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**Changing Property Rights in Fresh
Water in South Africa**

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Changing Property Rights in Fresh Water in South Africa

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Abstract

Since becoming a constitutional democracy in 1994, South African water law has been radically legislatively changed to vest the rights to all fresh water in the state. The motivation for the legislative change was to promote access to clean potable water, to protect the environment and to comply with international obligations. This aligns with international water law trends, but in South Africa the legislative changes have impacted on vested private property rights, which were historically based on Roman-Dutch law principles in that the owner of the land owned everything above and below the land, including, with some exceptions, the water. The delayed and phased implementation of the application of the *National Water Act 36 of 1998* is now creating a constitutional tension which still has to be tested in the Constitutional Court. Adding to this tension is a proposed review of the *National Water Act 36 of 1998*, to merge it with the Water Services Act, to provide for water tariffs to be set annually, a 'use it or lose it' policy for large sale water users and an end to water use trading among water users. I will highlight and discuss these areas of tension and argue that rather than transferring the ownership of natural resources to the state, a better and more legally cohesive result could have been achieved by revising the philosophy and parameters of the concept of ownership, particularly ownership of natural resources, to link such natural resource ownership to responsibilities. The South African experience in this has international relevance because natural resources transcend national borders and protection, exploitation and regulation of natural resources is a growing international problem.

Keywords: Water rights/ownership of fresh water/expropriation of fresh water use rights

Introduction

Since becoming a constitutional democracy in 1994, South African water law has been radically legislatively changed to vest ownership of all water in the state. The motivation for the legislative change was to promote access to clean, potable water, to protect the environment and to comply with international obligations.

This aligns with international water law trends, but in South Africa the legislative changes have impacted on vested private property rights, which were historically based on colonial Roman Dutch law principles. The Roman Dutch approach as applied in South Africa at that time was that the owner of the land owned everything above and below the land, including the water. The exception to the privately owned water was water flowing in large rivers, called public water, to which riparian land owners had use rights and quotas.

Since the *Constitution of the Republic of South Africa Act 108 of 1996* explicitly protects property rights, the delayed and phased implementation of the 1998 water legislation is now creating a constitutional tension, which is still to be tested in our Constitutional Court.

In this paper I will highlight and discuss these areas of tension and argue that a better and more legally cohesive result could have been achieved by revisiting the philosophy and parameters of the concept of ownership, particularly ownership of natural resources, to link such natural resource ownership to responsibilities, rather than transferring ownership of the natural resource to the state.

The Problem - Rights to Fresh Water

In 1994 when a democratically elected government came into power in South Africa 87% of the land, including everything above and below it in terms of colonially based Roman Dutch law, was owned by the white minority either in private ownership or by the white controlled state (Walker & Dubb, 2013:1; Cronje, 2012:1). White people constituted only 10% of the total population of South Africa, reflecting a very unequal distribution of resources, and in particular natural resources with 40% of black people not having access to fresh piped water on their residential sites (Budlender, 2002:1).

Traditionally there are three ways of dealing with property rights in resources internationally:

- place natural resources in common property with open access. This allows all citizens equal unrestricted access. However, experience has shown that such open access often leads to what is known as 'the tragedy of the commons',¹ with users over-

¹The phrase was first coined by the economist Garrett Hardin to describe how herdsmen will rationally and deliberately increase their use of common pasture, because they will receive all

exploiting the resource, since it is not in the interest of any one individual user to conserve or develop the resource.

- Place the natural resource in private ownership, where the private owner has the right to exclude others and then has an interest in developing and conserving the resource for sustainable use and exploitation. However the downside to private ownership is that the private property owner in principle has the right to use, abuse and even destroy the resource (Honore, 1961:107; Christman, 1994:19). It may also lead to unfettered acquisition and great disparity, as in the case of South Africa. This is then usually addressed by state intervention in the form of state regulation and restrictions to a greater or lesser extent, depending on the nature of the private property, for instance pollution legislation. Up to 1994 this was the trend in South African water law – public water in large rivers for common regulated use, private water rights with state regulation.
- Place the natural resource directly under state control or ownership in order to achieve conservation, sustainable use and equitable access. This may however, have expropriation and compensation implications and historically states have not been very successful in conserving and protecting resources. The prime example being marine resources.

The post-1994 democratically elected South African government opted to move fresh water from the "private property with state regulation" model to 'under state control and ownership' model with the *National Water Act 36 of 1998*.

Changes made to Existing Private Water Rights by the *National Water Act 36 of 1998*

- The second item of the preamble to the Act states that 'water is a natural resource that belongs to all the people'. This ignores the distinction between public and private water, and the property rights previously vested in private water.
- Section 3 refers to the state having 'Public trusteeship of nation's water resources', again ignoring the distinction between public and private water and the related property rights.
- Sections 8 and 9 deals with the establishment of a catchment management strategy, which must as a priority provide for and 'take into account ...the requirements of the reserve¹ and, where

the benefits of such use, but any negative impact will be shared, eventually resulting in degradation and overgrazing. See also Demetz (1967:347).

¹The reserve is defined in s 1 of the Act as 'the quantity and quality of water required –

applicable international obligations' before authorised use rights are made to existing or other users. In effect thus, existing users of private water may be deprived of that use to provide for the reserve.

- The Act provides for the classification of water and section 13(3)(g) for the 'regulation or prohibition of instream or land-based activities which may affect the quantity of water in or quality of the water resource', thereby controlling land based activities related to water.
- The Act provides for a reserve of the water resource to be maintained and for which no authorised use rights may be allocated.
- With the exceptions of very limited domestic use, a person may only use water (section 21) if licensed by the Act or if the license has been dispensed with by the responsible authority, if such use has been declared to be an 'existing lawful use' (section 32) or a general authorisation is granted (section 39) in terms of the Act.
- Lawful water users may *inter alia* not waste water and seepage or run-off water must be returned to the water resource (section 22(2)).
- The state may charge for water use (section 56).
- Section 22(6) provides that where a license application has been unsuccessful and has resulted 'in severe prejudice to the economic viability of the undertaking' compensation may be claimed. Thus compensation is only envisaged for severe prejudice and for such a compensation claim the reserve or an allocation made to rectify an over-allocation of water use from the resource, or to rectify an unfair or disproportionate water use, must be disregarded (section 22(7)).
- Licenses for underground water use may be granted without the landowners consent 'if there is good reason to do so' (section 24).
- When issuing licenses or general authorisations all relevant factors must be considered (section 27), including existing lawful use, the need to redress the results of past racial and gender discrimination, efficient and beneficial use of water in the public interest, socio-economic impact, any catchment management strategy applicable to that water resource, the likely effect of the water use on the resource and other water users, the class and resource quality objectives and investments made and to be made by the prospective water user.

(a) to satisfy basic human needs ... and

(b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource;'

- Licenses may be issued for a maximum of 40 years and are reviewable every five years (section 28).
- Existing users must apply within a limited time after receiving notification, to have their continued use verified, failing which they may no longer use the water (section 35).
- Once a license is issued it 'replaces any existing lawful water use entitlement of that person'. Existing rights are thus taken away not on promulgation or implementation of the Act, but by administrative decision.
- The pricing strategy for water use charges (section 56) is based on policy considerations relating to water use, water users, geographical area, socio-economic aspects, physical and demographical attributes.
- Water use charges if unpaid are a charge against the land recoverable from the current owner and the person actually responsible for the charges (section 60).

From the above it is clear that the Act infringed on pre-existing rights to water in some or all of the above ways, specifically by explicitly vesting all water in the state, requiring all existing users exceeding basic domestic use to apply for temporary licences, which could be refused or reduced and introducing payment for water use.

South African Constitutional Protection of Property Rights

The *Constitution of the Republic of South Africa Act 108 of 1996* explicitly protects private property rights as follows:

25. (1) *No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.*
- (2) *Property may be expropriated only in terms of a law of general application-*
 - (a) *for a public purpose in the public interest; and*
 - (b) *subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by court.*
- (3) *The amount of compensation and the time and manner of payment must be just and equitable ...*
- (8) *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with section 36(1).*

Section 36(1) deals with the limitations to the South African *Bill of Rights* contained in the Constitution and reads:

36 (1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- *the nature of the right;*
- *the importance of the purpose of the limitation;*
- *the nature and extent of the limitation;*
- *the relationship between the limitation and its purpose; and*
- *less restrictive means to achieve the purpose.*

Were the Pre-1998 water Rights Constitutionally Protected Property?

Whether the pre-1998 South African water rights were ownership rights or rights of use, is controversial (Van der Walt & Pienaar, 1997:12; Vos, 1978:10; Lyster & Lazarus, 1995:445; Klug, 1997:7). However, since constitutionally protected property rights are a much wider and more inclusive concept than private property rights,¹ the question of whether water rights were ownership or use rights is moot, since mere water use rights also amount to constitutionally protected property.

Due to the delayed and phased implementation of the water legislation, it has not been tested in South Africa's Constitutional Court. However, a decision either way by the Constitutional Court will be perilous. If the court finds that property rights were not expropriated by the *National Water Act 36 of 1998* and are not subject to compensation, it means that property rights enjoy little or no protection in South Africa, despite the constitutional provisions. Following on the recent case of *Agri South Africa v Minister for Minerals and Energy* 2013(4) SA 1 CC par 68 where it was held that the Mineral and Petroleum Resources and Development Act 28 of 2002 brought about a compulsory deprivation and not an expropriation of the landowners old order mineral rights. If the court decides it was an expropriation that must be compensated, that would have grave financial implications for the state, particularly since such a decision will impact on other resources, such as minerals, as well.

¹The general consensus among South African legal academics is that should private property not equate to constitutional property, the latter will be interpreted widely in line with the international trend, 'extending the traditional civil law concept of property appreciably' (Van Der Walt & Pienaar (1997:421) and Eliakim (1998:42) . A contrary view is expressed by Lazarus & Curry (1996:120). '.. however generous an interpretation of property is mandated by the Constitution, it is uncontroversial that there are limits to the rights in property.' This approach however confuses the question of what is property, with whether the exercise of the property rights/competencies should be limited.

In a fraught situation like this one needs to go back to the basic legal theory and philosophy underlying property rights and the protection of property rights in order to find a workable theoretical framework for resolving the tensions.

Philosophical and Theoretical Justifications for Property

Property as a Natural Right, a Reward for Labour or Labour and Desert

A common justification of private property is that it is a natural right based on the independence and dignity of individuals. This natural right justification of property links with Locke's labour theory, reproduced by Laslett (1964: par 138) to the effect that each person has a property right in him/herself and consequently the productive labour expended by a person on a thing subjects that thing to private property. The limitations are that the property acquired by labour should not exceed that which can be used by the individual before it spoils and there must be enough of a similar quality left in common for others.

This theory was revived and extended by Nozick (1974:175) omitting the 'fruits of labour' emphasis and with the proviso that it leaves enough goods of a similar quality for others, alternatively, others may not be in a worse position under a system of private ownership than they were before the appropriation¹ even if all the objects are appropriated. A key aspect of these justifications is that property serves to protect the individual from arbitrary interference by the state, except where such state interference is necessary to protect the very institution of private property.

Many criticisms may be levelled at the property as a natural right theory² which are not relevant for this topic. For our purposes this justification is not helpful:

- It is based on what individuals have done (labour) to acquire ownership, but does not address how to resolve inequality of property amongst individuals, who in principle should be equal, but are not due to the power relations of property.
- It does not deal with the contemporary, absolute and extensive ownership or the unfettered acquisition of property.

¹Although one could argue that third parties are automatically worse off in the sense that they are no longer able to appropriate that particular item, Nozick does not regard this as a deterrent to appropriation.

²The link between property and the ethical development of a person is obscure; logically 'property as a natural right' means that everyone *must* have property and are prohibited from alienating property to less than the determined minimum; The special emphasis on labour leads to the conclusion that property is a result of labour, not a natural right; The principle of owning one's body cannot be consistently extended to things. One's body is scarce but ownable, but other fruits of labour may only be appropriated if a similar quantity left for others. The limitation of 'leaving enough for others' seems irrational. If there is enough in common for everyone, there is no incentive to acquire property rights at all. If consistently applied parents would own their children or a surgeon his/her patient.

- It ignores the power relations of resource ownership and social context of property. If there were just one person, then having a property right in the fruit of his or her labour would be irrelevant in the absence of other persons obliged to respect that right.
- It therefore lacks a moral and social aspect and its limitations (prohibition on spoilage and leaving a similar quantity for others) are not practical in contemporary society.
- It specifically resists state redress or interference, since property is regarded as a buffer against state interference.

Munzer (1994:256) revived the Lockean approach, but substituted the labour criteria with a 'labour and desert' criteria. In essence, where a person performs some labour that society regards as worthy of compensation, he or she is entitled to and deserves property as recompense. This version moves away from the natural rights emphasis to a more multifaceted concept and importantly, recognises a decisive societal role, being the public dimension of private property. Munzer's limitations include a prohibition on waste, spoilage or accumulation beyond one's need and the effect of the appropriation on others must be defensible. Under Munzer's justification even vested rights may be impacted on moral considerations.

Munzer's 'labour and desert' justification addresses some of the criticisms levelled against the property as a natural right and property as labour justifications. It complements liberal philosophy as a limit to state power in its emphasis of individual liberty, and includes a social context (i.e. the limitation of 'no waste or spoilage' or excessive accumulation of property). It provides for property redistribution on moral grounds. From the perspective of finding a theoretical framework for resource ownership it may be helpful.

Property as a Means of Achieving Liberty

The rationale with this justification is that ownership of assets provides financial independence, which facilitates general independence. Property ownership curbs recklessness and encourages caution and forward planning, provided the future result of that planning is predictable prosperity. In terms of this property justification any redistribution of property is a violation of individual freedom.

Although the justification of 'property as liberty' has merit and support as a universal ideal with intuitive and historical resonance, for our theoretical model the theory is problematic. It may lead to great wealth, power and in fact *liberty* disparities. Once extreme poverty by the majority of the members of society results in loss of liberty, the 'property as liberty' theory fails. The property as liberty justification does not delineate the extent of property that is required to achieve and ensure liberty. That must be objectively delineated, otherwise the 'property as liberty' justification can be used to justify whatever version of liberty/property rights the state chooses and provided these (limited or

extensive) property rights are not interfered with, then 'liberty' is secured.¹ A key element of this justification is the criteria for and extent of property holding that is determined to be necessary for liberty and in this respect it may be a helpful theoretical basis for water or resources as property.

Property Rights Satisfy the Principles of Utility and Efficiency

This property justification holds that property rights increase human welfare by reducing conflict relating to resource use and maximises output from the resource. It is linked to the further justification that all people benefit from security and stability of possession and expectations, which in turn leads to property holding (Hume, 1960). Happiness according to Bentham (1931:96) consists of subsistence, abundance, equality and, most importantly, security. Property rights and security of expectation fulfil the above 'happiness' criteria and thus also the efficiency and utility justification criteria. From this flows that state interference with property rights negatively impacts on security of expectation and is contrary to the principles of utility and efficiency. This justification necessarily leads to protection of the *status quo*, regardless of inequality or moral goals.² Furthermore, the security of expectation does not necessarily justify private property or prohibit restrictions on private property. Other forms of property (or restricted property rights) can also fulfil the security of expectation requirement of the utility theory. In addition many choices could increase human happiness, and some persons may, contrary to expectation, choose for instance justice and welfare above security of expectation. For our purpose then again this property theory lacks an ethical, moral and social aspect, and in particular does not address property redistribution.

The Economic Justification of Property Rights

The economic model is based on the principle that the individual is rational and self-interested and seeks to maximise his/her preferences. This links to the utility and efficiency approach above and underlies much of the property rights in natural resources. The basic approach is that protection and conservation of the natural environment can best be achieved through attributing economic value to resources, and private property rights are the best way to attribute such economic value. This in turn leads to the most efficient allocation and productive exploitation of such resources (Demetz, 1967:347). Common property, by contrast according to the economic justification, leads to neglect or over exploitation of the resource ('the tragedy of the commons'). Thus, giving a certain person the whole bundle of rights of full liberal ownership over a certain asset is always more efficient and maximises productive output of that asset for the benefit of society as a whole, provided there are free competitive markets and private property.

¹Interesting question is whether having achieved this minimum of property, would subjects be prohibited from disposing of that property, and if yes, are they then still liberated?

²If the majority of the citizens are happy to disenfranchise the minority then under this theory it increases happiness and is seemingly acceptable.

Again there are a number of criticisms of the economic approach,¹ but for this article the most pertinent are that the economic justification does not measure what is morally worthwhile² and it assumes that:

- Economic value and preference maximization are desirable goals
- Everything (including ethical, social and political issues) can be valued in monetary terms, and ranked
- Concepts of monetary value are the only material factors, so all other values must be reduced to monetary value.

If any of these assumptions are incorrect, the results will be distorted and then the economic model cannot serve as justification for private property. For our purposes this model is not helpful because it lacks an ethical, moral and social aspect, and in particular does not address property redistribution to alleviate inequality.

Property as Propriety

According to this approach the justification for property is that it bestows on each person what is proper or appropriate.

Rose (1994:59) explains 'Property in this world "properly" consisted in whatever resources one needed to do one's part in keeping good order; and the normal understanding of order was indeed hierarchy – in the family, in the immediate community, in the larger society and commonwealth, in the natural world, and in the relation between natural and spiritual worlds.'

Historically property has always played an important role in the hierarchical governance and structuring of society and families, while providing the individual with autonomy to resist state power. This is particularly true of property in the form of land since it was a means to survival.

¹It assumes people always behave rationally to maximise their preferences, but many choices are made out of habit. Sometimes individuals will not choose a rational beneficial or efficient option, if it is manifestly unfair, ecologically damaging or immoral. Individuals may choose an option enhancing love, dignity and respect for themselves, rather than increasing wealth.

Some situations involve unpredictable outcomes and thus do not lend themselves to a rational, maximization of preference choice. Some options that initially seem beneficial, may turn out not to be so. Some individuals lack the capacity to make fully rational choices. Not all trade is based on self-interest, there is mutually beneficial trade as well. The notional 'free market' is unrealistic and impractical. Economies are mixed and imperfect, with inevitable obstacles to entry and egress, government regulation and monopolies. The economic approach presumes that there is a correlation between private property and efficiency so that entitlements will flow to their highest value use. The economic approach presumes that liberal, private property rights necessarily motivate the holder to trade those rights. These presumptions may not be correct. The economic approach presumes that private property already exists, and thus it does not serve as a justification for private property. If one thinks away private property completely in 'a tragedy of the commons' scenario, then there would be no overgrazing or over cultivation, because there would be no incentive to overgraze or over cultivate.

²If taken to a logical conclusion, less valued resources could be replaced with higher valued resources, impacting on biodiversity without moral compunction.

If the function of property is to promote social order, then property as propriety makes sense. However, as with 'property as liberty' above it necessarily involves a subjective assessment of what form and amount of property is proper for a person. In doing this, the property as propriety regiments how society should be ordered and the allocation of resources. It tends then to reinforce an existing property regime, but may impact on existing individual rights and freedoms to achieve redress or redistribution.

In short then 'property as propriety' has a socially ordering' aspect, a 'keep the state at bay' autonomy aspect, a moral aspirational aspect and a redistributive aspect that can perhaps serve as a theoretical basis in three ways:

- Property as propriety justifies such property as is necessary to survive both for present and future generations. . Lack of subsistence rights to shelter, food, clothing and a sound environment will run counter to good order and lead to instability and disorder. While a legal system cannot condone a person taking property of another for as much as the taker needs to survive, this principle can be used as a basis for a redistributive welfare state (Waldron 1990:283) or to ensure the essentials for continued human survival, both present and future generations. It is thus under this principle that conservation of the environment and natural resources should be legislated. By itself however this justification is very limited.
- Property as propriety may also be used to justify such property as is necessary to for a person to function in a social context, to promote independence and autonomy, hereafter referred to as individual autonomy rights. In this context, property as propriety is very close to the property is liberty justification, but limited by the promotion of good order in society. Not all autonomous desires or goals are reconcilable with society and propriety. For instance, vast accumulation of wealth or exclusive control over natural resources that deprives others may run counter to good order. According to this property justification domestic laws should determine who can own what goods and the extent of such property rights in order to attain maximum efficiency, physical and political independence from state power. Under this principle steps may be taken to prevent excessive acquisition of property, or misuse of natural resources to such an extent that it undermines the very justification of property rights and leads to social disorder.
- What Barnes (2009:54) terms as object propriety relates to those things that inherently affect society's ability to function, for instance land, water, oceans, airspace and means of production. The use of these things must then be regulated to promote social order. Private ownership of these resources would carry with it obligations e.g. productive use, supply of products to market free

from harmful pesticides. For these resources then one has private property with entitlement but also responsibilities, enforced either by the state or by use conditions enforceable by individuals.

Conclusion

In the South African context we had a pre-1994 unequal race based land distribution, with resultant unequal access to natural resources, which the post-1994 democratically elected government addressed by *inter alia* promulgating legislation that vested all right to water in the state, for the benefit of the people. This impacted on existing property rights, which were protected in the South African constitution, resulting in a constitutional tension still to be tested in the South African constitutional court.

My research of property theory and justifications has however shown that the redress wrought by the National Water Act 36 of 1998 can be theoretically justified in terms of the property as propriety approach in that:

- such water as is necessary for human survival, both present and future is allocated and takes precedence over all other water use
- water allocation over and above basic survival and domestic use, is provided for under a system of licensing and general allocations, against payment of certain fees and with limitations. These limited 'use rights' as a form of property could serve as individual autonomy rights, enabling the individual to function in society, acquire financial autonomy and to resist state power
- the Act provides for the state to regulate the fresh water, as a resource inherently affecting society's ability to function, to promote social order and as such complies with the property as propriety justification.

However, the same result could have been achieved by less restrictive means (as referred to in section 36 (1) of the South African Constitution). The water resource could have been left in private ownership, but in line with the property as propriety justification, such private ownership should be made subject to:

- subsistence and survival use rights of other citizens
- and inherently include obligations for the productive use, maintenance and conservation of the resource free from harmful pesticides or pollutants. Since water is an object propriety as referred to by Barnes (2009:54), being a resource that must be regulated to maintain social order, intense state regulation would be justified.

In this way private property could have remained intact, but also responsibilities, enforced either by the state or by use conditions enforceable by individuals. In this manner the deprivation or expropriation of private property and the resultant constitutional tension and uncertainty could have been avoided.

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