxter 77-78.

[164] Wiechers *Administratiefreg* 12.

[165] Van Warmelo 164-165.

> *"Die uitdrukking* [rule of law] *wil slegs sê dat die reg "reg" moet wees : ius moet iustum [sic] wees"*[166]

Van Warmelo is however of the opinion that this moral connotation of the doctrine makes it difficult to apply, because justice is difficult to evaluate, since it differs from time to time and from place to place.[167]

> "Legality in this [the normative] sense[168] connotes much more than a mere technique of government. As a basic principle of the legal system, it requires fairness, equality before the law and freedom from arbitrary administrative action"[169]

In this normative or moral sense, the rule of law is complementary to the ultra vires doctrine, ie. as an additional leg for the legality doctrine. This means that not only should administrative actions comply with formal and procedural legal prescriptions, but also with simple justice and fairness between legal subjects.

6.4.6. Natural justice

The principles of natural justice imply that an administrative authority must exercise its powers in a fair manner.[170] The elements of this doctrine include that reasons for decisions ought to be given; that a party ought to be heard before his rights, property,

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166 Van Warmelo 164.

167 164-168. Et vide par 389-394, where the rule of law as a moral measure of protection is justified.

168 In this sense, Baxter equalizes the rule of law and legality. Vide 77 : "each [legality, rule of law and *regstaat*] has embraced substantially the same values". Et vide 78-79.

169 Baxter 78.

170 Wiechers *Administratiefreg* 237 : "Natural justice ensures that the administrative body gives proper attention (ie. applies his mind)". Et vide Carpenter "Reasonableness in Administrative law" 267, who is of the opinion that this necessarily means that the results of an action must also be fair. According to Wiechers, the doctrine ensures that "simple justice" between legal subjects is applied (*Administratiefreg* 227).

liberty or legitimate expectations are impaired;[171] that detrimental information is made available; that the administrative decision must be free from prejudice; that a decision be unbiased.[172]

According to Baxter, the doctrine was derived from the Roman law maxims *audi alteram partem* and *nemo iudex in propria causa*, which were all that survived in the South African administrative law of the abandoned natural law (*ius naturale*).[173]

> "Another field in which these philosophies [natural law] are increasingly applied is in regard to judicial control of administrative and quasi-judicial functions, where the principles of natural justice such as the *audi alteram partem* rule and the principle that no man should be a judge in his own cause, are daily invoked and their application is being constantly refined and improved. Scarcely a day passes in the life of the courts without an application being made to them invoking these principles of natural justice. When we apply them daily we are acknowledging our debt to moral philosophers who did their work and thinking so many centuries ago".[174]

The purpose of natural justice is to advance administrative actions which are made rationally, accurate, informed, well-considered, not arbitrary, reflecting the public interest and without prejudice towards the party who is affected by the decision.[175] Baxter adds that it advances justice as a process value, ie. the principles of natural justice seek the

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171 This is the *audi alteram partem* rule. Vide in general Baxter 542-557; Forsyth 387 et seq; Labuscagne 182; Raath "Legitimate expectation" 128-140, "*Audi alteram partem*" 464 et seq; Taitz 254 et seq; Carpenter "Spesifieke nakoming" 126 et seq; Viljoen "Geregverdigde verwagting" 150 et seq, "Nogmaals Traub" 277; Hlophe "Legitimate expectation and natural justice" 165, "Legitimate expectation and student cases" 591; Barrie "Legitimate expectation and the appeal court" 169 et seq, "*Audi alteram partem*" 717; Ferreira 140 et seq.

172 Wiechers *Administratiefreg* 219-224; *Motaung v Mothiba* 1975 1 SA 618 O 629.

173 Baxter 536; Weeramantry 186-197, who is of the opinion that the rule of law was derived from natural law.

174 Weeramantry 192.

175 The purpose of the *audi alteram partem* rule is to ensure that all facts are considered, in order to advance the public interest, which is the very purpose of administrative actions (Wiechers 239).

very application of justice or fairness.[176] The modern tendency is to incorporate the principles of natural justice into a general duty to act fairly. Wiechers rightly asks the question why only these rules are exempted as having the specific purpose of justice, while, in fact, the very ideal of *all* legal rules is justice. He warns against the over-estimation of these rules as the only ones aimed at justice in the administrative process - the whole process must be fair.[177] He hesitantly submits that this is because these rules were derived from the *ius naturale*.[178]

The rules of natural justice therefore aim to guarantee a fair administrative process which serves the public interest, in terms of which administrative authorities, when exercising free discretions, are obliged to apply their minds to all relevant considerations, not to act in bias, to give reasons for decisions and to hear parties whose rights, liberties, property and legitimate expectations may be affected. They are based on simple justice between legal subjects which basis is said to have been derived from Roman law *ius naturale*.[179]

6.4.6.1. The ius naturale

Natural law is a much laboured subject in the legal philosophy, and many jurists have attempted to define it. Although positivists are often contemptuous regarding its value, it is by many regarded as the very foundation of positive law.

> "The story of natural law ... is the story of man's eternal quest for the essence of law, for that core of central principle which has universal applicability and commands universal

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[176] 540 : "It is a denial of justice *in itself* for natural justice to be ignored".

[177] *Administratiefreg* 217. Et vide 218 n 110.

[178] Justice was the very principle fundamental to the *ius naturale*.

[179] Wiechers *Administratiefreg* 133, 217.

> allegiance. The better world of the future which men are seeking to build for themselves and their posterity rests squarely upon a foundation of natural law"[180]

and

> "[Natural law] is not a body of actual law, which can be enforced in actual courts. It is a way of looking at things - a spirit of "humane interpretation" in the mind of the judge and the jurist - which may, and does, affect the law which is actually enforced, but does so without being actual law itself"[181]

It is regarded as timeless and universal :

> Natural law was timeless; but if there was any time at which it attained its zenith, that time was in the fullness of the days, and not in their beginning"[182]

Sohm describes it as an eternal, immutable law, equally valid at all times and all places, which can be deduced by an act of reason, by a purely intellectual process, from "the nature of the thing itself".[183]

6.4.6.1.1.Origin

Natural law had its origin in Greek philosophy on justice, and it basically referred to an eternal and universal ethical law overriding human laws.[184] Heraclitus (540-480 BC) is said to have been the father of natural law, advocating order, fairness, right and good as substances of an all-embracing divine law.[185] Socrates viewed universal justice as an

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[180] Weeramantry 185, 197. Et vide Sohm 150 : "Man continuosly strives to an ideal type of perfect law".

[181] Gierke xxxvi-xxxvii.

[182] Gierke xxxvii (et vide xxxviii-xli).

[183] Sohm 149. Et vide St Thomas Aquinas : "*Omnis lex e lege aeterna derivatur*".

[184] Van der Vyver 158; Weinreb 15.

[185] Vide Van Zyl *Justice and Equity* 45 who traces it back to the Sophists.

inborn natural justice in man. Plato once again ascribed justice to divine creation, but recognised Socrates' view of the universitality of justice (*ius naturale*) which embraces all human law.[186] Aristotle regarded *ius naturale* as universal justice which acted (by interpretation) to temper the positive (written) law of man.[187] The idea of natural law as being derived from divine reason was also that of the Stoics, who applied it by the principle of refraining to do harm to anyone.[188]

Major developments in respect of natural law occurred, owing to thoughts of the Roman lawyer Cicero (106-43 BC). He regarded natural law as an eternal law in accordance with divine reason :

> "The law which was never written and which we never taught, which we never learned by reading, but which was drawn from Nature herself, in which we have never been instructed, but for which we were made, which was never created by man's institutions, but which is inborn in us"[189]

Cicero drew a close relation between justice and the *ius naturale*,[190] in that he regarded justice as morally good and virtuous conduct in accordance with the tenets of natural law, ie. justice is rooted in nature and arises from the practical application of the *ius naturale* :

> "It hence appears that the universal concept of *iustitia* in Cicero, embracing all the virtues and a good many other positive characteristics besides, has an inextricable and intimate bond with nature. Cicero's definition of justice may indeed be described as the definition

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186 Cf Lloyd 107-108.

187 Weeramantry 185; Van Zyl *Justice and Equity* 117. Cf Lloyd 107-108 who denies that these early philosophers regarded nature any more than merely "the order of things". Only in the philosophies of the Stoics was it connected to man's reason.

188 Van Zyl "Antieke regsfilosofie" 118 (With reference to the Meditations of Aurelius).

189 Weeramantry 185.

190 Following Aristotle.

> of morally good and virtuous conduct in accordance with the tenets of natural law. Justice is thus rooted in nature and arises from the practical application of the *ius naturale*"[191]

The prominent relationship between justice (and equity) and the *ius naturale* was confirmed by classical lawyers : according to Ulpian, private law (being one of the two constituents of law) is inter alia derived from the *ius naturale* (the law which nature taught all animals) while law is the art of justice (the good and the fair), ie. to live honourably, not to harm others, and to render each his own.[192] Paulus described it as *aequum ac bonum et ius dicitur, ut est ius naturale.*[193]

In post-classical law, the concept of *ius naturale* was, probably under the influence of Christianity,[194] developed to what Van Zyl describes as "a valid and binding body of law which gave substance and reality to the community's feeling of, and desire for, justice, in the sense of *iustitia* or *aequitas*".[195]

The view that justice was the embodiment of the *ius naturale*, had been adhered to since the earliest philosophies as described, yet the *ius naturale* developed from a mere philosophical ideal to a practically applicable concept, in terms of which society's feeling for righteousness could be justified. It crystallized out as practical principles of fairness and equality, being not to harm others, to render each his own, and to live honourably, ie. generally aimed at the common good.

Roman-Dutch lawyers who advocated the *ius naturale* were Grotius and Voet. Grotius interconnected the concepts of justice, jurisprudence, fairness, right, reasonableness,

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191 Van Zyl *Justice and Equity* 77.

192 *D* 1 1 10 1.

193 *D* 1 1 11.

194 Van Zyl *Justice and Equity* 91-92 : "It was rooted in divine providence".

195 *Justice and Equity* 92.

equity and natural law, with the public interest as the purpose of law.[196] In his very practical view of natural law, he laid down some principles, viz. refraining from taking or keeping others' property, keeping promises, compensating for damage done, and rightful punishment.[197] Voet advocated that God is the founder of an unchangeable natural law, and it consists of that which right reason dictates, and it is based on justice.[198]

The English philosopher Hobbes[199] formulated several principles of practical natural law, as well as declaring that the *ius naturale* and civil law were equal and contained each other.[200] Justice between legal subjects thus became the gist of natural law, as of law itself : not only as an ideal of what law ought to be, but of positive law as such, in the sense that interpretation ought to be done from a viewpoint of the search for justice.[201]

> *"Die interpreteerder moet in elke statutêre bepaling, gemeenregtelike bron en hofuitspraak soveel as moontlik geregtigheid inlees as wat die woorde van die betrokke instrument toelaat"*[202]

The French Declaration of the Rights of Men and Citizens (1789) and the American Declaration of Independence (1776) were milestones in the development of the *ius naturale* to meet practical law, in that it set out principles of philosophical natural law

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196 Lee I.i.1-13, I.ii.1. Vide Lloyd 115 et seq.

197 *De Jure Belli ac Pacis* 8. Et vide Weeramantry 187.

198 Voet 1 1 12-17.

199 1588-1679.

200 Weeramantry 188.

201 Van der Vyver 160 et seq; Weeramantry 188 et seq.

202 Van der Vyver 156.

in practical ways for the application of justice.[203] These documents are said to have laid the foundation for modern administrative law principles such as the principles of legality, ultra vires, rule of law, judicial review, the rules of natural justice and political principles such as bills of rights and democracy; in fact, for law in general.[204]

6.4.6.2. Justice

Justice is defined in the Oxford Dictionary as fairness, or the exercise of authority in the maintenance of right, while fairness is defined as being unbiased or equitable. While the term "justice" was derived from the Latin *iustitia*, "equitable" was derived from *aequitas*.[205] Currently the terms are often used interchangeably. The concept of justice has developed from being the cornerstone of the *ius naturale* of antique philosophy, to a modern function of being a practical means to attain the purpose of law, ie. the public interest.

According to Van Zyl,[206] Cicero was the most important republican jurist as far as philosophical thought on justice was concerned. He based his thoughts on Greek philosophy.[207]

Cicero defined justice as a state of mind (*habitus animi*) which preserves the common good or public interest (*communis utilitas*) by recognising the dignity of all men. Such recognition is a result of the common social nature which urges that each should be

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[203] Weeramantry 190-191. Cf Locke who tended back to the overriding idea of the *ius naturale* (Weeramantry 191-192).

[204] Radbruch 1936 : "it is not law at all if it conflicts with justice" (Quoted by Weeramantry 192-193). Vide in general Nicholas 55 et seq; Hahlo & Kahn 13-23; Van Oven 13-14; Kunkel 100; Nathan 36.

[205] Cf Van Warmelo 26 who denies that equity was derived from *aequitas*.

[206] 71-72.

[207] Schultz 72 is of the opinion that the definition of *iustitia* was "simply copied from the Greeks" (by Cicero).

granted his own (*suum cuique tribuere*) and which protects the community from human alliance.[208] This feeling for common benefit, and thus for justice, is applied in two instances, viz. first to prevent men from harming each other, and secondly to encourage the use of common things for common interests and private things for private interests.[209] It is also reflected in human virtues such as piety, goodness, generosity, kindness and courtesy.[210] Justice is therefore a moral concept[211] derived from the human communal nature.[212] With reference to the Ciceronian interpretations by Achard, Ciulei and Du Plessis[213] and to various passages from Cicero,[214] Van Zyl concludes that "justice is therefore rooted in nature and arises from the practical application of the *ius naturale*. It is a nature which inspires patriotism, charity towards one's neighbours and a stable relationship between man and God"[215] and, according to Cicero,[216] it is based on sound reason (*recta ratio*).[217]

According to Van Zyl, the classical Roman period (27 BC to 284 AD) has produced a dearth of development in the philosophical thought on *iustitia*.[218] Ulpian, being one of

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[208] Van Zyl *Justice and Equity* 75.

[209] *Off* 1 7 20; Van Zyl *Justice and Equity* 75.

[210] *De Finibus* 5 23 65-66.

[211] *Justice and Equity* 81.

[212] *Justice and Equity* 77.

[213] According to Du Plessis, Ciceronian justice is "natural law" in action.

[214] *De Inv* 2 53 106; *Academica* 1 6 22-23; *Leg* 1 15 42-43.

[215] *Justice and Equity* 77-78.

[216] *Leg* 1 15 42-43.

[217] Van Zyl *Justice and Equity* 78.

[218] 87. Et vide Kunkel 111 : "With sublime sureness of touch they [the classical jurists] applied the methods of logical reasoning, the technique of the procedural formulas, and the complicated rules and conventions which resulted from the existence side by side of legal institutions old and new, civil and magistral, elastic and strictly formalistic. They avoided vague considerations of equity, moralizing turns of speech, and all stereotyped expressions".

the very few jurists who laboured the subject, drew a close parallel between *iustitia* and *aequitas*,[219] and also between *iustitia* and *ius*. According to Ulpian, the concept of *ius* was derived from *iustitia*. He defined *ius* as the art of the good and the fair,[220] while *iustitia* was defined as the persistent desire to grant to each his own right.[221] This is practically embodied in living honourably, refraining from doing harm to others, and granting each his own.[222]

In the post-classical period, probably due to the influence of Christianity, legal views once again underwent a sharp moral turn, so much so that Constantine enacted that in judicial matters, preference should be given to justice rather than to the *strictum ius*.[223] The role of the *ius naturale* once again became very prominent and interconnected to the principles of justice and equity (which were regarded as being synonymous by lawyers of this period).[224]

In Roman-Dutch legal philosophy, Van Leeuwen defined justice as the constant and unceasing willingness to render to each his own, while the law is the science of the good and the fair.[225] Justice is applied by the three maxims of law, viz. to live honourably, to

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[219] *Iustitia namque colimus, et boni et aequi notitiam profitemur* (*D* 1 1 1).

[220] *D* 1 1 *pr* : *Ius est ars boni et aequi*; 1 1 11 (Paulus). Et vide Sohm 23 : "Law is the formal expression of the means whereby a people organises itself for the struggle of existence". Et vide *I* 1 1 *pr*; *D* 1 1 10 *pr* : "Law apportions to each individual which is due to him as a member of the people and for the sake of the people".

[221] *I* 1 1 *pr*; 1 1 10 *pr*; Van Zyl *Justice and Equity* 89; Van Zyl "Justice" 113.

[222] *D* 1 1 10 1; Sohm 22 et seq. Sohm emphasises the connection between moral and juristic law, by saying that juristic laws are merely the embodiment of moral laws (23). But there is also a difference : law rests on morality but does not strive to enforce morality (which cannot be done).

[223] Van Zyl *Justice and Equity* 90-91; *C* 3 1 8. Et vide Van Zyl *Justice and Equity* 137-139; *D* 50 17 56.

[224] Van Zyl *Justice and Equity* 136.

[225] *CF* 1 1 1-11.

injure no-one and to render each his own. Justice also means the equal distribution of common things (eg. natural resources).[226]

Grotius was of the opinion that justice is a virtuous disposition of the will to do that which is just. What is just, is what is right or reasonable.

Voet described justice and equity as inborn human virtues which survived through the ages :

> "Thus certain rules of justice and equity remained, divinely engraved on men's hearts and inborn, dictating to each one what was lawful or unlawful, what things to do and what to avoid"[227]

According to Voet, referring to *Codex* 3 1 8, justice ought to prevail above strict law. The reason therefor is his view that justice is the foundation of the unchangeable, eternal and divine *ius naturale* which prevails at all times.

In South African law, justice has been described as a constant and perpetual desire to render unto each his own. It is seen as the end of jurisprudence, while jurisprudence is the knowledge of things divine and human, the science of what is just and unjust, or the art of what is right and what is fair.[228]

Hahlo & Kahn distinguish between justice, being the purpose of law, and "doing good", being a mere moral value :

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[226] *CF* 1 1 2.

[227] Voet 1 1 1.

[228] This view is based on *D* 1 1 4, 5. Vide Nathan 34-35; Wille 5 (what is just is what is reasonable and equitable).

> "While law aims at the doing of justice and the maintenance of peace and order in the community, moral law aims at the perfection of character and the doing of "good" as a value in itself".[229]

According to them, "objective" justice is applied in the courts, irrespective of subjective ethical feelings of wrong and right.[230] Justice is the purpose of law and has always been, although it was previously justified by natural law or moral feelings. Justice is "the chief instrument through which law fulfils its purpose in maintaining peace and order in the community",[231] and Hahlo & Kahn eventually defines it as "the prevailing sense of men of goodwill as to what is fair and right - the contemporary value system".[232] It is submitted that this eventual definition of justice can hardly be distinguished from a moral or ethical consideration of right and good.

Wiechers says that justice is the ideal purpose of all legal rules.[233] With reference to *Institutiones* 1 1 3 and *Digesta* 1 1 10 1, Van Warmelo agrees with this, and declares that it consists of principles in terms of which one may not receive benefit at the cost of another, and one may not be unduly enriched in terms of the law. He describes law as *iustitia est constans et perpetua voluntas ius suum cuique tribuens*,[234] which is interpreted that each should receive according to what he deserves, and that human dignity be respected.[235] The concept encompasses moral values, religious values and social values, which are values which may vary from time to time and from place to place. It aims at

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229 7.

230 23. The authors refer to *Preston & Dixon v Biden's Trustee* 1883 1 BAC 322 : "But a judge is not a censor morum".

231 Hahlo & Kahn 29.

232 31.

233 Note that the public interest is generally accepted by many authors as the purpose of the law.

234 *I* 1 1 *pr*; *D* 1 1 10 *pr*.

235 24-25.

what is good and fair, and at equity between members of the community (ie. the common good or the public interest).

It may thus be said that although law and justice (*ius et iustitia*) are not necessarily synonymous, justice is a purpose of law, in that it aims at the public interest.

According to Jenkins,[236] "justice" may be interpretaed in two ways. The first is a "depiction of the good society, the consummation of man's hopes and dreams, the heaven on earth which we should seek to achieve". It is the creation of a society where the freedom, equality, security and opportunities of members of the public is protected by the legal system. In this sense, justice is the way in which the public interest is advanced. The second refers to the legal procedure in terms of which laws ought to be certain, known and impartially administered, in terms of which men are equal before the law, no man is the judge in his own cause, and where there is no arbitrariness.

These two interpretations of justice therefore mean that both the purpose and procedure of the law should be fair and good and just and in the public interest.[237] Jenkins had two postulates in this regard, viz. that law is a principle of order, and that justice is the completion of law, ie. justice is the form of order that man seeks to create through law, ie. the normative or ideal form of order.[238] In practice, it means that justice is to refrain from doing harm, to consider the interests of members of the public so as to acquire order and stability. It is legal administration in such a way that the public interest is served.[239]

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[236] 324-325.

[237] Et vide Boulle 137.

[238] 327, 334. Et vide Wille 5.

[239] Et vide Wille 6, who describes justice as "the quality or capacity of conferring benefit on, and of avoiding harm to, others".

6.4.7. Conclusion

The concept of justice has never really shed the moral status attached to it by philosophers on the *ius naturale*. It has however gained practical characteristics such as refraining from doing harm to others, granting each his own, etc. But the modern concept of justice is a means to obtain not only order and peace in society, but also to advance the good and the fair. It is the instrument of the law to ensure both procedural and substantive equality and fairness and reasonableness, and although its application may be reviewed by courts of law, it is a moral virtue which forms the basis of the search for order and peace and the public interest. This means that the law will not be able to create order unless some justice as a virtue and as a procedural instrument is not implemented in this strife.

Justice may be defined as man's inborn feeling for righteousness, which he employs by being fair in legal procedure and substance, in order to preserve the interests of all, and to obtain peace and order in society. In this sense - justice being a moral concept with practical application in respect of social, political, religious and legal questions - the value of the *ius naturale* has been preserved : no longer as a philosophy, but as justification for the dynamic legal system, in terms of which an increasing variety of interest groups have to be accommodated. Increased interest groups require more rules and also more exceptions to rules, to obtain peace and order. Administrative discretion is the ideal means to inhibit increased rule-making to address increased interests.[240] The problem with administrative discretion is that it is difficult to control. This necessitated a return to justice as a criterion to control administrative discretion. Justice as a means to control discretion, currently manifests itself in principles such as the rule of law, rules of natural justice and reasonableness and the presumptions of interpretation and even in the ultra vires doctrine. Justice has thus filtered in through the grounds of judicial revision so as to form the very basis of the principle of legality. In practice, it means that

[240] Van Warmelo 164.

an administrative act will not pass through judicial revision unless it has passed the test of justice in procedure and substance.

In terms of the doctrine of natural justice, the obligation to provide reasons for decisions, to hear all parties, to provide detrimental information and to refrain from prejudice, are all requirements aimed at protecting the public from detriment due to arbitrariness, ie. to refrain from doing harm, and therefore to do *justice.*

In terms of the ultra vires doctrine, the obligations to act in good faith, to consider all relevant facts and interests and to act with no ulterior purpose, are all aimed at being procedurally fair and not harming members of society, ie. to do *justice.*

The presumptions of interpretation, viz. to consider the public interest, not to interfere or make exceptions or act retrospectively or unreasonably or unfair, are aimed at acquiring *justice* for all members of society.

The rule of law is directly aimed at considering substantial *justice* in the results of administrative decisionmaking.

It is thus submitted that justice is the all-encompassing ground of review of the principle of legality, which is embodied and has crystallized out in practical criteria such as the rule of law, ultra vires, the principles of natural justice and the presumptions of interpretation. And the very purpose of legality is to advance the public interest, in fulfilment of the very purpose of the law.[241]

[241] Vide Carpenter "Reasonableness in Administrative law" 263, 266-267.

6.5. CONCLUSION

From the above investigation, the following conclusions may be drawn :

* The public interest is the purpose of the law, in that the legal process strives to obtain order and peace by the consideration of the various interests in society.

* In the administrative law, the public interest is a juridical norm that binds the state to refrain from arbitrary administrative actions and to aim at fair and just decisionmaking.

* The concept of public interest was derived from the principle of *salus rei publicae suprema lex*, where Cicero interpreted the *res publicae* as a *communi utilitate*, ie. a moral norm, being justice.

* Being a juridical norm which restricts arbitrary decisionmaking, the public interest serves as a jurisdictional fact according to which administrative authorities must act, and which may be judicially reviewed.

* The principle of legality is the collective name for the various grounds of review in terms of which it is determined whether an administrative act has served the public interest.

* Ultra vires, the rule of law, natural justice, the presumptions of interpretation, reasonableness and expediency and justice have all been indicated as grounds of review, although many of these seem to overlap.

* Justice is the basis on which all the grounds of review are based.

* Justice is a concept derived from the *ius naturale*, where it was a moral norm implying fairness and equity amongst all.

* Ever-increasing interest groups necessitates the tightening of legal rules and exemptions for which administrative discretion is a solution. Increased control by administrative discretion however, in its turn, necessitates control over arbitrary decisionmaking which negates the public interest.

* Judicial review is an ideal form of control of administrative discretion.

* Justice, as a criterion for the grounds of review, is therefore the very basis of legality (and therefore of review) in that it protects the public against arbitrary administrative actions as far as both procedure and substance are concerned.

* The public interest is therefore a judicial norm which functions as a jurisdictional fact and which is obtained by the control of administrative actions by the grounds of review which are all based on justice.

6.5.1. The public interest in the South African water law

Now that the concept of public interest has been analyzed, its function in the Water Act may be evaluated.

It was said supra that the public interest is generously employed in the Water Act, especially in respect of water allocation within control areas, to restrict the allocation discretion of the minister, but also as a jurisdictional fact in respect of the water court's allocation discretion.

The term is not defined, and the minister is submitted to have a free discretion to decide what the public interest is and whether its allocation is done in the public interest. If this

is the case, his discretion may not be adjudicated by a court of law. This leaves interest groups whose interests and water requirements have not been considered during the allocation process, without any remedy. If the minister has acted within his statutory powers, and exercised his discretion in good faith, the merits and substance thereof cannot be adjudicated.

It was however submitted supra that if the public interest is defined as a jurisdictional fact and for which criteria are laid down, the minister's discretion will be restricted so as to consider these criteria. Because water has traditionally been and ought to be a natural resource which is common to all, these criteria ought to contain a reference to the interests of all water user sectors.

Various lawyers have struggled with the concept of the public interest, and although many have submitted that the concept needed formulation in order to make it of value in the administrative law, few could provide a proper definition - in fact, the concept has been described as not susceptible of definition. Pretorius went so far as to recommend that the doctrine of legality be employed in an attempt to formulate the concept.

In the above analysis of legality, the concept of *iustitia* has been investigated. It was found that, although the old philosophical concept of *iustitia*, (as it had been taken over by Roman lawyers from Greek philosophy) had been subjected to modernisation during the ages, it remained essentially intact : justice is still a moral virtue which strives at rendering each what is his and refraining from harming others. But it is nowadays increasingly regarded as the instrument used for the law to achieve its goal, being the public interest, ie. a practically usable criterion which enforces a fair legal procedure and non-arbitrary administrative decisionmaking. In this sense, justice is expressed in various forms, being the elements of legality, eg. an obligation to give reasons, to act bona fide, to hear the other party, to make detrimental information available, to consider all relevant factors, and to prohibit decision-making with an ulterior motive or against the public interest or unreasonably or with retrospective effect or for exceptional cases, etc.

All these rules represent a very basic duty to act fairly, with due consideration to others' rights, liberties, property and legitimate expectations, which is nothing but the justice of the *ius naturale* in its very original form, but with extended fields of application. Justice has been refined, but still serves the purpose - by way of its function as the criterion for legality - of assisting law to serve the public interest.

It is submitted that, when the public interest is thus employed in legislation as a jurisdictional fact, the administrative authority empowered with the quasi-judicial discretion does not have an unfettered discretion to arbitrarily decide what the public interest is and whether his decision complies with the public interest.

It is submitted that a decision will comply with the public interest only if justice is done, which will be the case only if all the grounds of revision have been met, ie. if the decision is not ultra vires, if it is in accordance with the rule of law and natural justice; and also when the presumptions of interpretation have been complied with, when the decision is taken in a fair, bona fide, reasonable and expedient way, when all relevant factors have been considered, when parties involved have been heard, etc.

In the case of water allocation, where the minister has a quasi-judicial discretion, for example, to allocate abundant water in a government water control area in the public interest, he is bound to take the decision in a just way and with a just result. To do so, he must comply with statutory prescriptions, act in good faith and with no ulterior purpose, with due consideration to all circumstances; he must hear parties whose rights, liberties, property or legitimate expectations are affected, he must act without prejudice, he must provide reasons and make information available, and he must comply with presumptions of interpretation with fairness, expediency and reasonableness. If not, his decision, whether it be procedural or substantial, may be reviewed by a court of law in respect of the principle of legality and the recognised grounds of review or merely because it does comply with simple justice. If this is the case, water allocation may be an administrative effort, yet it will give due consideration to the water demands of all

water user sectors. This will be in line with the given fact that the water resources are interrelated : the apportionment of water from a river in an area will in some way affect the water availability lower down the course of the river, or the ground water in the area, or the perenniality of the stream or the quality, run-off, temperature etc. If an administrative decision to allocate water from a certain portion of a stream is exercised, justice ought to be done to all water user sectors who are dependent on water from that stream in its entire length as well as water sources fed by it. Each competitive water user sector who feels aggrieved by the administrative action, may have the decision reviewed on one of the grounds of revision, ie. in terms of the doctrine of legality. The complexity of exercising current Water Act discretions in this way, ie. with such an extensive meaning given to the public interest, will force the amendment of the current water allocation mechanism to one which is aimed at integrated basin apportionment.

6.5.2. Water as *communia* in terms of the *ius naturale*

It was submitted supra that running water was *res communes* in terms of the *ius naturale* in Roman law. This meant that the nature of water as a life-giving and natural resource made it essential for all forms of life. For this reason, it could not be appropriated by anyone, but had to be shared by all in need of it. Water was common to all by its nature and by principles of justice and equity : it was only fair if everyone allowed others to share in the use of this natural resource, because it belonged to all.

The *ius naturale*, in this sense, had a double meaning : first, it carried the meaning of "according to the very nature of things" which was the Greek view of the *ius naturale*. The mere fact that water was a natural resource which moved about for the use of all in need of it, and that it, in its very nature could not be appropriated or distributed, caused it to be a common commodity, as were other such natural or life-giving resources, such as the air and the sea.

Secondly, it carried the meaning of "according to justice and equity", which was the additional meaning attached to the *ius naturale* since the Ciceronian philosophies :

> "Justice is rooted in nature and arises from the practical application of the *ius naturale*"[242]

Man's god-given sense of righteousness caused him to regard natural resources as available equally to everyone in need of it. Therefore it belongs to all in common and cannot be appropriated. If it could, the principle of rendering each his share would not have been complied with, and the common good (*communi utilitas* or *res publicae*) would not have been obtained.

The very close relationship between *ius naturale* and justice, and the consistent interpretation of justice since the antique philosophies, and the unchanged nature of water as a scarce and natural life-giving resource, supports a view that similar principles may still underlie the South African water law. This would mean

(i) that water is common to all user sectors due to its common nature, and
(ii) that water is common to all user sectors due to the principles of justice.

The application of these universal and eternal principles of natural law in our modern water allocation mechanism does not mean that the very philosophy of the *ius naturale* as a divine and overriding and separate legal system removed from and superior to positive law is being advocated. It merely means that some principles which form part of natural law philosophies have eternal and universal value, due to the purpose of the law - which remained the public interest through justice - and due to the consistent yet extended value which is still (and increasingly) attached to the concept of justice in the law.

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[242] Van Zyl *Justice and Equity* 77.

To still regard water as common to all life and therefore not capable of being appropriated, and available to all in common yet state-controlled rights of reasonable use, is a principle which will be in accordance with natural law philosophies and the eternal principle of justice, yet without undermining the positive law. Such a view will benefit the common good or public interest, being the very purpose of the law.

The formulation of the public interest in the Water Act as a jurisdictional fact which encompasses legality and is measured in terms of justice, is therefore a reflection of natural law principles of justice, as a jurisdictional fact to control ministerial discretion, but it is also a reflection of the natural law classification of water as common to all due to its very nature.

6.5.3. The statutory insertion of the term "public interest"

It was submitted supra that the term "public interest" in the Water Act, to circumscribe the discretion of the minister and the water court during water allocation, ought to be interpreted as a jurisdictional fact which may be adjudicated by a court of law on the grounds of review, which are based on justice.

But the grounds of review exist *ex natura*, based on statutory prescriptions. This means that :

* All administrative decisions ought to be in accordance with the principles of legality (ie. the ultra vires doctrine, the rule of law, the principles of natural justice, reasonableness, fairness, expediency, the presumptions of interpretation), ie. according to justice. These grounds of review which underlie legality, need not be mentioned in the empowering statute, because they are recognised by the courts.

* The purpose of the law is to serve the public interest, which is the common good. The purpose of administrative law is to advance the public interest and balance individual, public and government interests in a fair and just way. In cases of administrative acts, this is done by the principle of legality, which serves to control administrative acts. Fundamental to legality and its grounds of review, lies justice, which is the very means to advance the public interest.

It is submitted that the insertion of the phrase "in the public interest" in allocation provisions of the Water Act, when repeatedly circumscribing the discretion of the minister or the water court, is therefore redundant. It would suffice if water is defined to be common to all in need of it.

Whenever the minister or the water court is empowered to allocate water for whatever purpose, he is bound by the public interest in two ways : first, water is common to all, and if the water needs of any water user sector are disregarded during allocation, it will be contrary to the common rights of all in respect of water. Secondly, simple justice forces him to comply with legality, in order to avoid judicial review on any of the mentioned grounds of review, ie. ultra vires, the rule of law, natural justice, the presumptions of interpretation, reasonableness and simple justice for all. Because non-compliance with any of these rules negates the purpose of administrative law and law in general, ie. the public interest.

It is therefore finally submitted that the public interest has a very specific meaning which is based on justice. The public interest is a purpose of law, and simultaneously functions as a jurisdictional fact to all administrative discretions, irrespective of whether it is mentioned in the statute. If the South African water law is based on the correct principles, viz. that water belongs to all in need of it, then the insertion of this term in the act, will not be necessary.

CHAPTER VII

ECOBIOTIC WATER RIGHTS

"Water is scattered over the face of the earth
in rivers, lakes etc, for the use of
animals and vegetables"

Hough v Van der Merwe
1874

CHAPTER VII
ECOBIOTIC WATER RIGHTS

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ECOBIOTIC WATER RIGHTS

7.1. INTRODUCTION

It had been argued[1] that unless the water allocation system is found to provide effective protection for ecobiotic water requirements, it is outdated and in need of revision.[2] Continued failure to provide such protection, could cause irreparable damage to the environmental network of interrelationships.

It had also been argued that the cornerstone of the South African law is the distinction between public and private water, a distinction which had undergone a complex development process. Both the historical soundness of this distinction and the right of existence of the concept of private water, had been questioned.[3] It was submitted that, in an attempt to formulate a new mechanism for the apportionment of South Africa's scarce water resources amongst all users who depend on it, all water should be excluded from private ownership, and be similarly subject to statutory allocation processes.

Currently, the allocation mechanism is applicable mainly to public water, although there are various restrictions on the right of exclusive use which riparian owners have in respect of private water.

In order to evaluate the applicability of the water allocation system to ecobiotic requirements, it is necessary to investigate whether any water rights in respect of either private or public water exist to protect such ecobiotic needs. It is however necessary to first determine the nature of legal protection for ecobiotic water requirements in the Roman and Roman-Dutch law, in order to place the South African system in perspective.

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1 Chapter I.

2 Chapter I supra.

3 Chapter IV.

7.2. HISTORICAL BACKGROUND

7.2.1. Roman law

Rules aimed directly at the conservation of ecobiota did not occur in Roman law, and neither did conservation areas exist. The probable reason for this was a lack of an awareness and knowledge of the need for environmental conservation. The legal system was therefore not concerned with the protection or conservation of the environmental network, or with the survival needs of ecobiota.

7.2.1.1. The law of things

7.2.1.1.1. Water

In terms of the Roman law of things, things were either common to all (*res communes*), or common to a "body corporate" (*res universitatis*), or it belonged to individuals (*res singulorum*, or to nobody (*res nullius*).[4] Running water was of the first class, being common to all. While Gaius named this class *res publicae*, Marcianus named it *omnium communes*.[5] Other things included in this class were natural resources such as the air and the sea. Such natural resources, on which all were dependant for survival, could not be appropriated, yet nobody could be deterred from making reasonable use of it. The principle subjacent to this rule that it belonged to all in common, was the *ius naturale*, which was a system based on justice and equity for all.[6]

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[4] *D* 1 8 2*pr*. Vide Chapter III supra.

[5] This difference in terminology caused much confusion regarding the interpretation of the law of things and especially the classification of water. Vide Chapter III supra.

[6] Vide Chapters III and VI supra.

Although running water was common to all, perennial rivers (*flumina perennia* or *flumina publica*) were distinguished from seasonal rivers (*flumina torrentia* or *flumina privata*). A river which ceased to flow during some dry seasons, were not necessarily seasonal. Private (or seasonal) rivers were not *res privatae*, but remained *res publicae* like all other running water. These flood rivers, due to their negligible common value for navigation and fishing (which were the main uses of running water in those days), were seldom subject to competitive common use, and principles of justice allowed owners whose land they passed to use them to the exclusion of others. The use of public rivers (which were often subject to competitive use for navigation and fishing), was controlled by the state, in order to ensure peaceful common utilization. This was done by way of praetorian interdicts. State control was possible over all water, but the state seldom interfered with the public use of rivers which were relatively free of disputes. The distinction between public and private rivers was therefore drawn for administrative reasons, and not to create a class of water excluded from the natural law rule that running water was common to all.[7]

7.2.1.1.2. Conservation areas

"Conservation areas" were unknown in Roman law. If there had been such places where the purpose of land use was to protect ecobiota for the enjoyment of members of the public, it would probably have sorted under *res publicae* in terms of Gaius' classification system. Ulpian referred to *publici loci*, which were all places, houses, fields, and roads which belonged to the community as a whole.[8] He also included the sea, the public baths and theatres in this class.[9] The free use of public places could be restricted in

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7 Vide Uys "Natural ecosystems" 108 et seq.

8 *D* 43 8 2 3.

9 *D* 43 8 2 8-10. The inclusion of the sea into this class of things, is however contradictive to the classification of Marcianus, who distinguished between *res communes* and *res universitatis*. Vide Chapter III.I supra.

several ways : First by legislation,[10] secondly by reasonable use and the consideration of similar rights of others,[11] thirdly by a prohibition on any actions which could damage the place,[12] and fourthly by the necessity to obtain praetorian permission for the construction of any structure in the place.[13] The purpose of these restrictions was to protect the public interest.[14]

In the light of the restrictions on the public right of use in respect of these places, conservation areas would probably have qualified as public places, and would thus have classified as *res publicae* in terms of Gaius' classification system. This is the current status of conservation areas in terms of South African law.[15] It would however have been even more suited to Marcianus' *res universitatis* which included things controlled by a state authority for the benefit of the public. This is however mere speculation, because the concept of conservation areas or national parks was unknown to the Romans : it is a modern concept in accordance with world-wide environmental awareness. The Roman law classification system had however survived in the South African law of things, and an attempt to fit conservation areas into these systems, is therefore not altogether far-fetched.

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10 *D* 43 8 2*pr*.

11 *D* 43 8 2 9-11.

12 *D* 43 8 2*pr*, 7, 17.

13 *D* 43 8 2 10, 16.

14 *D* 43 8 2 2.

15 Van der Merwe *Sakereg* 31.

7.2.1.1.3. Ecobiota

(i) Animals

Wild animals, birds and fish were *res nullius* in terms of Gaius' classification. When an animal had been caught on land, in water or in the air, it became the property (*res privatae*) of the person who had captured it, by way of *occupatio*.[16] It would remain his property as long as he retained possession, ie until its escape.[17] Escape occurred when an animal regained its natural freedom by disappearing from sight, or when it fled beyond reach,[18] ie. when the owner lost effective control. In such a case, the animal would once again become *res nullius*.[19]

(ii) Vegetation

In Roman law, plants belonged to owners of the land on which they had been growing. This was due to a doctrine that an owner of land was also owner of everything beneath and above his land.[20] The owner was entitled to dispose of vegetation on his land at will. This right was often exercised by granting a personal servitude of usufruct, in terms of which a third party was allowed to appropriate the produce of a farm.

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16 *D* 41 1 1 1.

17 *D* 41 1 3 2.

18 *D* 51 1 5*pr.*

19 Vide Rabie & Van der Merwe "Wildboerdery" 115 for a discussion of the establishment of ownership by fencing.

20 *Cuius est solum ieus est usque ad coelum et ad inferos.*

7.2.1.2. Ecobiotic water rights

Because ecobiota was irrelevant for purposes of the law unless under human control, there were no rules to protect animals and plants which were living in their natural conditions. This implies the absence of ecobiotic water rights. An owner of land was entitled to use water to irrigate his crops or water his stock, but these water rights belonged to the land owners, and not to species in their own right. The lack of express protection for the water requirements of wildlife, was in accordance with the lack of conservation awareness, yet contrary to the principles of natural law, which were based on the principle of natural justice which would not allow nature to be neglected.[21]
It is submitted that the fact that ecobiotic water requirements were not specifically statutorily protected, does not necessarily mean that such needs were excluded from implicit legal protection. An evaluation of such alleged indirect protection will be undertaken against the background of the principles of the Roman law of things, as set out in the previous paragraphs, viz. (i) a lack of awareness of the environmental interdependence; (ii) the classification of wildlife as *res nullius*; (iii) the classification of public places as *res publicae*; (iv) the classification of running water as *omnium communia.*

7.2.1.2.1. Res universitatis and omnium communia

Gaius used the term *universitas* to describe a class of things in which rivers sorted.[22] Nobody had ownership in respect of the things in this class, but rights of use belonged to all. According to the dictionary meaning of this Latin term,[23] it includes "the whole

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[21] Vide Chapter VI supra.

[22] *Nullius in bonis esse creduntur, ipsius universitatis esse creduntur* (*D* 1 8 1*pr*).

[23] Lewis & Short *Latin Dictionary.*

number of things".[24] *Res universitatis* thus consisted of those things which belonged to each and all in need of it. To exclude animals and plants from this group of lawful users, would be contrary to the definition of the term *universitas*. It is therefore submitted that from Gaius' terminology, ecobiota should have had a legally defendable claim to water. In the light of the lack of conservation awareness, however, it had never been acknowledged.[25]

A similar interpretation can be applied to Marcianus' class of common things, viz. *omnium communia* (or *res communes*). Marcianus used the substantive genitive plural form of the term *omnia*, which literally means "all *things*", which negates the restriction of lawful water use to humans only. Such an interpretation of his terminology coincides with his view that the *ius naturale* was the fundamental principle underlying the classification of water as *res communes*.[26]

7.2.1.2.2. <u>*Pecus*</u>

The term *pecus* had a twofold meaning. The genitive, *pecoris*, referred to stock, while *pecudis* meant game.[27]

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[24] Other meanings which are given, are "the whole world" and "the universe". An alternative meaning which is given, is a legal person, but it is submitted that this is a modern concept which was probably not intended by Gaius. (Although the *populus Romanus, municipia* and *civitates* did exist as public bodies, Gaius referred to *collegia* only (*D* 47 2 2 4), which was a simple form of club or association. If he was referring to legal bodies, he would have used words such as *collegia* instead. Moreover, Gaius used the term as against *res singulorum*, and the acceptance of this alternative definition as Gaius' intention, will exclude several claimants from water utilization. This would mean that all streams belonged to corporate bodies. Moreover, it would be contrary to Gaius description of the class *res universitatis* as "*nullius in bonis esse creduntur*".

[25] Et vide *D* 1 8 5.

[26] It can nevertheless not be alleged that he had non-human use in mind - he mostly refrained from denying such use as being legal. This appears from examples of water utilization which he used in *D* 1 8 4 and 1 8 6. It is also in accordance with the lack of conservation awareness in his time. Other authors' examples which are aimed at human use only are found in *D* 43 12 and 43 20 3. Ecobiotic water requirements were probably regarded as a matter of course.

[27] Marchant & Charles 398.

In Digest 43 20 3 1, it was stated that water could be used for irrigation, for watering of *pecus,* and for recreation (*amoenitas*). In other texts in which this principle is applied, reference is however made to human use only. It may therefore be submitted that the author probably intended to refer to the first meaning of the term *pecus*, viz. stock (as the property of man) and not game.[28] This view is confirmed by the more general usage of the term *ferae bestiae* when reference was made to wild animals.[29]

Although the relevant texts in the Digest did not make use of the genitive form from which a deduction of the intended meaning could easily be made, this term cannot be restricted to stock. The concept is broad enough to be of use in a modern and conservation-oriented legal system.

7.2.1.2.3. *Amoenitas*

In terms of the Digest, water was available not only for irrigation, but also for stock-watering and for recreation (*amoenitas*). The extent of the application of this term in the Roman context is unclear, but it probably included fishing, the filling of pools, public baths, ornamental fountains and fish ponds. In the modern South African context, it would probably include the use of water for the maintenance of conservation areas : in terms of the National Parks Act,[30] the enjoyment of visitors is envisaged as one of the objectives of the maintenance of conservation areas. Ecobiotic water requirements need to be complied with in order to make such human enjoyment possible. The Roman concept of *amoenitas* would probably be of use in a modern system to provide similar protection to ecobiotic water requirements. As a result of the lack of conservation awareness in Roman law, it is however unlikely that this use was intended when water

[28] Et vide *D* 43 20 1 18.

[29] *D* 41 1 1 1.

[30] S 4, Act 75 of 1976.

was made available for *amoenitas*, but it is important that it was never expressly excluded from the concept.

7.2.1.2.4. Ius naturale and ius gentium

The *ius gentium* was a system of dynamic legal rules which controlled relationships amongst *cives* and *peregrini*. It was based on the rules of natural justice in terms of human common sense and man's instinctive sense of justice. In this sense, it was rightly used as a synonym for *ius omnium communes* and *ius naturale*, in that it was aimed at justice and equity for all.[31]

The *ius naturale* was the perfect, timeless, universal and immutable natural law which formed the basis of all law. Paulus called it "*semper aequum ac bonum*", because it was the embodiment of justice and equity.

It is submitted that the most important difference between the *ius gentium* and the *ius naturale*, was the origin of these concepts. While the *ius gentium* was based on man's instinctive justice, the *ius naturale* was based on divine providence. Both systems were, however, based on justice, which were fundamental to human relationships, and the difference was inspired by Greek philosophy rather than by any practical difference in their application. Authors of the positive law attached little value to the distinction. This is proved by Gaius and Marcianus who, in their classification systems, referred to the *ius gentium* and *ius naturale* respectively, intending the same principle. For purposes hereof, the philosophic distinction will be ignored, and both systems will be defined as a system of rules based on human righteousness.[32]

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[31] Van Zyl *Geskiedenis* 21 et seq. Et vide Chapter VI supra.

[32] Vide Chapter VI supra.

If the *ius naturale* is thus based on natural justice, then it is unlikely that all natural elements would not receive equal legal protection. It follows that if the *ius naturale* provided that running water belonged to all (*omnium communia*), it would be against the basic principles of justice and equity to deny a right to water to ecobiota, being in need of water for survival in their natural habitat. It should be kept in mind that the consideration of ecobiotic water requirements seems logical in terms of modern views, but, in Roman law, the legal relevance of ecobiota was restricted to cases where these belonged to humans. Water could, for instance, be used by stock only because their owners were entitled to water rights for purposes of stock-watering.[33] In the same way could water be lawfully used by plants merely as a result of the landowners being entitled to water for crop.[34] And pets were allowed water only because their owners were entitled to water rights for domestic use. Restrictions on water rights in respect of running water were aimed at peaceful common use, and not at the protection of ecosystems. The reason is that, in so far as no ownership or real rights had existed in respect of such organisms, there was no measurable harm which could be sanctioned by the *actio iniuriarum*. Damages could be claimed when animals and plants to whom water had been denied, belonged to humans in ownership.

It is therefore submitted that the *ius gentium* and *ius naturale,* being the foundation of Roman law, contained protection by implication for the water requirements of all in need of it, irrespective of whether the users were human or not. The fact that water rights had never been expressly granted to ecobiota, does not mean that the principle cannot be used in a modern system, in an attempt to provide such protection.

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[33] *D* 43 20 3; 47 7; 43 27.

[34] *D* 43 20 1 11, 43 20 3 1; 8 3 17.

7.2.1.4. Conclusion

It is submitted that although there had not been express protection for ecobiotic water requirements, it was due to a lack of an awareness of the need for environmental conservation and defective knowledge of interdependence of environmental elements, rather than to legal principles denying such protection.[35] In Roman law, ecobiota was not threatened with eradication due to over-exploitation of water resources, and therefore no rules were ever made to prevent such a disaster. What is important, is that the basic principles of the water law, viz. that water was common to each and all in terms of natural law, made it possible to issue such rules if necessary. For this reason, Roman water law is not necessarily irrelevant when historically sound principles are sought to form the basis of a modern allocation mechanism in which the water requirements of ecobiota are recognised.

7.2.2. Roman-Dutch law

7.2.2.1. The law of things

Res publicae were things which belonged to the civil community of Holland.[36] Although all members of the state were entitled to use it, the government had the right to control such common use.[37] Foreigners were not entitled to the use of these things unless in terms of permission or the payment of tollage.[38]

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[35] Legal rules are made only when practice demands it (Cowen 334 et seq).

[36] Vide n ? supra.

[37] Grotius *Inl* 2 1 24, 26; Van der Keessel 2 1 25; Voet 1 8 8, 9; Van Leeuwen *RDL* 2 1 12, 13.

[38] Grotius *Inl* 2 1 26; Kersteman *Woordeboek* sub voce "rivieren" 452; Van der Keessel 2 1 26; Voet 1 8 9; Van Leeuwen *RDL* 2 1 12.

It had been alleged supra that in Roman law this class of things was synonymous to *res communes*, but in accordance with the merger of the two classes as it was done by Justinian in his attempt to summarise the law in the Institutes, *res publicae* developed to become a separate class in Roman-Dutch law. Many jurists transferred water from the class *res communes* to *res publicae*, and left only the air and the sea in the class *res communes*. This classification, which deviated from that of Roman law, had several implications. First, it meant that water was available in rights of use to the whole civil community, but under control of the government.[39] Secondly, it meant that although water was a natural resource just like the air and the sea, it was however geographically and politically restricted in its common availability, and could not be utilized by each and all in need thereof. This territorial demarcation of river use was probably due to increasing international and intra-national competition, especially with regard to navigation and fishing. Thirdly, the *ius naturale* was no longer applicable to regulate the use of water, because the principles of justice of the *ius naturale* would not allow political demarcation of water utilization.

Many Roman-Dutch jurists were of the opinion that, in terms of the most recent customary law, rivers were *regalia*, belonging to the crown.[40] This meant that rivers could not be used freely for certain purposes without the leave of the government.[41] *Regalia* were those *res publicae* which were subject to heavy competitive use, such as water, and in respect of which the government assumed the strictest form of control.[42]

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[39] Kersteman *Woordeboek* sub voce "rivieren" 452; Grotius *De Jure Belli ac Pacis* 2 2 12; Voet 1 8 8, 9; Grotius *Inl* 2 1 25-28; Huber 2 1 19; Van Leeuwen *RDL* 2 1 12; Van der Keessel 2 1 25. The term "river" was not necessarily used : while Voet sorted only *perennial* rivers in this class, Grotius referred to *strome, ... meren ende andere bevaerbare wateren* as well as their banks and beds, and Van Leeuwen referred to *waters, strome, riviere, hoofweë*. Van der Keessel excluded town canals from the waters sorting under *res publicae*.

[40] Kersteman 162; Voet 1 8 9; Groenewegen 2 1 2 1; 2 1 23; Vinnius *Comm ad Inst* 2 1 12; Huber 2 1 19; Van Leeuwen *CF* 2 1 7. Et vide Hall *Maasdorp's Institutes* 97 et seq.

[41] Voet 1 8 9; Huber 2 1 19; Van Leeuwen *CF* 2 1 7; Van der Keessel 2 1 25.

[42] Vide 2.2.6 and n ? infra.

As far as the extent of government control was concerned, the position was not much different from the Roman law position : while members of the public had rights of use, the government had the power to control common use according to the extent of competitive use to which the rivers were subject.[43]

7.2.2.2. Conservation

There are signs of an increasing awareness of the need for conservation in Roman-Dutch law. This was mainly exercised in the form of statutory restrictions on hunting, or on the disturbance of game, birds and fish.[44] It is, however, submitted that the reason therefor was rather the preservation of species which had been valuable to humans, than the protection of species for the sake of environmental conservation. As far as plants are concerned, no conservation measures were applicable, unless such plants were the subject of farming operations.

7.2.2.3. The status of wildlife

In Roman-Dutch law, like in Roman law, wild animals were *res nullius*. This status was lost when it had been successfully captured (by way of *occupatio*).[45] *Occupatio* required effective control : this means that ownership was lost as soon as it had escaped beyond sight or beyond the capability of the hunter to recapture it. Mere wounding of an animal did not constitute *occupatio*.[46]

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[43] Voet 1 8 8, 9; Van Leeuwen *RDL* 2 1 13. Grotius *Inl* 2 1 26 probably also intended to refer to such *ad hoc* power of control, by referring only to larger and navigable waters, and by saying that the reason for state control was "*de bewaringe van de selve stroomen*".

[44] GPB 1315-1430; 2887; 1300-1315; 2151; 2509; 3133; 3179; 610-621.

[45] *Inl* 2 4 1, 2; Van Leeuwen 2 3 1; Voet 41 1 4; Van der Keessel *Dict* 4 1.

[46] *Inl* 2 4 4; Voet 41 1 4; Van der Keessel *Dict* 4 4.

According to Van Leeuwen, the fencing of an area constituted sufficient control to vest ownership. Voet, however, distinguished between *vivaria*, where animals were kept in captivity, and a fenced wilderness area, where animals were moving about freely. The reason for this distinction is that the fencing of wilderness areas was usually done to mark boundaries rather than to protect the animals therein or to restrict their freedom of movement for the purpose of acquisition by *occupatio*. It seems as if Voet regarded the **purpose** of fencing as relevant, and not the **effectiveness** of the fence to restrict the free movement of game.

Conservation areas such as those known today, ie. where the conservation of game is the very purpose of fencing, were probably unknown in Roman-Dutch law.

7.2.2.4. Statutory conservation measures

Unlike in Roman law, traces of conservation awareness, such as statutory control over hunting and the breeding of animals, appear in Roman-Dutch sources. Mention is even made of conservation areas.[47] The right to hunt was statutorily restricted.[48] Various *placaats* existed in Roman-Dutch law which regulated the capture of birds, fish and game.[49] The severest restrictions applied to smaller game species. Only noblemen had the right to hunt such game,[50] although the count had the power to permit hunting of small game by others. The capture of birds and fish was usually not prohibited, yet scarce types were protected.

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47 Van der Keessel *Dict* 4 1 1; Van Leeuwen *CF* 2 35, 36; *Inl* 2 4 11.

48 Groenewegen 2 1 12; Van Leeuwen 2 3 1; Voet 41 1 6; Van der Keessel 4 5.

49 *GPB* 1315-1430; 2887(2); 1300-1315(1); 2151; 2509(2); 3133; 3179(2); 610-621(3).

50 *Inl* 2 4 26-28; Groenewegen 2 1 12; Van Leeuwen 2 3 3; Voet 41 1 6. According to Van der Keessel *Dict* 4 26, the law has however changed so that owners had full rights to hunt on their own land.

The question is whether wild animals remained *res nullius* in spite of the power of the state to restrict or prohibit occupation thereof. It is submitted that although the hunting of certain wildlife species were subject to control measures (the state was thus *dominus bestiae*), wildlife was not the property of the crown, but remained *res nullius*. The power of the state to control public rights of use, does not imply that ownership had been assumed. Illegal hunting, ie. hunting without state permission, was punishable, although it was not regarded as theft. Ownership of animals which had been hunted illegally did not pass to the hunter, but was forfeited to the chief forester. This denial of the establishment of ownership in spite of effective occupation, was regarded as a sanction for the offence of illegal hunting, and not as the return of stolen goods.[51] This means that the fact that *occupatio* was subject to state control, did not imply that the state assumed rights of ownership. It remained occupiable *res nullius*, although by permit only.

The probable reason for the control of the use of wildlife in Roman-Dutch law, was to ensure that wildlife, as a relatively scarce resource, was equally available to all members of the public who wished to appropriate it. This, rather than the conservation of species for the benefit of its survival in the long term, or the preservation of the environmental network, may be regarded as the objective of the control measures exercised by the government. This awareness of the need to protect wildlife, as well as the recognition thereof in the law are, even more than in Roman law, a proper legal basis for modern conservation rules.

7.2.2.5. The status of water

From a conservation perspective, a small change in the classification of things during the reception of Roman law in Holland, had an important effect, which influenced the water law to this day.[52] In the Institutes, Justinian attempted to consolidate the classification

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[51] *Inl* 2 4 7; Groenewegen 2 1 17; Voet 41 1 7. Cf Van der Keessel *Dict* 4 1 who was of the opinion that the hunter did vest ownership in the captured game.

[52] Vide Chapter III supra.

systems of Gaius and Marcianus as contained in the texts of the Digest, which resulted in a distinction between *res publicae* and *res communes*. The distinction was accepted by Roman-Dutch lawyers, and justified the territorial and political restrictions placed on those things which were classified as *res publicae*. This means that things which sorted in this class, belonged not to each and all, but to members of the civil community only. The confusion which resulted from this doubling of classes of common things, was a distinction between running water and rivers : while running water was *res communes*, rivers were *res publicae*. It was soon realized that this distinction was unsound : to justify it, a distinction between larger and smaller streams developed, viz. *flumina publica* and *flumina privata*. While *flumina publica* were state controlled *res publicae*, *flumina privata* were *res privatae*. This had led to the disappearance of the classification of water as *res communes* (which belonged to each and all in common rights of use in terms of the *ius naturale*). Even Grotius and Voet, who advocated and supported the *ius naturale*, did not defend this unsound evolution.

Be that as it may, Roman-Dutch water law was an administrative system : large, navigable and perennial rivers were state-controlled, in the sense that the state assumed control for the benefit of peaceful common use. Rivers, which were subject to less user pressure, were relatively free of state control. It seems as if the status of water in terms of the law of things, was adapted to suit the practical administrative position, which led to confusion regarding the classes in which water sorted; political and territorial demarcation; the disappearance of the influence of the *ius naturale* in the water law and, eventually, the negation of principles which would ensure the protection of ecobiotic water requirements. In a water allocation system where principles of justice no longer form the basis of water distribution, and where political and territorial demarcation deprives non-citizens and non-humans from water utilization, there is no room for the justification of ecobiotic water rights.

It is therefore submitted that those principles which had existed in Roman water law and which could form a proper legal basis for the protection of ecobiotic water needs, had disappeared in Roman-Dutch law.

7.2.2.6. Ecobiotic water rights

Because game was protected rather for the sake of human utilization than for the sake of the preservation of species and the protection of environmental interrelationships, no direct provision had been made in the water law for the allocation of water for ecobiotic use. The reservation of rivers for civil use alone, indicates a lack of recognition of ecobiotic requirements. This is confirmed by the disappearance of the influence of the natural law in the water law. The universal principles of justice, in terms of which all water was available for each and all in need thereof, was no longer acknowledged.

Although the establishment of areas for the conservation of animals such as birds was encouraged by legislation,[53] no direct legal provisions to preserve the habitat of these animals, could be found. Legislation provided that no noisy sounds, such as gun shots or screaming, or the use of snares were allowed within certain distances from such areas. There was, however, no restriction on the quantity of water which could be diverted from the aquatic habitat of these animals. This may be regarded as an indication of poor conservation awareness rather than an intentional disregard of ecobiotic needs. Be that as it may, no direct measures could be traced in Roman-Dutch water law which were aimed at the protection of ecobiotic water requirements.

It was submitted earlier[54] that the term *pecus* had a twofold meaning : it could either be stack or game. This means that water allocation for ecobiotic purposes was theoretically possible. In Roman-Dutch law, this indirect protection of ecobiotic needs had

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[53] Van Leeuwen *CF* 2 3 6.

[54] Par 7.2.1. supra.

disappeared. Even Voet, in his commentaries on the Digest, omitted any reference to it.[55] The works of other lawyers contained no reference to water use by any animals, whether they qualified as stock or game.

Recognition of a right to use water for recreational purposes, which was allowed in Roman water law, was not adopted in Roman-Dutch law. Roman-Dutch authors concentrated on fishing, navigation and the leading of water, without discussing the details of the purposes of water use. The use of water for purposes of recreation was therefore not necessarily excluded, but by lack of direct legal provisions, legal protection cannot be assumed.

The transfer of running water from the class *res communes* to *res publicae*, negates the argument that it belonged to each and all in rights of use, like in Roman law. Roman-Dutch lawyers made it clear that water belonged to the civil community or even the kings. An interpretation like the one which had been made in respect of the Roman classification, viz. that the terms *omnium* or *universitas* could also include ecobiotic use, can no longer be made in respect of Roman-Dutch law.

In Roman law, the *ius naturale* determined the status of water as common to all. The rule was that all running water was common in terms of the *ius naturale*, in that it belonged to each and all in need of it, irrespective of political boundaries. The philosophy of the *ius naturale*, viz. justice for all, explains why even non-human organisms which needed water to survive, could not be deprived of it. The restriction of water rights to *cives* in Roman-Dutch law, negated the influence of principles of the *ius naturale*. It seems as if principles of justice did not regard it necessary to allow water for non-human purposes or for use outside political boundaries.

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[55] *Ad Pand* 43 14; 43 20.

7.2.3. South African law

7.2.3.1. The law of things

The Roman-Dutch system, in terms of which strict state control measures in respect of heavily utilized streams were possible, was accepted in the Cape during the seventeenth century.[56] Some authors were of the opinion that the state was *dominus fluminis*.[57] Although such a view is in accordance with the description of certain rivers as *regalia*, it had been submitted that *regalia* was not a class of things, but rather an administrative measure.[58] There are, however, no grounds for a submission that ownership of rivers vested in the state. On the contrary, there is support for a view that the streams in the Cape were subject to uncontrolled common use by all, and that the state interfered only in the case of user disputes.

As far as the classification of water is concerned, a distinction was drawn between running water (which sorted under *res communes*), and public rivers (which sorted under *res publicae*). The difference between these two classes of things, was that common things belonged to nobody but were available for common use, while public things, also available for common use, belonged to the state. No reference was made to a distinction between public and private water. In practice, water law was an administrative system : all rivers and streams were available for common use, while the state interfered in cases of user disputes only. This interference was not necessarily connected to the legal status of the stream. Irrigation had soon become a major water consumer. Because water was scarce, competition amongst irrigators had soon become a problem. Because smaller

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[56] De Wet "Opuscula" 11; "Water" 28. Control was exercised by way of *placaats*, of which the first was issued in 1655, to prevent pollution of the local streams (C 680 OPB 53 of 10 April 1655). Cf Visagie who denies the validity of these measures, due to the Political Council not having received legislative power from the states-general.

[57] Hall *Origin* 11.

[58] Vide Chapter III.III supra.

streams received less attention from large-scale irrigators, these streams became distinguished in law from those larger streams which had been capable of common irrigation. This had led to the distinction between public and private water which was created by the courts and later confirmed in legislation.[59]

7.2.3.2. Ecobiotic water rights

A preferential order of water rights had been developed by the nineteenth century supreme court, which distinguished between domestic, agricultural and industrial uses of water. Agricultural use was referred to as secondary use, being the use of water for "animals and vegetables".[60] Ecobiotic water needs were however not specifically protected, since the use of water for the support of animal and vegetable life probably referred to stock watering and irrigation only. Under the influence of the Roman law classification of water, the courts supported a view that no form of life in need thereof could be deprived of it :

> "Water is scattered over the face of the earth in rivers, lakes etc, for the use of animals and vegetables",[61] and
>
> "Common things... which on account of the common use that all have a right to by nature, cannot, by the law of nations, be divided...for without the use of air and water no-one could live or breathe".[62]

On the other hand, the water allocation system which the courts had developed, was not in accordance with this principle. The reason for this is the adoption of the English law principle of "riparian ownership" :

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[59] Chapter III.III supra.

[60] *Retief v Louw* 1984 4 Buch 165 181; *Hough v Van der Merwe* 1874 4 Buch 148 153.

[61] *Hough v Van der Merwe* 1874 4 Buch 148.

[62] *Retief v Louw* 1874 4 Buch 165.

> "In my opinion...after considering the authorities...the flowing perennial stream...is the common property of the proprietors of these two parcels of land, and of all the other proprietors of land lying on the course of the stream".[63]

If private water belonged to private owners, and public water was available for the reasonable common use of riparian owners only, then there was little room left for the natural law principle of common use by each and all. This distinction negated both the Roman-Dutch principle that water belonged to the whole civil community, and the Roman law principle that water belonged to each and all.

When the water law was codified in 1912,[64] the fundamental principle of justice in terms of the *ius naturale* had finally disappeared. The Irrigation Act was promulgated in order to address various irrigation problems with which the supreme courts were constantly confronted. Codification confirmed a rigid distinction drawn between public and private water, and negated several decisions which had relied on Roman law principles.

It is submitted that, as far as the allocation system is concerned, neither the Roman, Roman-Dutch or Anglo-American law had been followed. Principles had been drawn from all these systems, to create and justify a system in terms of which water was available for a limited group of people for prescribed purposes, of which irrigation was the most important. This system was adopted in the 1956 Water Act.

The disappearance of the influence of natural law principles from the water law, including the principle that water was common to each and everyone in need thereof had, after codification, excluded any claim to water rights which ecobiota could have had under the common law. Water now belonged to those with statutory water rights only. This limited group consisted mainly of riparian owners, using water for irrigation, but also for urban and even industrial purposes. In Roman law, the principles of natural law,

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[63] *Retief v Louw* 1874 4 Buch 165.

[64] Irrigation and Conservation of Waters Act 8 of 1912.

based on justice, allowed water for the requirements of each and all in need thereof. Although there was no direct rule which allowed water allocation for ecobiotic purposes, the reason therefore was ignorance of the value of conservation rather than a lack of suitable legal principles. In Roman-Dutch law, the position was that water was freely and excessively available, which negated the need to formulate rules for water apportionment.

The only trace of the once strong principles of natural law still to be found in the Water Act, is hidden in the term "public interest". This term is generously scattered through the provisions of the Act, limiting the discretion of the minister, the water court and other bodies empowered to allocate water. Yet the term is nowhere defined, and no measure of control exists to test whether a discretion *was* exercised in the public interest.[65]

In spite of a lack of statutory protection for ecobiotic water needs, the Department of Water Affairs had given formal recognition to the existence of this user sector in 1984, in a *opus magnum* on water management,[66] when an estimation of ecological water requirements had been fixed on 2 700 million m^3 per annum, which would hardly increase in the coming centuries.[67]

In 1991, the Presidents Council, in its report on a national environmental management system,[68] recommended that the Water Act would have to be amended to recognise water requirements of the environment[69] and of natural ecosystems.[70]

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65 Vide Chapter VI infra.

66 *Management of Water Resources* 1986.

67 Department of Water Affairs *Management of Water Resources* 2.26; 2.4, 5.

68 PC 1/1991.

69 35, 36.

70 170.

This initiative was implemented by the Department of Water Affairs in January 1992, when a draft policy was issued concerning water for managing the natural environment. It was declared that "notwithstanding the weak legal and administrative provisions for allocating water to the natural environment, the Department realizes that a substantial quantity of water is required for this user sector". According to this draft policy, ecobiotic water requirements constituted approximately 17% of the total water use, estimated at approximately 3 000 million m^3 per annum. It was suggested that this demand had to be accommodated in the statutory allocation mechanism after a Commission of Enquiry had addressed the question of water for managing the natural environment. Until such amendment, the Department would endeavour to draw legislative support for this sector's needs from the general powers of the minister, as specified in section 2(m) of the Water Act.

In March 1995, a discussion document had been released by the Department of Water Affairs and Forestry,[71] as a first step in the formal process of the revision of the water law. In this paper, where fundamentals for a new system are suggested, the protection of ecobiotic water needs is addressed as follows :

> "Recently the needs of the environment, particularly the riverine environment, have been increasingly taken into account and the impact of development is beginning to be taken seriously. The environment is being considered as a "user" of water, competing with other users, such as industrial, agricultural and municipal users. This, however, still does not go far enough. The law needs to view the environment as the **resource base** from which all development leads - the foundation on which all else depends."[72] [73]

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[71] *"You and your water rights" : South African Law Review : A call for public response* WPB-95 G.P.-S 1995

[72] 22.

[73] Similar views had been expressed in a White Paper on Water Supply and Sanitation, published in November 1994 (WP-1/1994).

A policy document on the new system of water allocation is expected as soon as the public comment on the discussion document has been considered.

From the above, it is submitted that the disappearance of the influence of natural law principles in the South African water law, had negated the foundation on which protection for ecobiotic water needs could be based. When an awareness of the importance of environmental conservation had developed in later years, no such basic principles had been left in the water law : neither the status of water and the system in terms of which water sources are currently classified and distinguished, nor the allocation mechanism, allow the allocation of water rights for ecobiotic needs. It has therefore become necessary to restructure the allocation mechanism of the water law in order to provide such protection, which seems clearly from the recent public discussion document. It is however submitted that the principles subjacent to the Roman water law could be valuable in a reform process.

7.3. PROTECTION OF ECOBIOTIC WATER REQUIREMENTS BY SOUTH AFRICAN WATER-RELATED LEGISLATION

7.3.1. Conservation

Conservation awareness and the incorporation of environmental conservation measures into legal systems, had become a worldwide tendency during the last few decades. This also applies to South Africa. Rules regarding environmental conservation have in fact been part of the South African law since the earliest years of European settlement in the Cape. In 1655, Jan van Riebeeck issued a *placaat* prohibiting the pollution of streams

in Table Valley.[74] Various regulations protecting fauna and flora had been placed on the statute book during those early years, and ever since.[75]

A variety of rules aimed at environmental conservation currently exist in South Africa, scattered through several acts, inter alia the National Parks Act of 1976,[76] the Conservation of Agricultural Resources Act of 1983,[77] the Forest Act of 1984,[78] the Mountain Catchment Areas Act of 1970,[79] the Sea Birds and Seals Protection Act of 1973,[80] the Lake Areas Development Act of 1975,[81] the Physical Planning Act of 1991,[82] the Atmospheric Pollution Prevention Act of 1965[83] and the Water Act of 1956.[84]

In accordance with growing conservation awareness during the last few decades, a need for a codified environmental policy had been identified. In 1982, the first Environment Conservation Act had been promulgated in South Africa, which was soon substituted by the Environment Conservation Act 73 of 1989. This Act was promulgated to provide for the effective protection and controlled utilization of the environment. The "environment" is defined in the act as the aggregate of surrounding objects, conditions and influences

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74 C 680 OPB 53 of 10 April 1655.

75 During the late nineteenth century, various hunting regulations were issued to control the eradication of game, especially in the Transvaal. This eventually led to the establishment of conservation areas.

76 Act 57 of 1976.

77 Act 34 1983.

78 Act 122 of 1984.

79 Act 63 of 1970.

80 Act 46 of 1973.

81 Act 39 of 1975.

82 Act 125 of 1991.

83 Act 45 of 1956.

84 Act 54 of 1956.

that affect the life and habitat of man or any other organism or collection of organisms.[85] Provision is made for the declaration of a policy for environmental conservation,[86] in accordance with which all authorities to whom powers relating to the environment have been assigned, should perform their duties.[87] This policy was declared in January 1994, which recognises that the protection of all species and habitats is essential for the survival of all life on earth.[88] It states that "water resources will be used judiciously and measures will be taken to ensure that South Africa's available water resources are utilized to the optimum for household, agricultural, forestry, industrial, recreation and nature conservation purposes and for the maintenance of ecosystems".[89] To this policy, all administrative authorities are bound in the exercise of their powers and duties.[90]

The act provides for the declaration of protected natural environment areas, where the administrator may issue directions relating to the land or water in such an area.[91] Provision is also made for the declaration of special nature reserves on state-owned land.[92] In these areas, a management plan will control the protection of the environment.[93] In May 1994, six classes of protected areas have been declared where, inter alia, the protection of ecobiota is envisaged.[94]

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85 Section 1 : "environment".

86 Section 2.

87 Section 3. This policy has not yet been declared.

88 GN 51 of 1994 GG 15426 32.

89 39.

90 Section 4 of the act.

91 Section 16(2).

92 Section 18(1).

93 Section 18(4)(b).

94 GN 449/1994 GG 15726 of 9 May 1994. Cf Chapter I.

Water pollution is prohibited,[95] and the minister may identify activities which may have a substantial detrimental effect on the environment, relating to, inter alia, water use and disposal, resource removal and renewal, and agricultural processes.[96] Such activities will be prohibited except when ministerial authorization for the undertaking thereof has been granted, which authorization is subject to the results of a report concerning the impact of such activities on the environment.

Proposed regulations regarding obligatory Environmental Impact Assessments were published in March 1994.[97] As far as water is concerned, it was proposed that such EIA's, by approved consultants, will be required prior to the construction of certain water works. These will include aqueducts, major canals, water transfer schemes, diversion schemes for normal flow, permanent flood control schemes, dams, reservoirs, levees, weirs and any construction with a height of more than 5 metres or a storage capacity of more than 50 000 cubic metres.[98]

Even prior to the recent declaration of the environmental policy, the Department of Water Affairs had been a leader in the application environmental protection principles, even since certain recommendations had been made in a White Paper on a National Policy regarding Environmental Conservation in 1980.[99] Various aspects prove their concern :

(i) Environment Impact Assessments are voluntarily undertaken for all major water projects, as part of the planning phase. The recommendations of such

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95 Section 19.

96 Section 21.

97 GN 171/1994 GG 15529 of 4 March 1994 67. These regulations have not as yet been finalized.

98 Clauses 1(m) and (n) of GN 172 of 1994 (The identification of activities which are detrimental to the environment) GG 15529 of 4 March 1994.

99 WP.O-80.

assessments are implemented during the design, construction, operation and decommissioning phases of these projects.

(ii) River basin studies are undertaken to promote effective basin management. These extensive, time-consuming and expensive projects include reference to relevant environmental factors, and initiate the compilation of balanced drainage basin development plans. Basin steering committees are appointed to oversee the work being done. The members thereof represent interest groups of all the facets of water utilization in the basin.[100]

(iii) Research is encouraged and carried out by the Department of Water Affairs, inter alia in an attempt to understand the influence of water management activities on the environment. The Water Research Commission was established by statute in 1971,[101] to promote and finance water research. This body finances various research projects aimed at environmental considerations in water management.

(iv) Provision is often made for the consideration of the public interest in the exercising of ministerial discretion. This is done by inviting public input, as in the case of the establishment of advisory committees, as well as by obliging the minister, in the exercise of his discretion, to consider the public interest. Although this term is not defined, conservation considerations should, in the light of increased environmental awareness, play an important role when ministerial discretion is exercised in the public interest.

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[100] Van Zyl & Pullen 9.

[101] By s 2 of Act 34 of 1971.

(v) Fifthly, a draft policy on Water for Managing the Natural Environment[102] has been issued recently, in which the objectives of the department concerning conservation issues have been set out.

(vi) In recent parliamentary documentation which had been published by the Department, the intention to give environmental aspects high priority in the reform of the water law, was emphasised.[103]

7.3.2. Ecobiotic water requirements

It had been argued that all living organisms are dependant on water, including human as well as non-human use.[104] All species play an indirect yet indispensable role in the well-being of man, by forming part of an interdependent network of environmental elements. This environmental network forms the habitat of inter alia man, and the conservation of species is thus necessary to maintain the network. Although the role of each biotic and abiotic element which in some way functions in the network, has not as yet been ascertained to any degree of sufficiency, it is reckoned that a disturbance of the fine balance between these elements may eventually cause a collapse in the network on which man is dependent for his survival.[105] Moreover, ecobiota often plays an important role in the renewal and purification of water, which emphasizes the necessity to accommodate these organisms in the water allocation mechanism.[106]

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[102] January 1992.

[103] White Paper on *Water Supply and Sanitation* WP-1/1995; Discussion Document on *"You and your Water Rights"* WPB-95.

[104] Chapter I.

[105] O'Keeffe Rep 121; Rabie *Environmental Legislation* 199.

[106] O'Keeffe Rep 131 20, 32; O'Keeffe Rep 121 21, 58 et seq.

A very sensitive balance exists between organisms and water conditions, both quantitative and qualitative. It is essential for the survival of species to maintain this balance. Since every organism in and around water sources probably contributes to the flow conditions of the water, the survival and diversity of species is important for human survival, being dependent on the interrelationships between environmental elements and therefore also on river ecobiota.

Human development, however, places an ever-increasing demand on water resources, often at the expense of the interests of non-human water user sectors. These users have never had much protection against human over-exploitation of the water resources, and are thus often eradicated unnoticed, in its turn at the expense of the environmental network.

The growing awareness of ecobiotic water requirements and of the importance of the conservation of species and the preservation of natural resources since the eighties, has caused the gradual realization that water had to be made available to ecobiota in order to conserve these species, which would, in its turn, contribute to the maintenance of the human environment.[107]

Proper water management is therefore required to ensure this survival objective. This is however not possible unless a proper understanding of the hydrological and ecobiotic processes is obtained. Extensive research on the water requirements of ecobiota is being undertaken countrywide, and the government has initiated a process of law reform, in which ecobiotic water requirements will be accommodated.

In terms of current law, the water requirements of ecobiota are not sufficiently protected. In spite of certain protective measures scattered through the legal system and which will be discussed in the following paragraph, there is a need for a well-structured water

[107] An increasing number of workshops, research, reports, etc., have been undertaken during the last decade.

allocation system in terms of which the environmental network is protected for sustainable development.

7.3.3. Ecobiotic water rights

Conservation measures aimed at the protection of ecobiotic water requirements have been inserted in various acts, to a debatable degree of effectiveness.[108] In the Water Act, there are no direct provisions aimed at the protection of the water requirements of ecobiota, mainly due to the historical background of the water law in South Africa. In an environmental conscious society, where the interdependency of environmental elements is realized, such a situation can no longer be afforded, and the water allocation mechanism ought to be revised to provide adequate protection for the water requirements of all user sectors, whether human or not.

7.3.3.1. Statutory measures dealing with ecobiotic water requirements

7.3.3.1.1. The Mountain Catchment Areas Act 63 of 1970

Runoff from mountain catchments is the main source of most South African rivers.[109] To yield the maximum quantity of water of the highest possible quality on the most dependable basis, without reducing plant cover and variety of species, optimal management of mountain catchment areas is necessary.[110] The Mountain Catchment Areas Act was promulgated to provide for the conservation, use, management and control of land situated in declared mountain catchment areas.[111] In terms of the Act,[112]

[108] Fuggle & Rabie 302 et seq.

[109] Rabie "Mountains" 214.

[110] See Department of Water Affairs *Management of Water Resources* 1.20-1.23 for the sensitivity of the balance between the soil, vegetation and water conservation in these areas.

[111] Long title of the Act. See in general Rabie op cit n 12 220 et seq, as well as Rabie "Mountains II" 66.

any private area of which the water yield is of great importance, may be declared to be a mountain catchment area. This declaration is initiated by regional action committees, recommending it on behalf of all interested parties, and giving consideration to the value of a certain area as a water source, the capacity of the area for yielding water and the degree of deterioration of vegetation and soil. The decision of proclaiming the area is then made by the Central Committee for the Delimitation of Mountain Catchment Areas.

Mountain catchment areas are managed by means of management guidelines, relating to conservation, use and control of land and vegetation within (and, in cases of intruding species, for as far as five kilometres outside) the area. Some seventeen areas have already been declared,[113] yielding 15% of the mean annual runoff of the main river systems in the Republic. The process of proclamation is continuing, and 3,8 million hectares[114] could eventually be so managed.[115]

Mountain catchment areas differ from catchment control areas[116] in two respects : first, catchment control areas can be declared in any area down the course of a stream and not only in mountain catchments. Secondly, catchment control areas are usually declared for some project to be carried out by the State in the national interest,[117] while in the case of mountain catchment areas, guidelines for ongoing management by owners are laid down. Although it is realized that the circumstances and problems differ from catchment to catchment, consideration should be given to standardizing conservation directions to be implemented by all owners of land within river catchments, which will

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112 Section 2.

113 Totalling an area of 600 000 ha.

114 Yielding 8 100mm^3.

115 Department of Water Affairs *Management of Water Resources* 6.55-6.56.

116 In terms of s 59(5)-(6) of the Water Act.

117 Eg damming, cleaning, deepening, widening, straightening or altering the course of a channel.

eliminate the necessity to declare mountain catchment areas. The Department of Environment Affairs has recently started developing a catchment biosystem management model which aims at obtaining the maximum production per water unit, optimum preservation of the natural ecology and minimization of soil erosion. Such a model should contain the suggested standard directions, applicable to all land concerned.

Wetlands usually occur on flats, but rivers often originate from sponges on mountain slopes.[118] These areas can thus be included under the protecting provisions of the Act. So too can river banks, which are sensitive wetlands, be covered under the provisions of this Act, when they are included in declared areas.

7.3.3.1.2. River conservancy districts in terms of the Natal Nature Conservation Ordinance 15 of 1974

The Natal Nature Conservation Ordinance authorises the Administrator to establish a river conservancy district.[119] The Ordinance also provides for riparian owners to organize themselves into voluntary associations, called river conservancies, for the purpose of advising the Natal Parks Board in regard to matters pertaining to waters in such districts.[120] The concept of "waters" includes rivers, streams and creeks.[121] Although the administrator may regulate the functions of river conservancies, the success thereof is dependant on voluntary compliance.

There are already some 78 such conservancies in Natal, spread over 6 547 square kilometres of land.

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[118] Ramsden *Wetland Legislation* 9.

[119] Section 136(1).

[120] Section 136(2).

[121] Section 1.

7.3.3.1.3. The Conservation of Agricultural Resources Act 43 of 1983

A few regulations of the Conservation of Agricultural Resources Act represent the only legislation directly aimed at the conservation of wetlands.[122] The Act is administered by the Department of Agriculture, adding a further authority to wetland management.

Firstly, the regulations forbid the utilization of the vegetation in wetlands that would cause deterioration or damage to agricultural resources.[123] Although this regulation is not specifically aimed at the conservation of wetland ecology, protection thereof is obtained simultaneously with the protection of agricultural resources, for example, through the prevention of overgrazing. Read with a further regulation,[124] which prohibits the removal of an obstruction which could increase soil erosion during floods, more protection is provided for wetland ecosystems, since natural barriers often trigger wetlands to come into existence.[125]

Secondly, the regulations[126] instruct land users to remove vegetation in watercourses which could cause obstructions during floods and cause soil erosion. Although the value of interfering with natural floods is debatable and still to be ascertained,[127] this provision serves as protection for river banks and could save riverine habitat.[128] Moreover, land

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122 GN R1048 of 25 May 1984. Vide in general Chapter IV.III supra.

123 Regulation 7(1).

124 Regulation 8(5).

125 Begg 77.

126 Regulation 7(2).

127 According to Begg 76 such activities would be environmentally damaging because of downstream consequences. He is further of the opinion that the passage of water through dense plant mass is crucial for the attenuation of flood and silt water, and for the wetland to perform its natural hydrological functions.

128 It seems as if reg 7(2) is in conflict with reg 8(5), since it is difficult to ascertain in advancewhether the removal of vegetation will cause or prevent soil erosion during floods. The value of reg 7(2) is thus doubted.

users are forbidden (without written permission) to drain or cultivate any vlei, marsh or water sponge or portion thereof on their land, or to cultivate any land within the flood area[129] of a watercourse.[130] "Drainage" is not defined, but "cultivation" is defined as "mechanical disturbance". Mechanical disturbance is a term which requires further definition, as it is not clear whether damage has to be proven and if so, whether ecological detriment would be sufficient, or whether proof of economical loss is required. Furthermore, the permission required is obtainable from an executive officer, whose sole discretion decides the matter. The officer is under no obligation to consider the environmental or ecological impact of his decision, and could make a decision on mere economical grounds. This can be prevented by the implementation of a uniform wetland management policy, to be applied by all authorities administering legislation relating to wetlands. Nevertheless, this regulation[131] represents a positive step in the direction of the protection of wetlands, and provides a mechanism to control ill-considered utilization and cultivation of these fragile areas. The regulation which prohibits veld burning without written consent,[132] affords protection to wetlands, since the value of burning vleis and reed beds is still unknown.

The Conservation of Agricultural Resources Act furthermore stipulates that control measures may be prescribed relating to the cultivation of virgin soil and the utilization and protection of cultivated land, vleis, marshes, water sponges and vegetation, and the control of the grazing capacity of the veld, as well as control of veld fires, weeds and invader plants, the restoration of eroded land and protection against pollution.[133]

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129 This is including an area up to ten metres outside the ten year flood line.

130 Regulation 7(3). This provision is not applicable to wetlands where cultivation or drainage has already been commenced, unless signs of excessive soil erosion is visible (s 7(4)).

131 Regulation 7(3).

132 Regulation 12(1).

133 Sections 5-7. The Physical Planning Act 88 of 1967 provides guidelines for spatial development of land (s 6(1)(a),(b)). Such guidelines, contained in a guide plan, could be an important mechanism for protecting riverine habitat.

Although these measures protect water resources against direct human disturbance, the conservation of such resources is greatly influenced by the quantity and quality of their water habitat. Unfortunately, no legislation exists to control water quality and quantity in order to protect such life. The river research programme mentioned earlier is, inter alia, aimed at ascertaining the water needs of animal and plant life in and around water resources, and to motivate statutory protection for these species and their habitats.

7.3.3.1.4. The Forest Act 122 of 1984

The Minister of Environment Affairs may prohibit afforestation or reafforestation of certain land, to protect any natural water source.[134] This prohibition is, in practice, dependent on the discretion of a forest officer, who will evaluate the status and hydrological value of a water source, and will determine how far from that water source the land may be afforested. This provision inter alia serves to protect riverine habitat from destruction, and to prevent soil erosion.

The Forest Act moreover forbids fishing in waters in State or private forests.[135] It is also an offence to injure, collect, take or remove any forest produce, which, in terms of the definition of forest produce, includes fish.[136]

The act also makes provision for the protection of forest produce in nature reserves and wilderness areas.[137] Forest produce includes anything which occurs, is grown or grows in a forest, as well as anything which is produced by any vertebrate or invertebrate member of the animal kingdom or any member of the plant kingdom.[138] A nature

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134 Section 8(1).

135 Section 21(2)(b).

136 Sections 1, 21(1)(a)(i).

137 Section 15.

138 Section 1 "forest produce".

reserve in terms of the Act is any area declared as such for the preservation of a particular natural forest or particular plants or animals or for some other conservation purpose, while a wilderness area is declared for the preservation of ecosystems or the scenic beauty. Similar conservation measures exist in respect of national parks[139] and provincial nature reserves.

7.3.3.1.5. The Lake Areas Development Act 39 of 1975

The Minister of Environment Affairs may declare any land comprising or adjoining a tidal lagoon, a tidal river, or any other land comprising or adjoining a natural lake or river, which is in the immediate vicinity of a tidal lagoon or tidal river, to be a lake area. Such a declaration may serve to protect the natural habitats in and around lakes, while the protected areas can serve as natural breeding and thus conservation areas for animal and bird species. No inland lake areas have as yet been declared.

7.3.3.1.6. Measures protecting fish and other aquatic life

The National Parks Act[140] indirectly prohibits fishing in any water courses within the borders of National Parks, by declaring hunting an offence[141] : while the term "hunt" include catching or any attempt to catch an animal,[142] the term "animal" includes fish.[143] However, fishing is allowed in certain circumstances.[144] Similar measures apply in Natal

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139 Section 21 of the National Parks Act 57 of 1976.

140 Act 57 of 1976.

141 Section 21(1)(c).

142 Section 1 "hunt".

143 The definition of "animal" in s 1 includes any member of the animal kingdom.

144 Regulation 46(4).

parks.[145] In the Cape, fishing in nature reserves is prohibited unless the Department of Nature and Environmental Conservation sets aside areas where it is allowed.[146] In the Orange Free State and in Transvaal, nature conservation ordinances do not specifically prohibit fishing in nature reserves.[147] Outside nature reserves, the different provincial nature conservation ordinances protect fish by limiting inter alia the size of fish being caught,[148] seasons in which angling is allowed[149] and methods of fishing (e.g. prohibitions on types of fishing equipment and the obstructing,[150] snatching, spearing and trapping of fish or the drainage of water, as well as using firearms, explosives or poisons[151]). Control is usually effected through licence systems,[152] the declaration of offences, as well as the encouraging of fishing clubs and the control of angling competitions.[153]

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145 Sections 1 "animal" and 15(1)(c) of the Natal Ordinance 15 of 1974, reg 29 PN 45 of 1958, reg 24, 26 PN 573 of 1958.

146 Regulation 11(h).

147 In fact, fish is excluded from the definition of game. Ss 1(1xii) "wild animal", 7 and 19 of the Tvl Ordinance 12 of 1983; ss 1 "wild animal", 35(3), 36(3) of the OFS Ordinance 8 of 1969.

148 Regulation 28 AN 2030 14 Dec 1983 (Tvl); reg 11(1)(b) AN 184 of 12 Aug 1983 (OFS); s 55(1)(b) of the Cape Ordinance 19 of 1974; ss 61, 62 of proclamation 357 of 1972 (Cape); reg 4 PN 141 of 1974 (Natal).

149 Sections 68, 69 of the Tvl Ordinance; s 25(1) of the OFS Ordinance; s 52 of the Cape Ordinance; s 143(2)(b) of the Natal Ordinance; reg 2(4) PN 141 of 1974 (Natal).

150 Sections 77, 78 of the Tvl Ordinance, s 49 of the Cape Ordinance; s 151(1)(d) of the Natal Ordinance; s 26(2)(d) of the OFS Ordinance.

151 Sections 71, 72, 73, 76 of the Tvl Ordinance; reg 40 AN 2030 of 14 Dec 1983 (Tvl); s 26, 27 of the OFS Ordinance; reg 12 AN 184 of 12 Aug 1983 (OFS); ss 54 and 56 of the Cape Ordinance; ss 59(1),(2), 60, of proclamation 357 of 1972 (Cape); ss151(1)(d),(e), 151(2) of the Natal Ordinance; reg 3, 8 PN 141 of 1974 (Natal).

152 Sections 74, 75, 80, 82 of the Tvl Ordinance; reg 37 AN 2030 of 14 Dec 1983 (Tvl); s 23 of the OFS Ordinance; reg 10 AN 184 of 12 Aug 1983; ss 143(2)(a),(d), 145(1) of the Natal Ordinance, reg 2(2) PN 141 of 1974 (Natal); ss 13, 50, 53, 57, 59 of the Cape Ordinance.

153 Section 142 of the Natal Ordinance; reg 40 AN 2030 of 14 Dec 1983 (Tvl); reg 13 AN 184 of 12 Aug 1983 (OFS).

It is an offence to wilfully injure or disturb the spawn of any fish,[154] or the spawning bed, bank or shallow whereon or wherein such spawn is deposited.[155] It is also an offence to place any obstruction in waters where it is calculated to prevent the free passage of fish.[156]

It is an offence to cultivate, possess, convey, buy, sell, donate or import certain aquatic growths[157] or to place them into waters.[158] It is also an offence to import or release live fish without a permit, except when it is released in the waters where it was caught, immediately after it has been caught.[159] Special measures control the occurrence of fish in water when such fish could be noxious to other fish. When, for example, the Cape director of nature and environmental conservation is of the opinion that any fish found in any inland water is injurious to any other fish, aquatic growth or water, he may order and assist an owner to take specified measures to catch or kill such fish.[160] Similar measures exist in the Transvaal.[161]

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154 Section 25(2)(a) of the OFS Ordinance; s 51 of the Cape Ordinance; s 143(3) of the Natal Ordinance. In the Tvl and OFS this offence can be committed only in the closed season.

155 Section 25(2)(b) of the OFS Ordinance; s 143(3) of the Natal Ordinance; s 51 of the Cape Ordinance.

156 Sections 77, 78 of the Tvl Ordinance; s 49 of the Cape Ordinance; s 151(1)(d) of the Natal Ordinance.

157 Section 85 of the Tvl Ordinance; s 29 of the OFS Ordinance; reg 14 AN 184 of 12 Aug 1983; s 60 of the Cape Ordinance.

158 Section 85 of the Tvl Ordinance; s 50 of the Cape Ordinance (The definition of "aquatic growth" in s 2(v) of the Cape Ordinance refers to any vegetation which grows or is able to grow in inland waters.)

159 Sections 79, 81 of the Tvl Ordinance; s 28 of the OFS Ordinance; s 50 of the Cape Ordinance; s 132 of the Natal Ordinance; reg 9 PN 141 of 1974. The lastmentioned ordinance does not make provision for the exception.

160 Section 19(1), (2) of the Cape Ordinance.

161 Section 101(h)(iii) of the Tvl Ordinance.

No legislation provides for the protection of fish when lawful interference with the course of streams is undertaken. Although the alteration in the course of a stream or the construction of water works may seriously harm fish life, and especially that of migrating fish, the construction of fish ladders, or ensuring a permanent water flow is not obligatory.

The impoundment of water could also be harmful to fish life, in that certain species might need water at specific temperatures or volumes. Since very little is known about the survival requirements of various fish species, an extensive research programme was launched in the Kruger National Park in 1987, to ascertain such needs. It is argued that only when this knowledge is at hand, claims as to legislative protection can be made. Aquatic life other than fish enjoy very little legislative protection.

7.3.3.1.7. The Constitution

In terms of the Constitution of the Republic of South Africa,[162] every person has the right to an environment which is not detrimental to his or her health or well being.[163] This provision will probably protect anybody who is prejudiced as a result of harm to the environmental network due to inadequate water distribution. The practical application of this provision is, however, still to be determined.

7.3.3.1.8. Environment Conservation Act 76 of 1989

The Environment Conservation Act of 1989 makes provision for the declaration of an environment conservation policy,[164] which policy had been declared in 1994.[165] In terms

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[162] Act 200 of 1993.

[163] Section 29.

[164] Section 2(1).

[165] By GN 51 of 21 January 1994 (GG 15428).

of this policy, the maintenance of natural systems and ecological processes and the protection of all species, diverse habitats and land forms is essential for the survival of all life on earth. The State and every person has a responsibility to act as trustee of the natural environment, and to consider all activities which may have an influence on the environment duly and to take all reasonable steps to promote the protection of the environment. Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or under any act, shall exercise such power with a view to promoting the objectives of the conservation policy.

The policy further states that water resources should be used judiciously and measures will be taken to ensure that the available water resources are utilised to the optimum for household, agricultural, forestry, industrial, recreational and nature conservation purposes and for the maintenance of ecosystems.

The practical applicability of these policy measures have not as yet been interpreted or determined.

7.3.3.1.9. The Water Act 54 of 1956

(a) Private water

An owner on whose land private water rises, falls, drains or is led, is entitled to the sole and exclusive right to use and enjoy such water, subject to statutory restrictions on the quantity and quality of the water so to be used.[166]

A right of exclusive use and enjoyment in respect of the water which is so allocated, necessarily implies that an owner has the right to allow the water to remain in the

[166] Vide Chapter IV.I supra.

stream, to flow down naturally for ecobiotic maintenance, to create a marsh or to impound the water, or to abstract it or lead it to another place for the purpose of the maintenance of ecosystems. He may therefore utilize his land with its natural private water resources as a nature conservation area, in order to conserve ecosystems and thus eventually contribute to the protection of the environmental network. His right to use private water for such purposes is however restricted in several ways :

(i) Water which is allowed to flow down to lower land, is subject to rights of reasonable and beneficial use by lower owners, which is in effect a restrictive right placed on the upper owner's right after thirty years. Therefore, the use of water for the maintenance of a riverine system on upper land, may contribute to an owner eventually having his exclusive right of use restricted. For instance, if an owner has private water on his land, of which he uses half for domestic purposes, and allows the other half to flow down in a channel for the preservation of ecosystems, and after thirty years he is succeeded by a new owner, the new owner will not be allowed to impound or abstract the entire stream, if that would be in conflict with thirty years beneficial use made of the water by a lower owner. Alternatively, if the owner needs part of the half which is otherwise allowed to flow down, he will not be allowed to do so to the detriment of lower owners who have vested rights of long user. This means that the application of private water for conservation purposes might, in the long term, deprive an upper owner of his exclusive right of use. As an alternative, he will have to create an artificial ecosystem such as a wetland, and deter water from following a natural course, to prevent him or his successors in title to lose their section 5(1) rights in respect of private water. This being the risk of utilizing private water for ecobiotic requirements, owners are discouraged to use it as such, and encouraged to rather retain the water on the land by impoundment, even if that is by the creation of artificial ecosystems.

(ii) It was submitted supra that the right of exclusive use is hardly more than a statutorily restricted right of beneficial use of a common commodity.[167] If the submission is correct, then an upper owner may not utilize private water for ecobiotic maintenance, unless he can prove that such use is "beneficial". Several courts have already attempted to define the concept of beneficial use, and it is concluded that beneficial use is measured in terms of economical criteria.[168] In the light of the modern recognition of ecobiota as worth conserving, and of its role in the environmental network, it is submitted that economical considerations should no longer be decisive to determine whether water is used beneficially. The use of private water for ecobiotic purposes ought to be regarded as beneficial use, even if such water is utilized by allowing it to flow down in a natural way.

(iii) Section 23 contains direct provisions which protect ecobiota from pollution of water by other users. It is an offence for any person to wilfully or negligently commit any act which could pollute water in such a way as to render it less fit for, inter alia, the propagation of fish or other aquatic life.[169] Negligence is presumed until the contrary is proved.

It was argued supra that capability of common use is the main criterion for the current distinction between public and private water. Those streams which are not subject to competitive use, need little statutory regulation or distribution, and are available for the sole and exclusive use and enjoyment of owners on whose land such water is found. Although such owners are not obliged to share the

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167 Chapter IV.I supra.

168 *Ex parte Pietpotgietersrust* 1914 Krummeck Rep 19; *Minister van Waterwese v Oewereienaars aan die Skeerpoortrivier* TWC 4096/92 (unreported) decided on 17 March 1994. In this lastmentioned case, the court considered "*ekonomiese verantwoordbaarheid*" as the criterion to determine beneficial use.

169 Section 23(1)(a)(ii). Water pollution is also prohibited by the Mountain Catchment Areas Act, and the provincial nature conservation ordinances declare it an offence to deposit or discharge any solid, liquid or gaseous material into any waters, when such material could be injurious to any fish or fish food (s 84 of the Tvl ordinance; s 48(a) of the Cape ordinance; s 152 of the Natal ordinance).

water or make it available for common use or allow used water to return to the stream, and such water can, for that reason, be said to be of little common value, and the misuse thereof ought not to affect others, the legislature nevertheless found it necessary to restrict the pollution thereof for the sake of other users, aquatic life and recreation.

A question as to the intention of the legislature in applying these restrictive measures to private water as well, necessarily arises, especially in the light of the fact that private water is not used in common. First, it can be regarded as proof of the above view that private water is not subject to ownership, because the right to abuse one's property is included in the powers which ownership offers.[170] Secondly, it can be argued that the legislature took into consideration that water resources are integrated and that the pollution of any water source will eventually affect water quality in general. Thirdly, it can be argued that the legislature considered environmental aspects and not human detriment only : the pollution of water can harm sensitive ecobiota in and around water sources, which can eventually harm environmental interrelationships to the detriment of both man and his supporting environmental elements. This interpretation of the legislature's motive for including private water under the anti-pollution provisions, is supported by the express provision in section 23(1)(a)(ii), where fish and other aquatic life are listed as worthy of legal protection.

(iv) In terms of section 6(3), the use of public water is not allowed if the use of private water to which the user is entitled, will make such use of public water wasteful. Viewed from an ecological perspective, the question rises whether the application of water for ecobiotic purposes is wasteful. Because if it is, then the application of private water on one's land for ecobiotic purposes, will render the use of public water wasteful. This will mean that an owner who has private water

[170] Van der Merwe *Sakereg* 173.

on his land, is obliged to apply it, as far as possible, for non-wasteful purposes, so as to negate the necessity to acquire a right of use in respect of the public water. If ecobiota is however regarded as a valid claimant to water, then an owner's decision to apply his private water for ecobiotic use only (eg. to allow it to flow down to maintain riverine species or to maintain a wetland) would not deprive him of his right to public water. The decision as to whether the occurrence of private water on one's land is of such a volume and can be so utilized to render his use of public water wasteful, depends on the water court.[171] It is therefore submitted that an owner will have to prove to the court that his use of the private water does not render his use of public water wasteful. This is a heavy burden, because the section reads as follows :

> "[s]o long as the water court is of the opinion that the supply of water so created is of such volume and can be so utilized by such owner that the use by him of water from a public stream ... would be a wasteful use"

It is therefore submitted that, although the right which an owner has in respect of private water on his land, is a right of sole and exclusive use and enjoyment, this right is restricted as far as its application for ecobiotic purposes is concerned. Unless ecobiota is recognised in the act as a lawful water user sector and ecobiotic water use as a lawful purpose of water utilization, such use of private water cannot be assumed.

(b) Public water

The allocation mechanism of the Water Act in respect of public water, is contained in several provisions which have been discussed supra.[172] A right of use for ecobiotic purposes is nowhere expressly included in the allocation mechanism, although it may be

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[171] Section 6(3).

[172] Chapter V.III supra. Et vide Uys "Natuurbewaring" 375-377.

attempted to acquire such a right in terms of certain provisions which do not expressly *exclude* such protection :

(i) Section 11

The water court may grant permission to any person who has no right in respect of public water, to use a specified quantity of such water for any purpose.[173] It may be submitted that a private owner of land has *locus standi* to apply to a water court for permission to use water on his land for ecobiotic purposes, or that a conservation authority may make such an application on behalf of the ecobiota within a conservation area. Few private owners will however spare the time and cost to make such an application unless they derive economical benefit from the conservation of natural ecosystems, eg. private game ranches. The method of obtaining water rights for ecobiota by way of a court order, is therefore unpractical and of little value where ecobiota has no legal status per se. It is clear that non-human and non-economical water use was not intended by the legislature when this procedure was inserted into the act, and a broad interpretation of the provision that it grants ecobiotic protection, is not necessarily in accordance with the intention of the legislature. A second argument against such a broad interpretation of section 11(2), is that the court has a discretion as to whether it will be in the public interest to grant such permission, while the public interest is an undefined term to which the court may give its own meaning. Thirdly, the court is bound to a minimum restriction of existing rights, while domestic and stock-watering rights may not be restricted for purposes of such permission. In a water-scarce country, these preferential rights reduce the chances of water allocation for other purposes, and it is submitted that unless ecobiota receives a similar protection status as human water needs, this way of obtaining ecobiotic water rights is doubtful.

(ii) Section 62(2I)

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[173] Section 11(2).

Within government water control areas, the minister has to determine the quantity of the consistent flow of a public stream which can be allocated for irrigation purposes, and then allocate irrigation quotas according to a prescribed formula. Any water which is during any period in excess of this allocated quantity due to floods, irregular precipitation, etc., may be allocated by the minister for use within the control area for any purpose, or outside the area for urban and industrial purposes. It is submitted that the minister is empowered to allocate a quantity of this excessive and inconsistent water for ecobiotic purposes within the area, if he deems it to be in the public interest. But once again, he has the discretion to determine what the public interest is, what the priority of preference is, and whether ecobiotic water requirements figure in the preferential order of such allocation. It therefore seems as if there is little more than a mere *spes* that ecobiota will receive a part of this excessive water.[174] Moreover, an excess of water in a stream will depend on weather climatological conditions which vary from year to year. Allocation in terms of this provision is therefore not of a permanent or long-term nature, which is unsatisfactory if conservation of ecosystems is envisaged.

(iii) Section 9A

Strict state control of water use, (which certain authors have described as a system of *dominus fluminis*,[175]) has survived in section 9A of the Water Act. In terms of this provision, the minister may, notwithstanding any other provisions or rights in respect of public water, and whenever "in his opinion" a water shortage exists or is likely to arise, "in his discretion" from time to time by notice in the Gazette control, "as he in the public interest may deem expedient" and subject to the conditions "as he may think fit", the use of water out of any public stream or natural channel for agricultural, urban or industrial

[174] Et vide Chapter V.III supra.

[175] Hall *Origin* 11 et seq. Et vide Chapter III.III supra.

purposes.[176] This section was inserted into the act in 1957,[177] during widespread drought conditions.[178]

The minister may decide whether a current water situation qualifies as a water shortage, or whether such a shortage is likely to arise. He may decide whether, as a result of the shortage, control measures are necessary. He may apply measures and conditions which he thinks fit, and, moreover, decide what the public interest is and whether such measures are in the public interest. In fact, it seems as if the minister's drought management powers are all-encompassing, and have been described as "draconic".[179]

The wording of this subsection lends itself to at least three possible interpretations :

A first interpretation of the subsection is that the list of purposes of use referred to, viz. agricultural, urban and industrial uses, was specified in order to restrict the minister in the kinds of water rights which he may impair. As to what the minister may do after restricting the exercise of these existing rights, it is argued that he may reallocate water rights for any purposes whatsoever as he may think fit in the public interest. He may therefore even allocate water rights to users who have never had rights before.

A second possible interpretation of the subsection is similar to the first as far as the rights which may be affected are concerned, but it is argued that the minister is restricted in his discretion by the words "control, regulate, limit or prohibit". He may therefore not disregard existing water rights or reallocate rights, but he may control the way in which existing water rights are exercised by the holders thereof.

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176 Section 9A(1).

177 By the Water Amendment Act 75 of 1957.

178 Hall *Hall on Water Rights* 68.

179 According to the director of water allocation of the Department of Water Affairs.

In terms of a third possible interpretation, the purposes of use listed in the provision were so specified in order to restrict the minister's discretion as far as the purposes *in favour of which* he may control water use are concerned. He is therefore entitled to regulate *any* lawful water rights, even if they fall outside the scope of agricultural, urban or industrial purposes. He may however only regulate or control or limit or prohibit it in favour of the three purposes mentioned. This means that even if other rights exist, the minister may prohibit the continued exercise thereof, and allocate all the available water for the benefit of the three specified purposes. In terms of this interpretation, agricultural, urban and industrial purposes are regarded as emergency uses, to which all others are subject in times of scarcity.

This seemingly technical dispute as to the correct interpretation of section 9A, could be of importance, especially for users not recognised by the general terms of the Act, and who usually have to rely on the discretion of the water court in the public interest, in order to obtain water rights.[180]

The question whether ecobiotic water requirements can be favoured by this ministerial power, is contentious, and will be illustrated with an example referring to the Sabie river in the eastern Transvaal :

The Sabie river is described as a relatively undisturbed river,[181] which originates on the escarpment in the area of Graskop and Sabie in the Eastern Transvaal, and passes through the self-governing territories of Lebowa, Kangwane, and Gazankulu, as well as through the Kruger National Park (where it is joined by the Sand river) before entering Mozambique and joining the Incomati river. No control area[182] has been declared for

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[180] Section 11(2)(b).

[181] Disturbance is measured in terms of human development (O'Keeffe Rep 131 24 et seq).

[182] In terms of ss 28 and 59 of the Water Act.

this river, and neither has any major impoundment taken place in its course.[183] Some irrigation[184] and forestry[185] is practised on its banks. The river has been relatively free of major disputes in the past, due to its perennial and strong low-flow during winter months.

In terms of the Water Act, a riparian owner is entitled to the reasonable use of his share of the normal flow of a public river.[186] A share is either obtained from someone else, or determined by the water court in terms of the criteria set out in section 52 of the Act. It therefore seems as if no *ex lege* water rights exist, and that a person has to apply for a right to be entitled to use the normal flow of a public stream. This does however not represent the practical situation, where riparian owners readily make use of what they deem to be their reasonable shares, and do not approach the court unless in cases of disputes.[187] Although valid criticism can therefore be raised against the practical application of section 9(1), and although it can be submitted that the use of normal flow without an apportionment is illegal, this argument deserves a separate discussion, and for purposes hereof, the use made of such water in practice, will be deemed to be legal use.[188]

Section 9 restricts the purposes for which riparian owners may use water, to agricultural and urban purposes. To become entitled to use such water for any other purposes, a

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183 Four irrigation districts however exist, as well as several private impoundments in terms of s 9B(1) permits. The only government water work is the Da Gama dam in the White Waters spruit, which serves the White Waters Main Irrigation district with irrigation water.

184 8 445 hectares of irrigated land.

185 72 100 hectares of afforested land.

186 Section 9(1).

187 Hall *Water Rights* 59. Even then, owners prefer to rather refer disputes to the Department of Water Affairs, probably due to financial reasons.

188 Vide Chapter V.III.

water court order has to be obtained.[189] As far as the Sabie river is concerned, no such order has been obtained under the 1956 Act, although a similar court order, authorising the use for the generation of hydro-electric power by the owners of the farm Lisbon,[190] has been issued under the 1912 Irrigation Act. As far as the Kruger National Park is concerned, the use of water in rest camps does not qualify as urban use[191] and neither does ecobiotic use[192] of water qualify as agricultural use.[193] For the Park to therefore obtain water rights from the Sabie river, an application ought to be lodged to the water court in terms of section 11(2)(b)(ii). This has never been done, and the conclusion is that no water rights in respect of the water of the Sabie river currently exist in favour of the Kruger National Park. There is however a servitudal condition in terms of which the upper riparian owners of the farm Lisbon are bound to allow a constant stream of water of 1,98 cumec to pass over their weir, for use within the Park.[194] The validity of this right is however questionable, mainly because rights to use the normal flow of public streams (even rights acquired from others), may be used for agricultural and urban purposes only.[195]

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189 In terms of s 11.

190 Registration Division 297 KU Transvaal.

191 Vide the definition of "use for urban purposes" in s 1 of the Act, where the existence of a local authority is required.

192 Vide Uys "Natural ecosystems" 103 for the meaning of this term.

193 Section 1 "use for agricultural purposes".

194 D 7748/33 dated 1954-12-20. The servitude of storage and abutment was registered in terms of ss 104 and 105 of the 1912 Act.

195 Section 9(1). It was recently submitted by the regional engineer of the Department, in a report on the Sabie river situation, that this servitudal condition is no longer valid : in the relevant clause contained in the servitude, the South African Railways, as well as the rest camps Skukuza and Lower Sabie, were appointed beneficiaries of the condition. But, first, the railways is no longer operative in the Park, and secondly, rest camp use does not qualify as lawful water use in that it does not comply with the definition of "use for urban purposes" (vide n 191 supra). A third argument against the validity of the condition, is the existence of a permit in terms of section 9B(1), in favour of the farm Belfast (Saringwa Estate), an upper riparian owner, which was issued in 1980. In terms of a condition of this permit, a minimum of 1 cumec must "at all times possible" be released past the point of abstraction from the water work. This means that there will not necessarily be 1,98 cumec at the Lisbon weir which can be released to the Park. The inability to comply with the condition

The situation on the banks of the Sabie river is therefore that riparian owners withdraw from the river what they regard to be a reasonable share for urban and agricultural purposes, while other user sectors use what is left of the normal flow. There has never been a scarcity of water which forced the users to request a declaration, apportionment or allocation of rights.

The flow of the Sabie river had dropped to its lowest recorded level during the 1991 drought, and it was feared that this once strong perennial river would come to a standstill during the 1992 winter season. While riparian owners had been negotiating methods to mutually restrict diversion, a request from the warden of the Kruger Park to the director-general of Water Affairs, triggered the section 9A emergency procedure, in terms of which the minister could regulate the exercise of water rights.[196] The question is what the powers of the minister embrace as far as the allocation of water rights to the Kruger Park in terms of section 9A is concerned, and what the effect of such a notice will be on the current water use and existing water rights.

If the first of the three abovementioned interpretations of subsection 9A is correct, then the minister is empowered to control, regulate, limit or prohibit the use of the water in the Sabie river which may legally be used for urban, agricultural and industrial purposes. Since no rights have been obtained in terms of section 11 to use water for other purposes, the minister is empowered to control the use of all the water in the river,

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contained in the servitude, raises further doubt as to the validity thereof. On the other hand, it can be asked whether water released from a dam still qualifies as "public water", a "public stream" or "normal flow" as defined, and, furthermore, whether s 9(1) is at all applicable to the use of such water. It is submitted that the main problem which caused this uncertainty is the haphazard way in which water rights have been issued to riparian farmers, in that existing uses were seldom considered when new rights were granted. This was in its turn due to the usual abundance of water in the area.

196 Notice of s 9A emergency measures was published in the Gazette on 26 June 1992, with effect from 1 July 1992. In terms of this notice, a minimum flow of 0,6 cumec had to be measured at the measuring station at Lower Sabie rest camp in the Kruger Park. It was however reported by the regional director of the Department on 16 March 1992, that there was in fact a surplus of irrigation water and that the only effect of s 9A measures would be to benefit the Kruger National Park, which experienced a shortage.

because all the water is available for the purposes over which he has control. If the Park *had* however obtained ecobiotic water rights by way of a water court order, then the minister would not have been empowered to interfere with the exercise of these rights, because he may only control the use of water for agricultural, urban and industrial purposes. This may be regarded by the affected water users as unfair, especially because the only unimpeachable right then seems to be the one which did not arise *ex lege*, but had to be obtained from the court, which was only entitled to grant it with due consideration of existing rights.

This interpretation further implies that although the minister is restricted to interference with specified rights, he may regulate or limit or prohibit those rights for any purpose which he deems expedient in the public interest. This could mean that the minister may allocate water rights to other user sectors who have not been entitled to water rights previously. In the case of the Sabie river, it could mean that the minister may limit or suspend the water rights of those who use water for agricultural, urban and industrial purposes, and apportion the available water amongst all the lawful and unlawful user sectors along the river, including users for ecobiotic purposes. This is exactly what had happened with the section 9A notice, in terms of which the Kruger Park was entitled to a minimum flow of 0,6 cumec. It can therefore be concluded that this interpretation of the provision is followed by the Department of Water Affairs.[197]

In terms of the second interpretation, the minister is restricted to interference with existing agricultural, urban and industrial rights, but he is not empowered to re-allocate water rights to user sectors other than those from whom he assumed it. This means that his powers merely include the restriction of existing rights, and not the redistribution of rights or the transfer of water rights to other users. In the case of the Sabie river, this will have the effect that the minister may control the rights of agriculture, urban use and

[197] This conclusion is confirmed by the recent draft policy statement concerning water for the natural environment, issued by the Department in January 1992 (*Water for managing the natural environment*).

industry by imposing restrictions such as levies, diversion-turns, maximum diversion limits or prohibitions on use, but he may not allocate water rights to the Kruger National Park, which had not previously possessed legal water rights. This will mean that the recent measures in terms of section 9A were irregular, in that the minister has exceeded his statutorily restricted discretionary powers by granting rights to erstwhile unlawful users.

In terms of the third interpretation, the minister may control or regulate or limit or prohibit the use of water for *all* legal purposes. Therefore, even an ecobiotic right which has been obtained from a water court, can be affected by the control measures contained in the notice. The minister is however restricted in the purposes for which he may institute such emergency measures. He may institute control measures for the benefit of the three specified purposes only. He is thus entitled to prohibit the use of water for ecobiotic purposes and allow all the water which remains in the river during the drought for agricultural, urban and industrial purposes. Applied to the Sabie river, and using an imaginative case where the Park *has* obtained ecobiotic water rights, the minister may prohibit the water use of all of these, and allow only the three specified users to continue to divert water. He is not entitled to allow other users to draw benefit from the restrictions. The Park can therefore be severely restricted in its water rights in favour of agriculture, industrial and urban use. In terms of this interpretation, the minister has exceeded his powers by allocating a right to the Kruger Park to 0,6 cumec of water in the recent section 9A notice.

From the above example, it is clear that the interpretation attached to the terminology of section 9A could significantly affect the water situation. It is therefore necessary to ascertain which of these interpretations is in accordance with the intention of the legislature.

In an attempt to select the most probable interpretation of section 9A(1), two main questions arise. First, were the words

> "the minister may ... control, regulate, limit or prohibit, as he in the public interest may deem expedient ... the ... use ... of water ... for agricultural, urban or industrial purposes or specified agricultural, urban or industrial purposes",

intended to mean that the minister may impair agricultural, urban and industrial water rights only, or that he may impair any water rights, although for the benefit of agriculture, urban use or industry only?

Secondly, do the words "control, regulate, limit or prohibit" include the power to suspend and reallocate water rights, or may the minister restrict each holder in the *exercise* of his right only, without depriving him of his right or transferring a part of such erstwhile right to another user?

If the answer to the second question is that the minister is not entitled to reallocate water rights or transfer rights from one user to another, then the first question lapses. Such a conclusion will moreover negate both the first and third of the three possible interpretations of the subsection as discussed supra. For this reason, the second question will be attended to first.

There are two possible views in an attempt to answer the question of the discretion of the minister :

The terms "control" and "regulate" do not necessarily include any suggestion of existing rights. In terms of such a wide interpretation, these terms imply that even where *no* lawful or apportioned or declared water rights exist, the minister may control the use of the water in the area. Where water rights *do* exist, the minister may suspend all such rights and control, regulate or prohibit the use of water in the area, i.e. he may exercise those powers as if no rights exist. These terms can however also be interpreted in a narrower sense, viz. requiring existing rights which can be so controlled, regulated or prohibited : just as the minister may *control* the use of water by all the interest groups

around a public stream,[198] he may also *control* the exercise of a specific existing water right, eg. by imposing levies or leading turns. Just as he may *regulate* the general water use in an area, he may *regulate* the exercise of a specific existing right, eg. by imposing periods during which the right may be exercised. But as far as the terms "limit" and "prohibit" are concerned, the minister can limit or prohibit specified rights, but he cannot limit or prohibit the use of water unless there are declared existing rights of use. These terms therefore bear a narrow meaning. They are transitive verbs which require specific existing rights which can be so limited or prohibited. The inclusion of the words "limit" and "prohibit" in the list of powers which are vested in the minister, therefore creates the impression that the legislature intended to use the two other terms in their restricted meanings, as well as to bear the same narrow application as "limit" and "prohibit".[199] It can therefore be argued that it was not intended to apply the powers to a situation where no water rights existed or where the minister has uplifted all rights, but that it was intended only to apply to specified rights. His powers of control, regulation, limitation and prohibition can therefore only be exercised in respect of existing rights. The result of such an interpretation, is that the minister is not empowered to disregard or suspend existing rights so as to reallocate water rights, thereby allocating rights to non-riparian owners or owners who previously had no water rights. He may only control each holder of an existing right in the exercise thereof, be it by reduced diversion, increased rates, turns of leading or whatever measures he deems fit. He is thus bound to restrict his actions in terms of section 9A to control the way in which existing rights are exercised.

This narrow interpretation of the powers of the minister, is supported by the list of actions which he may so control or regulate or limit or prohibit, viz. impoundment, storage, abstraction, supply or use. It is submitted that it is not possible to control or

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198 The term "control" was used in this wider meaning in s 6(1) of the Act.

199 Vide Baxter 406-407, who is of the opinion that the courts tend to give a strict interpretation to statutory powers where they infringe upon existing rights and activities. Various factors however influence the courts' decision to accord the powers widely or narrowly, including the wording of the provision, the extent of intended infringement of existing rights as well as the public importance of the activity which is exercised in terms of the right.

regulate or limit or prohibit any of these actions, unless such actions are in fact being exercised by the holders of rights. In terms of section 6(1), the control and use of public water is regulated by the Act. The Act expressly grants rights of impoundment, storage, abstraction, supply or use,[200] and no such rights exist unless in terms of one or the other provision of the Act. For the minister to therefore be able to control these actions, he has to specifically address the holders of such rights. If there are no declared rights, or if the minister suspends all existing rights, then he would not be able to perform his restrictive powers. This view confirms the argument that the minister has no wide powers to suspend and reallocate rights, but merely to control the exercise of existing rights. If this was not the case, then the necessity to enlist restrictable actions would have fallen away.

A second argument in favour of this view, is the general terminology of the subsection. If the legislature intended to vest wide-ranging powers in the minister to suspend all existing rights and then to reallocate water rights to anyone (including erstwhile owners who had no water rights), he probably would not have chosen such restrictive terminology. To "control, regulate, limit or prohibit" the "impounding, storage, abstraction, supply or use" of water is something far removed from the suspension, assumption or reallocation of rights. If the legislature intended to grant to the minister all-embracing powers to reallocate water rights, he would rather have used terms such as suspend, nullify, assume, reapportion, redistribute or reallocate.

A third argument which supports this view, is the specific reference to the purposes of use which can be affected by the notice, viz. agricultural, urban and industrial purposes or specified agricultural, urban or industrial purposes. The use of the term "specified", once again refers to existing rights.[201] If it is argued that the listing of these purposes

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[200] Sections 7, 9, 9B, 10 and 13.

[201] It probably means that the minister is empowered to specify in the notice that only certain existing rights are affected, and that he is thus not obliged to affect *all* agricultural, urban and industrial purposes.

refers to the purposes for which he may reallocate water rights after suspending all existing rights, then the use of the phrase "or specified agricultural, urban and industrial purposes" would make no sense. Because if he reallocates rights of water use, it cannot be for anything else than for purposes which he specifies in the notice. The last phrase is logical only if the listing of these purposes was done to specify what kinds of *existing* rights the minister may impair in the notice.

The conclusion is that the minister is restricted in his powers when acting in terms of section 9A. He is not allowed to disregard existing rights and restructure the position of water rights in an area, but merely to interfere with the *exercise* of specific existing rights. He may therefore not suspend an apportionment of rights, and re-apportion as if there has never been any rights. He has to maintain and respect the existence of rights, but he may restrict the exercise thereof as he in the public interest deems expedient.

If this is the correct interpretation of the powers of the minister, then the first question lapses. If the minister is not entitled to suspend and reallocate water rights, then there is no sense in an argument that he is restricted to certain purposes when he reallocates suspended water rights. This would make the second possible interpretation of the three mentioned earlier, the one closest to the intention of the legislature, viz. that the minister is restricted in his interference with certain existing rights, and that he has no free discretion to suspend those rights and reallocate water rights in the area as he deems fit, but that he may only impose restrictions, however severe, on the way in which existing rights are exercised by the holders thereof.[202]

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[202] Applied to the Sabie river case, the minister is entitled to impair existing agricultural, urban or industrial water rights by controlling, regulating, limiting or prohibiting certain actions, viz. impoundment, storage, abstraction, supply or use of the water to which the holders of the rights are under normal circumstances entitled in terms of their allocated rights. He is however not entitled to suspend all existing rights and reallocate water rights in the catchment, by granting rights of use to riparian or non-riparian owners who have not previously been entitled to water rights. Therefore, the section 9A emergency procedure is no short-cut method to obtain water rights for owners who have never obtained rights by way of the normal procedure, ie. via the water court. Neither is it a method for those who are not entitled to water rights *ex lege*, to obtain water rights instead of using

In terms of an alternative view of the intention of the legislature concerning the discretion of the minister, it can be argued that, in spite of the restrictive terminology of section 9A, the phrase "as he may deem expedient in the public interest" implies a free and wide-ranging discretion vested in the minister to restrict existing rights in favour of *any* purposes which he may deem fit in the public interest, irrespective of whether water users who draw benefit from his discretionary reallocations have previously possessed water rights or not. This means that the terms "control, regulate, limit or prohibit" were not listed to restrict the discretion of the minister, but rather to extend it.

This view is supported by the phrase "notwithstanding any right which any person may have in respect of public water...", which can be read to empower the minister to disregard all existing rights and reallocate water rights. If this is the correct interpretation, it will, if consistently applied, mean that any prospective water user who is not entitled to lawful water use in terms of the Act, may apply for an allocation in terms of section 9A, if he can prove the jurisdictional facts, ie. an existing or threatening water shortage.[203]

Such an interpretation however questions the very reason for granting the discretion of allocating water rights in terms of section 11, to the water court and not to the minister : if the minister practically has a similar discretion in terms of section 9A, his discretion will necessarily deprive the water court of its function, since it is certainly cheaper to

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reserve water which usually, in good years, flow in the stream and is not utilized by holders of water rights.

[203] This is not necessarily difficult to prove : even in times of relatively good rainfall, the Park often experiences a dearth of water in its once strong and perennial rivers, mainly due to over-exploitation up-stream. Applied to the Kruger Park, it means that the Park may approach the minister with regard to all its erstwhile perennial rivers which now experience a water shortage, viz. the Levhuvhu, Shingwedzi, Olifants and Letaba rivers, to exercise his free discretion to allocate emergency water rights in the public interest. The minister may then control, regulate, limit or prohibit existing agricultural, urban and industrial water rights of upper riparian owners, in order to grant to the Park the right to use some of the water.

obtain a ministerial allocation than a water court order.[204] Moreover, this view does not explain the necessity to restrict the minister in his discretion by expressly listing the functions which he may exercise while making a reallocation. Neither does it explain the necessity to list the uses made by holders of existing rights which may be impaired by the minister while reallocating water rights. It is submitted that it was not the intention of the legislature that the emergency measures of section 9A be of benefit to users who do not possess legal water rights. It was only inserted in the Act in order to ensure that up-stream legal users do not, during a period of drought, exhaust public water to the detriment of lower users who also possess quotas or water rights.

It therefore seems as if any benefit which the Park may receive from the section 9A-procedure, ought to be a mere incidental result of the restrictions which the minister may impose on the rights of others, and that the minister is not entitled to make an allocation of water for purposes of ecobiotic use. The onus of obtaining water rights in terms of the provisions of the Act, whether by agreement or in terms of a water court order, therefore rests on each claimant to water, and the minister cannot be expected to produce water rights by exercising his emergency powers, which are rather aimed at conserving water for holders of existing rights than for providing water for those who never had any lawful water rights.

Section 9A was intended to function as an emergency measure to ensure that the holders of water rights in a specified area exercise their rights in such a way that the water is conserved to last through a drought. It was not intended to create legal protection to water users who never had water rights, but who survived on the excess of water in rivers and streams.

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[204] The only practical difference will then be the existence of a water shortage which has to be proved in the case of an application for an allocation in terms of section 9A. But certainly no one who does not experience a water shortage, will approach the water court for allocation either.

The solution in the case of a threatening drought therefore lies in the acquisition of lawful water rights before emergency measures in terms of section 9A are being issued. Such water rights can be obtained only by application to the court in terms of section 11(2)(b). If such rights are obtained, the minister is not empowered to suspend it when control measures are introduced in terms of section 9A. It is however submitted that the system in terms of which water rights are allocated, ought to be revised so as to accommodate the demands of all water sectors, irrespective of the purposes for which water is required. It is difficult to understand why the court has to be convinced that it will be in the public interest to grant ecobiotic water rights, while agricultural water rights are granted irrespective of the public interest, but on the mere submission of the agricultural needs.

It is nevertheless submitted that the drought control measures provided for in the Water Act are insufficient, due to the restrictions imposed on the discretion of the minister to reallocate water in the public interest. In spite of phrases such as "notwithstanding any right any person may have in respect of public water or the use thereof", and "as he in the public interest may deem expedient and in the manner and subject to such conditions as he may think fit", the minister is restricted to specified control measures regarding specified purposes of use and specified actions. All water rights, irrespective of the purposes of use, ought to be subject to emergency state control in times of drought, which control measures ought to be all-encompassing.

(iv) Section 56

The control of any government water work,[205] and the power to regulate or prohibit the abstraction of any water from any area submerged as a result of the construction of such work, vests in the minister.[206] He may supply and distribute the water thereof to any person, on any conditions, to use at any place and for any purpose.[207] Moreover, the rights and privileges of ownership in such a water work vest in the state and are exercised by the minister.[208] Subsections (3), (4) and (5) seem to jointly vest in the minister extensive powers to deal with the water of a government water work as he deems fit. While subsection (4) determines the status of such water works, subsection (5) describes the contents thereof, and subsection (3) gives details of the practical powers which the minister may actually exercise. It is not necessary for the minister to declare a government water control area in order to regulate water use from government water works. He is the *ex lege* owner of the water in such a water work and may deal with it as he deems fit.[209]

It is significant that the minister is not, in terms of this provision, expressly bound to consider the public interest when he exercises his discretion to distribute the water of a government water work. Neither is he bound to consider existing rights. This is the only provision in the act where ownership in respect of water is vested, which increases the extent of the minister's discretion as to the control of the water. Nothing refrains him

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[205] A *government* water work is a water work which is constructed, acquired or maintained by or under the control of the minister, and it includes the water impounded and stored in such a work, while a water work is a construction used for inter alia the impoundment, storage, control or abstraction of water, or the use of water for any purpose, or the conservation of rain water (s 1). It is interesting to note that a water work refers to the structure alone, while, in the case of a *government* water work, reference is also made to the water contained therein.

[206] Section 56(5).

[207] Section 56(3).

[208] Section 56(4).

[209] Et vide Chapter V.II supra.

from allocating water rights in respect of the water within the water work for ecobiotic purposes. It may be submitted that the "release document" which had been issued by the minister in 1983 in respect of the water of the Fanie Bothadam, in terms of which the Kruger National Park became entitled to ad hoc releases of water,[210] was issued in terms of this provision.[211]

Section 56 may be regarded as the only provision in terms of which ecobiota may lawfully receive water allocation. This is however not sufficient, because first, the minister's power to allocate water for this purpose is restricted to the water within government water works, and secondly, the lack of express recognition of ecobiotic water use as a lawful water user sector in terms of the act, casts doubt on the value of the demand of this sector for allocation in terms of this or any other provision. Moreover, government water works are mostly constructed in accordance with proven water requirements, and in the preceding White Paper, the estimated capacity is allocated to recognised user sectors beforehand. This often had the implication that, due to the recency of awareness of the water demand of ecobiota, ecobiotic water requirements had not been considered when this apportionment was approved. The water of many government water works has therefore been apportioned to supply other demands only, and the addition of a new claimant caused practical disputes and necessitated reduction of existing quotas or increased storage. This is what has happened with the Fanie Bothadam : during the planning phase, ecobiotic water needs were not considered, and water quotas were allocated to all the user sectors up to the western boundary of the Kruger Park.[212] This resulted in the desiccation of the stream within the Park. When this was realized, there was no water in the dam in reserve, which could be allocated, and the minister could hardly, without causing extensive reaction and dissatisfaction,

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[210] Vide Chapter II supra.

[211] There are however reasons why the validity of the document can be doubted, which are discussed in Chapter II supra.

[212] Vide the case study of this river Chapter II supra.

reduce quotas which had by then already been utilized. Eventually, the minister granted to the Park a temporary right to make use of the water which had been reserved and allocated for urban development in Pietersburg, until it is required by this town. Nowadays, due to the recognition of ecobiotic water needs, the minister will probably plan the apportionment and the dam capacity with due consideration of ecobiotic demands as an additional user sector.

What is necessary, is express statutory recognition of ecobiota as a lawful water user sector, entitled to inclusion during the apportionment of any water, supported by the public interest as a defined restriction on the otherwise extensive allocation discretion which is vested in the minister.[213]

7.4. CONCLUSION

It seems as if ecobiota enjoys very little protection under the Water Act. The only *spes* which it has for the acquisition of water rights, is with respect to the wide discretion of the minister and the water court to allocate water notwithstanding *ex lege* water rights. There are however several technical and practical problems when refuge is taken to these authorities, including its lack of *locus standi*, the undefinedness of the restricting concept of "public interest", the lack of an intention in the act to recognise it as a lawful user sector, and the possible conflict of interfering with existing rights in order to accommodate a new claimant.

In respect of private water, the situation is not much more favourable, because first, ecobiota cannot be regarded as an owner of land, where private water is stated to belong to owners of land on which it occurs.[214] Secondly, the fact that an owner allows his

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[213] Vide Chapter VI supra.

[214] Section 1 "owner".

private water to run down freely for ecobiotic benefit, will eventually deprive him of his right of sole and exclusive use in respect of the water, owing to prescription.[215]

The *spes* which ecobiota has in respect of water allocation, is submitted to be outdated and can no longer be tolerated or afforded, in the light of the interdependency of environmental elements and the recognition of the importance to conserve this relationship.

A conclusion that the Water Act currently provides insufficient legally enforceable protection for the water requirements of natural ecosystems,[216] can however not be passed over in silence. It was said earlier that a legal system should be a dynamic set of rules, adaptable to changing practices, and if rules fail to meet newly developed norms, they ought to be revised. Revision of the law to accommodate the above-mentioned requirements, can however be harmful to current lawful water users, since the allocation of scarce water to additional users would reduce their shares. Politically this is a hazardous step, and consideration ought also to be given to exploiting existing surface and ground water sources to the maximum yield, to develop unconventional water resources, to re-use effluent, and to obtain water from other countries.[217] These methods of increasing the available exploitable water are, however, not enough, in the light of the simultaneous increase in water demand.

What is needed, is the accommodation of the water requirements of ecobiota in the statutory water allocation system. The indirect ways in which these systems can claim water rights in terms of the abovementioned provisions, are insecure, and guarantee no protection in times of water scarcity. It is therefore submitted that the allocation system of the Water Act ought to be amended, in the first place to define the public interest

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[215] Section 5.

[216] Hiddema 1989.

[217] Department of Water Affairs *Management of Water Resources* 3.23 et seq.

with reference to the interests of ecobiota, and, in the second place, to include these biotic systems as a lawful water user sector, entitled to rights of use in terms of the basic allocation system, as well as to a quota in terms of the discretionary powers of the minister. In the third place, private water ought to be as apportionable as public water, and the right of existence of a distinction between these terms is questionable.[218] Finally, a water management system of integrated basin management, based on environmental principles of sustainable development rather than economic preference, is necessary to effect proper conservation of water and ecobiota.

[218] Rabie "Rivers" 186.

CHAPTER VIII

CONCLUSION

"The drafting of water laws is a subject for legal experts
working in close co-operation with scientists
like hydrologists, hydro-geologists, meteorologists,
economists, administrators, sociologists,
conservationists etc."

F Visser
SAJAS 1989

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CONCLUSION

8.1. SUMMARY

This investigation and critical evaluation of the South African water allocation mechanism, its development end its application, was aimed at proposing fundamentals to an improved system in terms of which ecobiotic water requirements may be included in the variety of water user sectors which enjoy statutory protection.

In the previous chapters, it was concluded that :

(i) There is a sensitive balance between environmental elements in terms of which these elements can be alleged to be interdependent. Each of these, whether human or not, whether it is a living organism or a natural resource, ought to be protected because each has an important function to maintain this balance. The recognition of the interdependence of environmental elements, inter alia implies the recognition of the water needs of all organisms. Therefore the legal system, which controls the apportionment of water, should accommodate protective measures for the water requirements of ecobiota as well. If it does not, it is outdated and ought to be revised.

(ii) In an investigation of the Letaba river in the eastern Transvaal, it was noted that the typical (yet lawful) way in which water had been apportioned, was with preference to irrigation. This had happened to the extent of over-utilization of the river, and to the detriment of natural aquatic processes in terms of which the river system is capable of sustained yield. The failure to recognise ecobiotic water requirements during the allocation of water rights, as well as the lack of an attempt to conserve the riverine systems, have now resulted in a situation where even large-scaled impoundment is no longer an effective measure to supply in the

growing water needs of man and beast dependent on the river. Basin planning, with due regard to environmental considerations, is nowadays regarded as the means to manage a river in order to obtain sustained yield, and it is realized that irrigation may no longer enjoy preferential status during the apportionment of water.

(iii) In Roman law, water belonged to each and all in need of it for survival in reasonable rights of use. This was so because natural law principles, based on justice and equity, did not tolerate apportionment of natural resources to the detriment of any of its users : it had to be always available for common yet reasonable rights of use. However, owing to Justinian's incorrect summary and interpretation of the texts of classical jurists regarding the classification of water in the legal system, a distinction between public and private water was established, which had influenced the water law ever since.

In Roman-Dutch law, the use of water was restricted to *cives*, which excluded not only political foreigners from the right to reasonable rights of use of the rivers, but also non-human users. No longer was the *ius naturale* the basis of the water law.

In South African law, the importance of irrigation had soon necessitated rules to apportion the scarce resource amongst those who demanded it for economic benefit. The lack of a statutory allocation mechanism forced the judicature to develop a system to apportion water. The problem with this method of law-making, is that it was formulated for the benefit only of those who approached the court with disputes - in this case the agricultural sector. When the law was eventually codified, these rules made by the courts were used as the basis, which necessarily resulted in irrigation enjoying preferential statutory water rights. Only recently have voices been raised on behalf of environmental considerations such as integrated basin management and water rights for ecobiota.

The problem is that many water sources are already in a state of over-utilization and applying environmental considerations may deprive the holders of existing lawful water rights of their beneficial use thereof. It is however necessary to revise the allocation system so as to actually increase water availability. One possible way is to reconsider the distinction between public and private water which forms the cornerstone of the water allocation mechanism, and which justifies the exclusion of various water sources from the statutory allocation system. Although cost-intensive solutions such as inter-basin water transfers, weather-modification, desalinization of sea water and even the melting of ice-bergs may be considered, it submitted that basic legal principles such as this historically and practically unsound distinction between public and private water, as well as the sometimes confusing definitions in the act, the difference in legal status of (and rights to) various forms in which water occurs, and often inadequate administrative control, are subjacent to various water apportionment problems. The revision thereof in favour of fair and balanced integrated water management principles, might encourage the creation of an environmentally sound water allocation mechanism.

(iv) The modern concept of justice as a moral value which strives to obtain order and peace and to advance procedural and substantial good and fair in society, was derived from the *ius naturale*. As the basis of legality and the purpose of the law, justice and the public interest serve a similar purpose in the administrative law, ie. to protect society against unfair and arbitrary administrative acts. These concepts are thus closely connected, which means that an administrative act will necessarily comply with the public interest if justice is done, and justice will have been done if the grounds of review have been considered, ie. if the decision was not ultra vires, against the rule of law or against the principles of natural justice. This conclusion implies that water allocation in terms of the statutory ministerial discretion will necessarily be in the public interest if justice was done according to criteria embodied in the grounds of review.

The public interest therefore does not need not be defined, and neither does it need it be inserted into the act to serve as a jurisdictional fact, since it is the very purpose of the law and the reviewable objective of administrative discretion. The acceptance of legality as a measure of control of administrative acts, negates the necessity to statutorily submit all administrative acts to the public interest. If the water law is based on sound principles, ie. that water belongs to all in common, then the insertion of this restrictive concept in water legislation is redundant.

8.2. PROPOSED FUNDAMENTALS

The following fundamentals for an amended water allocation mechanism, which are historically sound and which address the criticism expressed in the foregoing evaluation of the water law, ought to be investigated, to determine the practical feasibility thereof and to eventually make recommendations as to the drafting of new water legislation.

(i) Fresh water is common to each and all in need of it.

* Fresh water implies an integrated body of inland water such as a river, wetland, dam, lake or pool, whether underground or not.

* Fresh water is classified as *res communes* in the law of things.

* No distinction is drawn between forms of water sources as far as legal status is concerned, irrespective of its volume, capability of common use, the purposes of use, its source or origin, the existence of original grants or subdivisions, its nature as running or stagnant, its visibility or not, or whether it occurs in a main stream, tributary or headwaters.

* Fresh water is not subject to ownership, but merely to rights of use *(usus publicus)*.

* A lawful water user sector may include
  - any non-human organism which requires water for survival in its natural habitat
  - any person or community who requires water for urban or domestic purposes
  - any industry, business or farming which requires water for economic survival

  irrespective of whether the user is a riparian owner or not.

(ii) Fresh water is, subject to the provisions of the act, available for reasonable and beneficial use by any user sector with lawful access to a water source or to whom a right of use has been allocated in terms of the act.

* Reasonable use is use in such a way that similar rights of use by other user sectors in respect of the source are fairly considered, which may be tested by a water court.

* Use encompasses both consumptive and non-consumptive utilization.

(iii) The minister is empowered to allocate, restrict, control, apportion or suspend rights of use in respect of any water source amongst water user sectors in the public interest.

* The minister does not need to declare control areas in order to assume control of water utilization.

* Apportionment by the minister suspends existing rights of reasonable and beneficial common use.

* The minister exercises his water allocation discretion in accordance with the public interest, which is embodied in the grounds of review which constitute the principle of legality and are based on justice.

* The minister does not allocate water rights or apportion the water of a water source unless in accordance with or on recommendation of a basin authority (vide 4 infra).

* The minister is empowered to exercise drought management which measures may affect or even suspend existing water rights temporarily. Such measures will impair water rights in a basin as a unit, and not only those of specific users or in specific areas.

* Existing rights may not be impaired by ministerial discretion unless affected parties have been heard.

* The minister may, for purposes of water apportionment or the allocation of rights, distinguish between normal flow and surplus water, where normal flow is water which occurs in a water source with a consistency of 70% during the four driest months of the year.

(iv) State control is exercised by the minister in accordance with basin representation.

* Representatives of all user sectors within a basin form regional basin committees (BC), where water demands are submitted and dealt with as far as it can be done peacefully, or from where basin questions are reported to basin authorities (BA).

* Representatives of regional basin committees form basin authorities on which representatives from relevant state departments are also present.

Basin authorities are responsible for basin data in order to acquire water allocation.

* Basin authorities report to the Minister of Water Affairs who allocates water rights or apportions water within basins to all user sectors which are represented on basin committees.

* Water rights are not allocated according to prescribed statutory formulas but according to practical basin considerations ascertained by the basin authorities.

* Water allocation ought not to depend on preferential purposes of use or on economical considerations only, but also according to the divergent water needs of each user sector, its contribution to the gross national product, its aesthetical value and its influence on the environment, eg. its affect on water quality, natural renewal processes etc.

(v) The water court is a court of appeal and review.

* The water court is not empowered to allocate water rights or apportion water.

* The water court may arbitrate disputes between water users with existing water rights, eg. to determine whether use is reasonable and beneficial.

* The water court may hear appeals from user sectors against ministerial discretion.

* Legality is the criterion according to which administrative acts are judged, and it is embodied in the grounds of review recognised in the

administrative law, such as the ultra vires doctrine, the principles of natural justice, the presumptions of interpretation, the rule of law, justice and equity.

* The water court has the discretion to determine whether an administrative act serves the public interest.

Riviere het gedruis, Here, riviere het gedruis,
riviere het gedreun,
maar hoog bo die geraas van baie waters,
hoog bo die golwe van die see
troon die Here in sy koninklike mag

Psalm 93

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