The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the "public space"

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Abstract: The right to have access to sufficient water is enshrined in section 27(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution). This right, in combination with section 24 of the Constitution (the right to an environment that is not harmful to health or well-being), resulted in the adoption of the National Water Act 36 of 1998 (NWA) which fundamentally changed the foundations of the country's water law system. The preamble to the NWA states that water is 'a scarce natural resource that belongs to all people'. The Act broke new ground by introducing the concept of public trusteeship into the South African water law. Section 3 of the NWA stipulates that water falls under the centralised control of the public trustee to, inter alia, improve the allocation, management, use, conservation and equality of access to this scarce resource. Such statutory transformation has led some scholars to argue that elements of the Anglo-American public trust doctrine has, through the concept of public trusteeship, been introduced into South African water law. This Anglo-American public trust doctrine speaks to the concepts of public ownership, the public's rights in natural resources, the state's fiduciary responsibilities, as well as the protection of the public interest in particular natural resources. There are, however, 'inherent shortcomings' in the Anglo-American public trust doctrine as a potential model for trusteeship in the South African water regulatory framework. This article draws on a 'functional equivalent' of the Anglo-American public trust doctrine, namely the German property law concept of őffentliche Sache, to inform the South African concept of public trusteeship, and to identify and analyse a number of potential legal implications of the concept for South Africa's water in the "public space".

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A. Introduction

Water is an essential,[1] but alarmingly scarce resource.[2] According to a report on sanitation and drinking water by the World Health Organisation and UNICEF in 2013,[3] an estimated 768 million people do not have access to sufficient and safe water for domestic use. Water scarcity had been growing in many regions.[4] This is particularly true for countries in the southern African region such as South Africa, where the demand for water is often in excess of the resource's physical availability.[5] Although the cities in South Africa have, for now, averted its 'day zero' fears,[6] the country's overall demand for water is on the increase[7] due to factors such as drought conditions,[8] water pollution,[9] climate change,[10] and population and industry growth.[11] South Africa's political history, characterised by a reality of inequitable access to water, challenges water resources regulation in fairly unique ways.[12]

1 Water is essential for people, plants and animals to survive on earth. Water is further vital for inter alia health, religious purposes, as well as responsible socio-economic growth. *Damon Barrett / Vinodh Jaichand*, The right to water, privatised water and access to justice: tackling United Kingdom water companies' practices in developing countries, South African Journal of Human Rights (2007), p. 561; *Ben Crow / Farhana Sultana*, Gender, class and access to water: three cases in a poor and crowded delta, Society & Natural Resources: An International Journal 15(8) (2002), p. 709; *Philippe Cullet*, Water law, poverty, and development water reforms in India, Oxford 2009, p. 8–17; *David Seckler / Randolph Barker / Upali Amarasinghe*, Water scarcity in the twenty-first century, International Journal of Water Resources Development 15 (1999), p. 15; *Hubert Thompson*, Water law a practical approach to resource management & the provision of services, Cape Town 2006, p. 3.

2 Thompson, note 1, p. 1; United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 15, The right to water, Articles 11 & 12 of the Covenant, 20 January 2003.

3 *World Health Organisation & UNICEF,* Progress on sanitation and drinking-water, http://apps.who.int/iris/bitstream/10665/81245/1/9789241505390_eng.pdf (last accessed 29 August 2018).

4 *Karen Bakker,* The 'Commons' Versus the 'Commodity': Alter-globalization, Anti-privatization and the Human Right to Water in the Global South, Antipode 39(3) (2007), p. 1.

5 *Sheila Barradas / David Shepherd / Ria Theron* (eds), A review of South Africa's water sector, Creamer Media's Water Report 2016, p. 14.

6 The City of Cape Town has introduced the concept of 'Day Zero' to manage water consumption. The concept literally means the day when most of the city's taps would be switched off.

7 In the light hereof, it is envisaged that the number of people directly affected by problems related to access to sufficient water is expected to increase to five billion by the year 2025. *Vanessa Rüegger*, Water distribution in the public interest and the human right to water: Swiss, South African and international law compared, Law, Environment and Development Journal 10(1) (2014), p. 3.

8 *Barrada /, Shepherd / Theron*, note 5, p. 14.

9 Ibid., p. 7.

10 Ibid., p. 10–11.

11 Ibid., p. 7.

12 White Paper on a National Water Policy for South Africa (1997); *Philip Woodhouse,* Reforming Land and Water Rights in South Africa, Development and Change 43 (2012), p. 1.

Twenty years ago, well aware of a growing water crisis, the South African legislature promulgated the National Water Act 36 of 1998 (NWA).[13] The NWA abolished the earlier differentiation between private and public water;[14] and rejected the direct link that existed between land ownership and access to the resource.[15] The new paradigm of the NWA fundamentally transformed the South African water regulatory regime by effectively nasionalising water.[16] The preamble of the NWA, for example, states that water is 'a scarce natural resource that belongs to all people'. It is herein argued that, in order to facilitate the notion that water belongs to all people, the legislature introduced the concept of public trusteeship. Section 3 of the NWA stipulates that the country's water falls under the centralised control of the public trustee to, *inter alia*, improve the allocation, management, use, conservation and equality of access to this scarce resource.

Upon its introduction, the NWA was celebrated as one of the most progressive environmental Acts worldwide;[17] visionary for its introduction of the concept of public trusteeship. The implications of which have been extensively researched in the past two decades. Existing scholarship shows, to varying degrees, that the concept of public trusteeship places all of South Africa's water resources under the control of the National Government by virtue of a statutory duty to protect and manage the country's water, for the benefit of all persons.[18] The environmental and human rights lawyer may justifiably hail this development in South Africa's water law as indeed much has been achieved in interpreting and progressively realising the right to have access to sufficient water since the introduction of the concept of public trusteeship.[19] The property lawyer, on the other hand, is for a number of reasons left perplexed by the concept and perceived legal workings of public trusteeship.

13 It is trite that, in terms of the previous dispensation and its prevailing riparian rights doctrine, access to land and therefore water resources attached to land, were restricted and available only to the white minority of the country; See the White Paper, note 12.

14 White Paper, note 12, par. 5.1.1.

15 *Elmarie van der Schyff / Germarié Viljoen,* Water and the Public Trust Doctrine – A South African Perspective, The Journal for Transdisciplinary Research in Southern Africa, 2008*,* p. 393–340.

16 Woodhouse, note 12, p. 848.

17 *Barbara Schreiner*, Viewpoint – Why Has the South African National Water Act Been so Difficult to Implement?, Water Alternatives 6(2) (2013), p.1.

18 See, for example, *Elmarie van der Schyff,* Unpacking the public trust doctrine: a journey into foreign territory, Potchefstroom Electronic Law Journal 13(5) (2010), p. 122–189; *Elmarie van der Schyff,* Stewardship doctrines of public trust: has the eagle of public trust landed on South African soil?, The South African Law Journal 130 (2013), p. 369–389; *Van der Schyff & Viljoen*, note 15, p. 393–340; *Germarié Viljoen,* Water as Public Property: A Parallel Evaluation of South African and German Law, LLD Thesis, North West University (2016), p. 1–369; *Cheri-Leigh Young,* Public Trusteeship and Water Management: Developing the South African concept of public trusteeship to improve management of water resources in the context of South African water law, PhD Thesis, University of Cape Town (2014), p 1–397.

19 See for example *Federation for Sustainable Environment and Others v Minister of Water Affairs* 2012 (ZAGPPHC); *Mazibuko v The City of Johannesburg and Others* 2010 3 BCLR 239 (CC); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W).

Questions include whether the NWA, through the concept of public trusteeship merely reaffirms the public nature of water and legal principles that originally applied to the nation's water resources under the African customary and Dutch rule; whether the public trust fiduciary responsibility alters the nature of ownership; to what extent the concept introduced any institutional regime change; and whether the notion of *res publicae* has been statutorily introduced through the concept of public trusteeship. It also remains unclear what public trusteeship suggests for water within the 'public space'. These are pertinent questions in the light of South Africa's water crisis and pressures such as climate change. It is therefore necessary to question whether the statutory introduction of the concept of public trusteeship brought about a new or alternative property rights regime within which water is managed. A better understanding of the property rights regime within which water as a natural resource is currently regulated, may contribute in realising the vision of the concept of public trusteeship by clarifying, *inter alia*, the extent of the state's regulatory powers and constitutional and statutory obligations; the extent to which access to water is granted to the general public; and the nature, duration and possible limitations of individual rights to water acquired in terms of the NWA.

As the concept of public trusteeship in South African jurisprudence does not have established links to existing principles of law, it appears feasible and necessary to question whether existing foreign law may provide interpretative guidance.[20] Moving beyond the parameters of South African law, insights may presumably be gleaned from foreign legal frameworks that acknowledge public trusteeship and related concepts in the water context. The Anglo-American public trust doctrine serves as one such foreign framework and has already been considered by scholars on public trusteeship and natural resource management in South Africa.[21] The Anglo-American public trust doctrine speaks to, *inter alia*, the concepts of public ownership, the public's rights in natural resources, the state's fiduciary responsibilities, as well as the protection of the public interest, in particular natural resources.[22] There are, however, 'inherent shortcomings' in the Anglo-American public trust doctrine as a potential model for trusteeship in the South African water regulatory framework.[23] One such 'shortcoming' pertains to the fact that South African law originated from Roman-Dutch law and was further influenced by English law. A legal principle derived from a fairly 'foreign' legal regime such as the Anglo-American regime, does not automatically slot into South African law.[24] It should further be noted that the Anglo-American pub-

20 See Section 39(1) of the Constitution of the Republic of South Africa, 1996.

21 *Elmarie Van der Schyff,* The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002, LLD Thesis, North West University (2006), p. 106–148; *Young*, note 18, p. 147–171.

22 *Van der Schyff,* note 18, p. 280–281.

23 *Viljoen,* note 18, p. 186–188.

24 *Elmarie Van der Schyff*, South African Natural Resources, Property Rights, and Public Trusteeship, in David Grinlinton and Prue Taylor (eds), Property Rights and Sustainability The Evolution of Property Rights to Meet Ecological Challenges, Leiden 2011, p. 330.

lic trust doctrine expanded and developed to different degrees in different American states and uncertainty exists as to how the public trust doctrine is applied from one state to the next.[25] The distinction made between high-tide states (where the public trust resources may not be owned privately) and the low-tide states (where private ownership of trust property is possible)[26] typically brings into question which variant of the Anglo-American public trust doctrine should find application in South African law.[27] Sand[28] suggests that this challenge can be surpassed to the extent that 'functional equivalents' of the public trust doctrine exist. One such 'functional equivalent' arguably being the German property law concept of *őffentliche Sache.*[29]

This article sets out to achieve two objectives: to determine how and the extent to which the German property law concept of *őffentliche Sache* may inform the interpretation of the South African concept of public trusteeship, and to identify and analyse a number of legal implications brought about by the concept for South Africa's water in the 'public space'.

The discussion is structured as follows: the first part explores, in general terms, the notion of a public trust 'anatomy' or 'space', and shows how water as natural resource in South Africa fits into this 'space'. The first part of this paper concludes with the submission that water in the 'public space' needs a specific and unique regulatory regime; that of public trusteeship. The second part sets the context and basis for understanding the German law *őffentliche Sache*-based water regulatory regime. This discussion is expected to provide insight into the 'public space' wherein Germany's water resources is regulated; highlighting the nature of the rights that can be acquired in water as a resource as well as the state's regulatory obligations in relation thereto. The third part focusses on the South African water regulatory framework, reflecting on how and to what extent the German concept of *őffentliche Sache* may inform the interpretation of the South African concept of public trusteeship as entrenched in the NWA. Naturally flowing from the comparative reflections, the paper concludes with some legal implications for South Africa's water in the 'public space'.

25 *Young*, note 18, p. 254–255, 158, 160.

26 *Viljoen*, note 18, p. 186.

27 *Viljoen*, note 18, p. 187.

28 *Mary Turnipseed et al,* Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law, Environment (2010), p. 12.

29 *Hanno Kube*, Private Property in Natural Resources and the Public Weal in German Law – Latent Similarities to the Public Trust Doctrine, Natural Resources Journal 37 (1997), p. 857.

B. 'Public space' and the concept of public trusteeship

'Public spaces' feature in our daily lives. In Neal's words:[30] '[w]e encounter them every day as we go about our routine activities. We use public roads and sidewalks to get to work and school […], we go to the mall to shop; the park to relax; the museum or theatre for fun'. Yet, despite the prominence of public spaces, there is remarkably little scholarly work on what the notion entails. Scholars, dealing with the notion of a public space, often assume that he or she and the reader share a working understanding thereof.[31] In Economics, for example, scholars seem to immediately turn to the concepts of 'public goods' or 'common resources' when they examine the notion of a public space. The distinction between public goods and common resources has led authors to propose a categorisation of goods on the basis of excludability and rivalry.[32] Public goods are then generally defined by having two essential attributes, namely non-excludability and nonrivalry in consumption.[33] A tornado siren serves as a good example: when it sounds, it is impossible to prevent anyone from hearing it (it is not excludable), and the cost of providing it to an additional person is zero (it is not rival). With these two attributes, parks and roads will also qualify as public goods.[34] Economist then define 'common resources', as goods that are rival in consumption, but not excludable.[35] The fish in the ocean is often used as an example: it is difficult to prevent people from catching the fish, but one person's catching will prevent another person from catching that same fish.[36] The narrative on common resources then often turns to an important problem for policymakers, because such resources are often overused relative to the available amount. Hardin[37] popularised this dilemma of over-exploitation, calling it the 'tragedy of the commons'. Although the categorisation between public goods and common resources in the field of economics is helpful in clarifying distinctions made between private, public and common goods, their excludability and rivalry, the categorisation lacks a systematic comparison[38] of these concepts and it fails to convey or define any property rights regime for the said goods or resources. Clarity on property rights regimes is crucial when the public space is discussed. In fact, when property rights are allocated in a public

30 *Zachary Neal,* Locating Public Space, in: Anthony Orum / Zachary Neal (eds), Common Ground? Readings and Reflections on Public Space, New York 2010, p. 1.

31 Namely that public spaces include all areas that are open and accessible to all members of the public in a society. *Neal*, note 30, p. 1.

32 *Jose Apesteguia / Frank Maier-Rigaud*, The Role of Rivalry Public Goods versus Common-Pool Resources, Journal of Conflict Resolution (2006), p. 647.

33 *Apesteguia / Maier-Rigaud*, note 32, p. 647.

34 *James Quilligan*, The Wealth of the Commons A World Beyond Market & State, http://wealthofthecommons.org/essay/why-distinguish-common-goods-public-goods (last accessed 16 October 2018).

35 *Apesteguia / Maier-Rigaud*, note 32, p. 647.

36 *Apesteguia / Maier-Rigaud*, note 32, p. 647.

37 *Garrett Hardin*, The Tragedy of the Commons, The Social Contract (2001), p. 26–35.

38 *Apesteguia / Maier-Rigaud*, note 32, p. 646.

space, a complex set of rights and duties is established that characterises the relationship of individuals amongst each other with respect to the public space, be it a particular 'object', 'thing' or 'resource'. According to Glück,[39] this 'complex of rights and duties' defines the property regime within which an 'object', 'things' or 'resource' is regulated.

Attempts to understand the property rights regime within which South Africa's water is being regulated, often rely on the ancient Roman law recognition and categorisation of property that do not exclusively belong to a private individual.[40] Roman law has a large proprietary rights system with different categories of 'things that cannot be privately owned'. *Res publicae,* or public property, is one such Roman law category and includes the classic examples of bridges, roads, harbours, rivers and so forth.[41] *Res publicae* include things belonging to the public; which has to be used in the interest of the public; and which are open to the public by operation of law.[42] It is from this preliminary Roman law understanding of *res publicae,* consisting out of at least three distinct ideas or thoughts, that scholars conceptualise a 'public space' regime, with demarcated rights and duties, that may be useful for the regulation of, *inter alia,* water resources.

The first idea, namely that *res publicae* 'belongs to the public', is generally perceived, albeit not without criticism,[43] to mean that the 'ownership'[44] of the property in question vests in a government agency, public authority, or the state.[45] Notably, scholars examining

39 *Peter Glück*, Property rights and multipurpose mountain forest management, *Forest Policy and Economics* (2002), p. 129.

40 *Peter Bassenge et al,* Palandt Bürgerliches Gesetzbuch, München 1991, p. 56; *Carol Rose*, A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation, Washington and Lee Law Review 53 (1996), p. 270.

41 *Carol Rose*, Romans, roads, and romantic creators: Traditions of public property in the information age, Law and Contemporary Problems 66 (2003), p. 96; see also *Bassenge*, note 40, p. 56.

42 *Rose*, note 41, p. 96.

43 Property rights in public property are often not controlled by the state or Government, but rather by the society at large. In this argument, Rose calls the "owner" of the public property the "unorganised public". If this argument is followed in the context of the public space, it may be accepted that the notion of a public space creates multiple stakeholders who all have a say about how the property or resources concerned may be used. Although this approach might be insightful on different levels, it should be acknowledged that the "unorganised public" is usually dependent on the state or (democratically elected) Government to control the public space on its behalf. Therefore, whether the "ownership" of public property vests in the state or the citizenry at large, the control and management usually resides with a group of elected individuals who are representatives of the state. *Carol Rose*, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, The University of Chicago Law Review 53 (1986), p. 721.

44 It should be emphasised that the public property conception of "ownership" is detached from the self-serving and exclusionary interests normally associated with private ownership. *Rose,* note 41, p. 99.

45 The terms 'public property', 'state property' or 'collective property' are often used to refer to the property regime describing the states', or some public agency's responsibility to control the resource in question. *Richard Barnes*, Property Rights and Natural Resources Studies in International Law, Oxford 2009, p. 154.

'publicly owned' property, often treat the concept of *res publicae* as synonymous to the 'public domain'.[46] The connection between *res publicae* and the public domain seems viable if one considers the fact that the latter usually includes territory belonging to, or property being regulated by, a state or government. One should however be careful to *only* use the idea of 'public ownership' to unearth the public space regime. In fact, to only use public ownership as criterion would be misleading and incomplete. Many examples exist where privately owned property, a restaurant for example, are regarded as public spaces. The second idea brought forward from *res publicae* to understand the notion of a public space, namely that the property concerned should be used in the public interest, is helpful, but can also not be used without reservation. The reason being that the concept of public interest is generally difficult to define.[47] The third idea, namely that public spaces should be open to the public by operation of law, provides important guidance in unraveling the notion of a public space, especially when resources such as beaches or public roads,[48] which are open and available to the public, are considered. Once again, to support the notion of a public space only with reference to this one criterion of unrestricted access, will be erroneous, as access to certain public spaces is often restricted. Access to schools, hospitals, swimming pools or theatres,[49] for example, requires individual permission from the authority in which the public dominion is vested.[50] As the three ideas put forward by *res publicae* do not fully demarcate the public space, reference is made to another Roman law category of things that do not exclusively belong to a private individual, that of *res communes*.

In terms of Roman law, the category of *res omnium communes* (common property)[51] included things that were available for the use and enjoyment of the 'entire human race',[52]

46 *Brewster Kneen*, Redefining 'Property' Private Property, the Commons, and the Public Domain, Seedling (2004), p. 3.

47 *Hanri Mostert,* The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany A Comparative Analysis, Heidelberg 2002, p. 22. Mostert argues that the possible formulation of a definition of the public interest in the context of property law is complicated by the fact that other similar terms, such as 'public use', 'public weal' (or 'common good') or 'public purpose' are used to denote concepts that overlap to varying extents with the term public interest. Mostert, however, provides a useful explanation when she argues that the term public interest should refer to factors that could influence the well-being of the community as a whole.

48 *Bassenge*, note 40, p. 1083; *Hubert Hennekens*, Openbare Zaken naar Publiek- en Privaatrecht, Zwolle 1993, p. 9; *Gerrit Van der Veen,* Openbare Zaken, Zwolle 1997, p. 40; *Hans Wieling*, Sachenrecht, Berlin 2007, p. 26.

49 *Van der Veen*, note 48, p. 43.

50 Fire stations, parking areas for public officials, police weapons and similar equipment can barely be labelled as being 'open to the public'. *Van der Veen,* note 48, p. 39.

51 *PJ Badenhorst / Juanita Pienaar / Hanri Mostert,* Silberberg and Schoeman's The Law of Property, Durban 2005, p. 23.

52 *Johan Van der Vyver*, The Ètatisation of Public Property, in Daniel Visser DP (ed) Essays on the History of Law, Cape Town 1989, p. 261–299.

and were therefore common or available to all citizens collectively.[53] Because of their features,[54] things categorised under the category of *res communes omnium* could not belong to any person individually and were therefore asserted to have no owner.[55] Barnes[56] defines common property as rights of access rather than rights of exclusion. He does not focus on common property as 'things', but as 'rights'. The term 'open access' is also used to describe the position where everyone holds a shared right of use in the common property resource at hand.[57] In general, open-access resources allow unrestricted access to certain resources to all members of society.[58] However, one should be careful of the ambiguity involved in the use of the terms 'common property' and 'open-access resources', for not all common property is necessarily managed in a fully open-access system.[59] Ziff argues that something more restrictive than pure open access is usually intended when common property is discussed.[60] The example of an open park may illustrate this more 'restrictive' idea of common property.[61] Anyone has an equal right of access to the park.[62] However, restrictions on what one may use the park for to the degree that such uses become arbitrary, renders the park a collective property.[63] Arguably, contemporary common property is therefore a property regime that allocates rights including, but not limited to, management, use, exclusion and access of a shared resource to a specific community or group of people.[64] Common property refers to a particular social arrangement regulating the preservation, maintenance, and consumption of a *common* resource. While the group has relatively free but monitored access to the shared resources, there are rules and mechanisms in place that al-

53 *Nic Olivier / Gerrit Pienaar / André Van der Walt*, Sakereg Studentehandboek, Cape Town 1992, p. 20; *Thomas / Van der Merwe /Stoop,* Historical Foundations of South African Private Law, Durban 2000, p. 144.

54 As far as common property is concerned, the research indicated that the main characteristic of common property is that common 'things' are generally so important to mankind that they are incapable of being subject to ownership.

55 *Gaius,* Institutes 2.1.1 makes no distinction of *res communes omnium*.

56 *Barnes*, note 45, p. 153.

57 Ibid., p. 153; *Bruce Ziff,* Principles of Property Law, Scarborough 2006, p. 8.

58 *Barnes*, note 45, p. 2; *John Page*, Reconceptualising property: Towards a sustainable paradigm, in: Brendan Edgeworth / Lyria Moses / Cathy Sherry (eds), Property Law Review Multiple perspectives on the law of real and personal property, Sydney 2011, p. 93.

59 *Ziff*, note 57, p. 8.

60 Ibid., p. 9.

61 *Barnes,* note 45, p.154.

62 *Jeremy Waldron*, The Right to Private Property, New York 1988, p. 41.

63 *Barnes,* note 45, p.153; *Ziff,* note 57, p. 9.

64 *Barnes,* note 45, p. 153; *Ben Crow* / *Farhana Sultana*, Gender, Class and Access to Water: Three Cases in a Poor and Crowded Delta, Society & Natural Resources: An International Journal (2002), p. 711.

low the group to exclude outsiders from using the resource.[65] On the other hand, open-access resources represent a regime where no one owns or exercises control over the resources. As no individual or group has the legal capacity to restrict access to the resource, anyone is allowed to enter or harvest the open-access resource in question. It would therefore be an erroneous assumption to equate an open-access regime with the common property regime.[66]

The South African Supreme Court of Appeal, in the case of *Mostert Snr and Another v S,*[67] recently classified water as common property. A farmer and his son grew sugarcane on a farm riparian to the Lomati River. They had intentionally omitted to register a second pump to monitor water usage as required by the Lomati Irrigation Board. In addition, they had tampered with the existing pump station meter to reflect a lower than actual water usage. These actions resulted in charges of theft, fraud and further criminal charges for the contravention of section 151 (1)(e) and (5) of the NWA for wrongfully, unlawfully, intentionally or negligently tampering or interfering with the required pump and unlawfully, intentionally or negligently committing an act detrimentally affecting a water resource by illegally abstracting water from the Lomati River. The court *a quo* held that common law charges could not be brought by the state, as the statutory penalties excluded common law remedies. However, on appeal, the Supreme Court of Appeal found that the NWA had not specifically excluded common law offences. Consequently, in order to establish whether the water was capable of being stolen in terms of the common law, the court had to establish whether the water contained in the Lomati River was of private or public in nature. In light of the historical foundations and distinctions drawn between *res publicae* and *res omnium communes* above*,* it seems surprising that the court concluded that public water, whether running in a river or stream, is classified as *res omnium communes.* The court held:

> *Roman law recognised certain things as being res extra patrimonium which were incapable of being owned, including those things classified as res communes being 'things of common enjoyment, available to all living persons by virtue of their existence'. Public water, running in a river or a stream, was recognised as being res communes and therefore incapable of being owned. These Roman law principles were adopted by Roman-Dutch law and subsequently recognised in South Africa.*

The Supreme Court of Appeal therefore concluded that the water contained in rivers is *res omnium communes,* or common property and therefore incapable of ownership. If it is not owned, it cannot be stolen. This judgment can, however, be criticised. Young[68] for example

65 *Elinor Ostrom*, How Types of Goods and Property rights jointly affect collective action, Journal of Theoretical Politics (2003), p. 239.

66 *Kenneth Ruddle*, Changing the Focus of Coastal Fisheries Management in Robert Pomeroy (ed), Community Management and Common Property of Coastal Fisheries in Asia and the Pacific: Concepts, Methods and Experiences, Philippines 1994, p. 63–86.

67 *Mostert Snr / Another v S* 2010 2 All SA 482 (SCA).

68 *Young*, note 18, p. 138.

argues that the Supreme Court of Appeal failed to properly analyse the distinctions made between the Roman and Roman-Dutch law concepts of *res publicae* and *res omnium communes* as discussed above. The discussions above indicate that running water should be classified as *res omnium communes,* while water in perennial rivers should be regarded as *res publicae. Res publicae* entails public property that is susceptible to use by all.

From the discussion thus far, it is clear that public spaces are by their very nature contested and uncertain – and even misinterpreted by the courts.[69] Yet, the notion of a public space has been incorporated into the South African water law. In fact, in no vague terms, the preamble to the NWA states that water is 'a scarce natural resource that belongs to all people'. It is herein submitted that the South African legislature intentionally introduced the concept of public trusteeship as a tool to regulate and facilitate access to water in the uncertain context of a public space. Due to the fact that the concept of public trusteeship is a relatively novel[70] concept in South African jurisprudence, it appears feasible and necessary to question whether existing foreign law may provide interpretative guidance.[71] The German property law concept of *öffentliche Sache*[72] serves as one such foreign framework that may be analysed to identify potential legal implications for the interpretation of the concept of public trusteeship and water in the public space.

C. The 'public space' wherein Germany's water resources is regulated

Embedded in its own historical context, the German legal system provides for different forms of property that are relevant for the notion of a public space. Both German private and public law acknowledge the concept of property.[73] Constitutional law, criminal law and administrative law are more specific areas of public law that provide for the concept of public property. Although property law textbooks rarely attend to it, various forms of public property have been acknowledged and systematically classified in these areas of public law.[74] In the German Administrative law, Raff,[75] for example, differentiate between three forms, namely 'public property proper' (*öffentliche Sache*), 'factually public things' and

69 The meaning of a public space within a particular context is determined by various factors; political or urban and social conceptions all serve as co-determinants of the notion.

70 *Van der Schyff*, note 18, p. 122.

71 Section 39(1) of the Constitution of the Republic of South Africa, 1996.

72 *Kube,* note 29, p. 857.

73 Which is closely linked to a distinction between personal and propriety rights found in the Bürgerliche Gesetzbuch (the German Civil Code); *Bassenge*, note 40, p. 55–57, 1081–1082.

74 *Christoph Gröpl and Martine Rupp*, State Assets (Public Ownership) in the Federal Republic of Germany, http://www.ius-publicum.com/repository/uploads/10_03_2011_16_33_Groepl.pdf (last accessed 2 October 2018); *Petr Havlan* and *Jan Janeček*, So-called Public Thing as an Object of "Public Ownership", https://is.muni.cz/do/law/shop/publikace/8474430/210-4842-Ukazka.pdf (last accessed 1 October 2018) 12; *Murray Raff*, Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law, The Hague 2003, p. 161–162.

75 *Raff,* note 75, p. 161–162.

'public property held in a private capacity by a public authority to execute its public functions'. The latter category represents things or objects that never truly leave the private law, such as an office building that is leased to a private tenant to generate public income.[76] The category of 'factually public things', also technically remains in the private law realm, because they are not administrated by a public authority, but managed by a private owner to serve a public purpose.[77] An example of a 'factually public thing' is that of a privately owned art gallery. The remaining category, that of 'public property proper', also known as *öffentliche Sache,* is most important for present purposes, as it provides valuable insights to the interface between property and water that are crucial for examining the 'public space' wherein Germany's water is regulated.

Although various scholarly descriptions and explanations exist, the category of *öffentliche Sache* is generally understood to include those things or objects that, through their use, directly and permanently serve particular needs of the public administration, the public interest or the common good.[78] It is important to note that the criterion is also set for serving a 'public interest', and should not be restricted to serve only 'a public purpose' or to be available for 'public access'.[79] This description of *öffentliche Sache* resembles with what has in section B above been described as a "public space".

I. The concept of öffentliche Sache

Kube[80] holds that the concept of *öffentliche Sache* evolved when the idea of restricting private property in natural resources for public benefit gained momentum. He argues that the German legal system has established the framework of *öffentliche Sache* 'in order to conceptually describe the interplay between private ownership rights in natural resources and restrictions on their exclusive use for the benefit of the public.'[81] In essence, the concept *öffentliche Sache* denotes an approach that regulates the *use* of resources that serve a beneficial public function (*Gemeinwohl*).[82] Existing private property rights in resources that serve a public function (if there are any) are in terms of this approach restricted, so that the use of the property serves the public interest. The concept of *öffentliche Sache* therefore

76 Ibid., p. 161–162.

77 Ibid., p. 162.

78 *Raff,* note 75, p. 162.

79 *Hennekens*, note 48, p. 7; *Van der Veen*, note 48, p. 37.

80 *Kube*, note 29, p. 861.

81 *Kube*, note 29, p. 857.

82 *Hermann Dilcher,* J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Berlin 1995, p. 17; *Kube*, note 22, p. 861. Things such as streets, natural and other water bodies, rail systems, airports, ports, dikes, parks, sport stadia, public swimming pools, schools, libraries, parking lots, water, gas and electrical services institutions, government buildings and churches are regarded as public in nature due to their function.

necessarily affect the legal nature of the resource in question. In terms of hereof, private property is affected by an *öffentliche Dienstbarkeit* (public servitude).[83]

Scholars[84] argue that the key to understanding the concept of *öffentliche Sache* is the concept of a *Widmung*. A *Widmung* denotes the formal legal mechanism by which a resource is dedicated to the public.[85] The *Widmung* is made pursuant to legislation, an administrative act, or from custom, as in the case of beaches.[86] The *Widmung* then determines both the content and the extent of the resource's public beneficial function. It is therefore arguable that a *Widmung* 'founds the future public legal status' of the resource.[87] Naturally, once the public status of a resource has been acknowledged, the use of the resource in question is restricted by the public beneficial function it is dedicated to fulfil.[88] The restriction following the *Widmung* or *öffentlichrechtliche Dienstbarkeit*[89] attaches to the resource itself and is independent of the property holder.[90] Consequently, a dedication runs with the property or resource, and restricts subsequent buyers for reasons of the public interest.[91]

Effectively, the concept of *öffentliche Sache* supplants the private law powers of an owner of a resource with state management.[92] The state should, however, not be seen as the proprietor of the resource in question. The state rather manages the resources on behalf of the nation as *der öffentliche Sachherr*.[93] Once the property is dedicated, the *öffentliche Sachherr* is bound to ensure that the *öffentliche Sache* is used,[94] protected,[95] conserved,[96] managed and controlled to keep the public property in a good condition to serve the public interest.[97]

Various environmental law statutes in Germany acknowledge instances of *öffentliche Sache* that authorise the state and its agencies to issue a *Widmung*, and which dedicate a part or the whole of the resource's uses to the public.[98] The Bundesnaturschhutzgesetz of

83 *Karl-Hermann Capelle,* Bürgerliches Recht Sachenrecht, Wiesbaden 1963, p. 80–82; *Kube*, note 29, p. 862; *Theodor Maunz* / *Günter Dürig,* Grundgesetz Kommentar, München 2013, p. 56.

84 *Kube*, note 29, p. 861; *Raff*, note 75, p. 161.

85 *Dilcher*, note 82, p. 17; *Kube*, note 29, p. 861.

86 *Kube*, note 29, p. 861; *Raff*, note 75, p. 161.

87 *Raff*, note 75, p. 161.

88 *Havlan* / *Janeček*, note 77, p. 11; *Mara Wantuch-Thole*, Cultural Property in Cross-Border Litigation: Turning Rights into Claims, Berlin 2015, p. 104.

89 *Wantuch-Thole,* note 88, p. 103–104.

90 *Kube*, note 29, p. 862.

91 *Kube*, note 29, p. 862; *Wantuch-Thole,* note 88, p. 104.

92 *Dilcher*, note 82, p. 17; *Kube*, note 29, p. 862.

93 *Wieling*, note 48, p. 26.

94 *Hennekens*, note 48, p.

95 Ibid., p.

96 Ibid., p.

97 Ibid., p. *Wieling*, note 48, p 26.

98 *Kube*, note 29, p. 862.

2009, for example, prohibits recreational land uses, hunting, or road construction in areas expressly deemed to be of particular environmental significance.[99] Following the same trend, the Bundes-Immissionsschutzgesetz[100] restricts the scope of the possible uses of industrial plants[101] that produce polluting substances.[102] The German water law offers a particularly good example of a sector-specific regulatory regime that incorporated the concept of *őffentliche Sache.*[103]

II. Őffentliche Sache and the German water regulatory regime

Kube[104] explains that the federal legislator used the concept of *őffentliche Sache* as a basis for the Wasserhaushaltsgesetz (Federal Water Act or WHG) of 1957. Although the WHG does not explicitly recognise the concept of *őffentliche Sache*, the Act contains principles and features reminiscent of *őffentliche Sache.* This leads to the conclusion that the legislator *de jure* incorporated the concept of *őffentliche Sache* into the WHG.[105]

Article 1a of the WHG, for example, provides for the public beneficial function of water resources. It states that, as a part of the balance of the ecosystem and as a habitat for animals and plants, the country's waters have to be secured. The WHG also acknowledges the resource's central role in human survival. In fact, the WHG stipulates that water resources should be managed in such a way that they serve the general well-being of current and future generations and, in harmony with this, also serve the purposes of an individual and that any avoidable damage to their ecological functions does not occur.[106] Based on this particular feature of a public beneficial function, it is contended that the WHG regards water as *őffentliche Sache.*

99 See also the Landesnaturschutzgesetz of 2010. Article 13(2) of the Bundesnaturschhutzgesetz of 2009 stipulates:

> *All actions which may lead to destruction of, cause damage to, or induce changes in, a nature reserve or which may be a source of major disturbance for a nature reserve, shall be prohibited, subject to more specific provisions to be adopted. Where this is compatible with the purpose of protection, nature reserves may be accessible to the general public.*

100 Bundes-Immissionsschutzgesetz of 1990; *Bassenge*, note 26, p. 1082.

101 Article 2 of the Bundes-Immissionsschutzgesetz of 1990.

102 Article 4 of the Bundes-Immissionsschutzgesetz states that the establishment and operation of installations which, on account of their nature or their operation are particularly liable to cause harmful effects on the environment or otherwise endanger or cause significant disadvantages or significant nuisance to the general public or the neighborhood, shall be subject to licensing.

103 See *Bassenge*, note 40, p. 1082; *Rüdiger Breuer /Klaus Gärditz*, Öffentliches und privates Wasserrecht, München 1976, p. 25; *Kube*, note 29, p. 867.

104 *Kube*, note 29, p. 869–870.

105 Specific reference is made to the concept of *őffentliche Sache's* public beneficial function and public law dominion by a *Widmung* (dedication).

106 Article 1a of the WHG.

The second important reflection of the *őffentliche Sache*-concept in the WHG is the establishment of a public law dominion and the resource's consequent dedication to the public. With the commencement of the WHG, the private owner, if there was one, lost the power to use or even dispose of water resources to the extent to which the use of resources have been dedicated to the public. The WHG continued and introduced an overarching, administrative system to regulate water rights. In terms of this system, all uses of water, including the withdrawal or diversion of water from surface waters,[107] the damming or drawing-down of surface waters,[108] the withdrawal of solid material from surface waters where this affects the properties of such waters or their flow,[109] the introduction or discharge of substances into waters,[110] and the withdrawal, conveyance to the surface, or diversion of groundwater[111] are subject to official Government authorisation. The principal mechanism used by the German Government for the public management of water resources, is the institution of water rights that are allocated in terms of the WHG.[112] Water rights are granted by way of permit or license. The WHG hence reformed the water regulatory framework with the assertion of state control over water resources and the introduction of complex public regulatory mechanisms for the allocation of water use rights.[113] Consequently, ownership of land does not bestow any entitlement to use water which requires a permit or license.[114]

As indicated, the allocation of water use in Germany hinges on a complex administrative process.[115] The administrative procedure normally provides for *inter alia* the prospective water user to submit a written application to the decision-making authority, accompanied by an environmental impact assessment.[116] The process further provides for a period during which third parties may file formal objections against the said water use applica-

107 Section 9(1)(1) of the WHG.

108 Section 9(1)(2) of the WHG.

109 Section 9(1)(3) of the WHG.

110 Section 9(1)(4) of the WHG.

111 Section 9(1)(5) of the WHG.

112 *Fritz Baur* / *Jürgen Baur* / *Rolf Stürner*, Sachenrecht, München 1999, p. 318; *Breuer* / *Klaus,* note 76, p.; *Stephen Hodgson*, Land and Water- the rights interface, http://www.fao.org/3/a-y5692e.pdf (last accessed 2 October 2018).

113 History had the result that, in many German states, water rights have for a long time been considered as a subsidiary component of landownership. In fact, a right to use water often depended on landownership. Therefore, in the German states that used private law concepts to regulate water resources, landowners obtained water rights together with, or as an extension of their land title. *Hodgson*, note 112, p. 5.

114 *Salman Salman* / *Daniel Bradlow*, *Regulatory Frameworks for Water Resources Management: A Comparative Study,* Law, Justice, and Development (2006) p. 86; Section 4(3) of the WHG; *John Tisdell*, Equity and Social Justice in Water Doctrines, Social Justice Research (2003), p. 412.

115 The complexity is ascribed to the nature of both the water resource and water rights themselves. See also *Stephen Hodgson*, Modern Water Rights: Theory and Practice, http://www.fao.org/3/a-a0864e.pdf (last accessed 31 July 2018), p. 43.

116 Section 11(1) of the WHG; The environmental impact assessment is dependent on the size and nature of the proposed water use. *Thomas Lundmark*, Principles and Instruments of German En-

tion.[117] Once these stages in the administrative process are duly adhered to, the water administration authority proceeds with an administrative process to assess whether and to what extent the proposed water right may impair the ecological or chemical status of the water.[118] The review process ultimately results in the official allocation or refusal of a water right. A permit or license can typically be refused if the proposed use is likely to be detrimental to the water resource or public interest.[119] Clearly, the water regulatory framework, based on the concept of *öffentliche Sache,* requires rational and effective decision-making by the administration.[120] One of the mechanisms used in German water law to ensure non-arbitrary decision-making, is planning.[121]

Once a decision for water allocation has been made in favour of the applicant, a permit or license is issued subject to conditions that are designed to, *inter alia,* prevent detrimental impacts on the water resource itself, as well as to other water users.[122] The conditions can be either of general application, which are applicable to all water rights, and which are spelt out in the WHG,[123] or of specific application to individual rights, as set out in the particular license or permit. Specific conditions typically constitute details on how the water in question should be used, measured and treated.[124] These conditions form an integral part of the water right and allow the administration to exercise a degree of control over how the water in question is used.[125] A water right provides its holder with a revocable right to use water for a particular purpose[126] in a specific way as prescribed by the conditions, and for a limited period of time[127] that is determined by the administrative authority.[128]

vironmental Law, Journal of Environmental Law and Practice 4(4) (1997), p. 43–44; *Salman* / *Bradlow*, note 114, p. 64.

117 Section 11(2) of the WHG.

118 *Salman* / *Bradlow*, note 114, p. 64.

119 *Salman* / *Bradlow*, note 114, p. 64.

120 *Hodgson*, note 112, p. 31.

121 In this regard, the European Union Water Framework Directive (FWD), which has been incorporated into the WHG, obliges Germany to engage in the preparation and periodic review of River Basin Management Plans, for example. The purpose of such plans goes beyond the mere allocation of water rights. The Management Plans set out development and management priorities. It is within this framework of planning that decisions regarding the regulation of water rights must be made. *Hodgson*, note 112, p. 31, 43; *Salman* / *Bradlow*, note 114, p. 61; *Andreas Thiel*, Constitutional state structure and scalar re-organization of natural resource governance: The transformation of polycentric water governance in Spain, Portugal and Germany, Land Use Policy (2015), p. 176.

122 *Salman* / *Bradlow*, note 114, p. 64.

123 See section 12 of the WHG; *Hodgson*, note 112, p. 56.

124 *Hodgson*, note 112, p. 23.

125 *Hodgson*, note 112, p. 23.

126 Section 10(1) of the WHG.

127 Section 14(2) of the WHG.

128 *Salman* / *Bradlow*, note 114, p. 64.

Once a water right has been allocated, the right holder has a legitimate expectation to rely on that water right throughout its duration.[129] The general rule is that the water administration may not arbitrarily suspend or re-allocate water that is already subject to a water right of a third party.[130] However, water may be re-allocated in particular circumstances that might include *force majeure* or the public interest or public weal. In the *Naßauskiesung-case*,[131] for example, the Government invoked the public interest to justify the re-allocation of water rights.

Water uses in Germany were therefore in terms of the WHG removed from the scope of private property and placed in a public law management regime. In the latter regime, the relevant administrative authority manages the country's water resources on behalf of the nation.[132] Without becoming the owner of such resources, the public authority has the discretion to allocate or dedicate the country's water resources' uses to the public so that they serve the general well-being of current and future generations.

D. A proposed understanding of the concept of public trusteeship as embodied in South African water law

As indicated in the introductory paragraph above, the South African legislature promulgated the NWA as a novel legal framework for water resources regulation. The right to have access to sufficient water is at the core of the new, post-constitutional water regulatory framework. In order to facilitate the latter, the preamble to the NWA states that water 'belongs to all people', while section 3 stipulates that the National Government is appointed as the trustee of the country's water resources.[133] In terms of the new public trust regulatory framework, all water use rights are placed under the centralised control of the state or public trustee to, *inter alia,* improve the distribution, management, use, conservation and equal-

129 *Hodgson*, note 112, p. 21.

130 *Hodgson*, note 112, p. 22–23.

131 BVerfGE 58, 300.

132 The *őffentliche Sachherr* has the necessary authority to dedicate the property in question to *őffentliche Sache.* Once the property is dedicated, the *őffentliche Sachherr* is cloaked with a duty to ensure that the *őffentliche Sache* is used, protected, conserved, managed and controlled to keep the public property in a good condition to serve the public interest. The specific powers of the *őffentliche Sachherr* are founded in statutes. For example, concerning the protection of public water, Van der Veen indicates that *'[h]et beschermingsregime van de openbare wateren is in essentie neergelegd in het paragraaf 2.3.2 […of the] Wasserhaushaltsgesetz…*' In addition to the above stated duties, the *őffentliche Sachherr* is responsible to ensure that the public has access to the *őffentliche Sache. Hennekens*, note 48, p. ; *Van der Veen*, note 48, p 49, 241; *Wieling*, note 48, p 26

133 The concept of public trusteeship is thus far understood as a concept that places all of South Africa's water resources under the fiduciary control of the National Government. Its addition to the water regulatory framework is hailed against the post-constitutional policy discourse that aims to redress past inequalities while simultaneously achieving efficient and sustainable water use.

ity of access to this scarce resource.[134] We are therefore witnesses of a transformation in which property rights were redefined, often to the disadvantage of property owners that previously enjoyed access to water as an 'extension' of land ownership.[135] Understandably, the introduction of the concept of public trusteeship, linked to water in the 'public space', and the replacement of exclusive use rights with discretionary water allowances, raise questions about the property rights regime within which water is regulated. Questions include whether water use rights should be regarded as property; what the scope of protection is that may be afforded by the constitutional property clause (section 25 of the Constitution); and what the scope, content and implications of the property law concepts of deprivation and expropriation entail if water rights are regarded as property.[136]

Scholarship[137] shows that, since the promulgation of the Constitution with its property clause, the South African property rights regime evolved from a 'traditional ownership-object paradigm' into a rights-based paradigm. This post-constitutional transformation gradually led to the recognition and protection of a broader range of rights in property. For example, in addition to 'traditional' ownership rights, licenses, permits and the use of public resources also qualify for constitutional property protection.[138] Within this context, where the introduction of the concept of public trusteeship effectively altered the nature of ownership and introduced an institutional regime change for water management, it is necessary to examine the legal implications for existing property rights and the regulation of water resources in South Africa.

As stated earlier, the German law concept of *őffentliche Sache* may inform the understanding of the South African concept of public trusteeship, as per section 3 of the NWA. The German law example is particularly useful in regulating water situated in the public space. The following section consequently develops and interprets the concept of public trusteeship in South Africa. The key elements of the concept of *őffentliche Sache*, as argued in paragraph C above, will be used to guide the discussion.

The key to understanding the concept of *őffentliche Sache* in Germany's water sector, is the concept of a *Widmung.* In terms thereof, water resources are formally dedicated to the public. In effect, the concept supplants the traditional rights of private property holders to use and dispose of their property, and vests control of water resources in the state. The Ger-

134 *Viljoen*, note 18, p. i.

135 For an analysis on the evolution of water rights in South Africa, see *Dev Tewari*, A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present, Water SA (2009), p. 639–710.

136 *Elmarie van der Schyff,* Die nasionalisering van waterregte in Suid-Afrika: ontneming of onteiening?, PELJ 6 (2006), p. 81–112.

137 *Van der Schyff,* note 24, p. 337.

138 *André Van der Walt*, Towards a theory of rights in property: exploratory observations on the paradigm of poast-apartheid property law, *SAPR/PL* (1995), p. 314; *Germarié Viljoen,* A Note on licences as property: Some implications for the South African water regulatory regime, South African Journal of Environmental Law and Policy 23 (2017), p. 202–204.

man water law therefore presents an example of a transformed property regime for the regulation of water resources. Notably, the German state is not regarded as the proprietor of the country's water resources, but merely manages the resources on behalf of the nation as *de őffentliche Sachherr*. If this understanding is applied to the South African public trusteeship regulatory regime, it may be understood that all of South Africa's water resources, including surface and groundwater, are removed from the sphere of private property rights, and placed under state authority. As per the German law example, South Africa's water resources vest in the state as legal entity representing the nation. The National Government does therefore not become the owner of the country's water resources, with exclusionary rights, as an owner of private property often acquires. Instead, the public trustee has fiduciary responsibility of careful management in the sense that the public trustee must ensure that the nation's water (being defined as part of an "inalienable public trust") is protected, used, developed, conserved, managed and controlled in a sustainable manner to the benefit of the citizenry. Such interpretation requires from the National Government (the public trustee), and all its repositories with decision-making power, to consider and to give effect to the state's constitutional mandate and the fundamental principles and objectives of the NWA. The public trustee, through the National Government, is therefore mandated to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in line with the prescripts of the law, including meeting the basic human needs of present and future generations,[139] promoting equitable access to water,[140] redressing the results of past racial and gender discrimination,[141] and promoting the efficient, sustainable and beneficial use of water in the public interest.[142]

Similar to the German water law example, the National Government allocates and regulates the use of South Africa's water resources by means of a licensing or permitting system.[143] Water use entitlements or access rights are divided into three categories in terms of section 4 of the NWA. The first category contains entitlements to use water without any permission or license; the second category includes the instances where an individual is allowed to continue with an existing lawful water use; and water uses of the third category require a general authorisation, permit or license from the relevant authority. Giving effect to the constitutional right of access to water for basic needs,[144] individuals are allowed to use water in or from a water resource without permission if the water use is listed in Schedule 1 of the NWA. Schedule 1 stipulates that everyone is entitled to water for reasonable domestic purposes, including but not limited to domestic gardening, animal watering, fire-

139 Section 2(a) of the NWA.

140 Section 2(b) of the NWA.

141 Section 2(c) of the NWA.

142 Section 2(d) of the NWA.

143 Chapter 4 of the NWA.

144 *Robyn Stein,* Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System, Texas Law Review (2005), p. 2179.

fighting and recreational use. Section 4(2) of the NWA articulates the second category of water use entitlements in the sense that any person may continue the lawful use of water in terms of the previous *Water Act* 56 of 1956, subject to any conditions regarding the substitution of the right of use by the new licensing procedure in terms of the NWA. In terms of section 4(3) of the NWA, the third category of entitlements to use water is subject to a general authorisation or license in terms of the NWA.[145]

In terms of section 28 of the NWA, allocated water licenses are subject to conditions and are issued for a fixed period that may not exceed forty years.[146] As section 28 of the NWA does not acknowledge private, individual or exclusionary rights in water, and as the holder of the water right cannot freely decide on the unlimited use or exploitation of the resource, it is clear that water cannot be subject to private, exclusionary water rights. Similarly, sections 53–55 of the NWA disregard the possibility of private ownership in water resources. Sections 53–55 deal with the consequences of contraventions of license conditions and provide for the possibility of *inter alia* the retraction of entitlements to use water. The consequences of contraventions range from the responsible authority requiring the licensee to take remedial action,[147] failing which it may take necessary action and recover reasonable costs from that person[148] or the suspension or withdrawal of a license by the public authority.[149] These forms of regulatory control are conducive to what was envisioned with the adoption of the notion of public trusteeship over water resources in the public space, vesting the authority over water resources with the national sphere of Government. Notably, although the authority over water resources in South Africa primarily vests with the national sphere of Government, schedules 4B and 5B of the Constitution, allows the National Government to delegate certain functions pertaining to water resources to other spheres of Government.

Whereas some may argue that the concept of public trusteeship and its introduction of an administrative use rights system amounted to a redefinition of property rights, often to the disadvantage of property owners that previously enjoyed access to water as an 'extension' of land ownership, it is also necessary to revisit the discussion on the public beneficial function of *őffentliche Sache* in German law. The latter provides important guidance in understanding the implications of the concept of public trusteeship in the public space. The notion of public trusteeship can, as per the concept of *őffentliche Sache,* be interpreted as to protect public, and not private or individual interests. It follows that a private individual or legal entity will not be able to claim benefits flowing from the NWA if the claim is not

145 See the explanatory note of chapter 4 of the NWA. As a general rule, a water use must be licensed unless it is listed in Schedule 1, is an existing lawful water use, is permissible under a general authorisation, or if the responsible authority waives the need for a license.

146 Section 28(1)(d)-(e) of the NWA.

147 Section 53(1)(c) of the NWA.

148 Section 53(2)(a) of the NWA.

149 Section 54 of the NWA.

shaped by the public interest.[150] In fact, the public beneficial function or the public interest must be advanced and supported via every public trusteeship action in terms of the NWA.[151] The result is that the implications of the concept of public trusteeship, if interpreted to protect public interests, seem infinite. The protection of public interests demands government action, and include, for example, the assessment and management of the Reserve (the basic human needs reserve and the ecological reserve).[152] Other envisaged implications include that the public trustee should determine the amount of water required to meet the basic human and ecological needs, and to set them aside, before water can be allocated for other needs. Therefore, as in the case of German water law, the public trust regulatory regime in South Africa should and cannot be based on the gravity of infringements in individual property rights, but rather on the question to what extent the resources are positively assigned to the public in the public space.[153]

E. Unfolding implications of the concept of public trusteeship for South Africa: concluding remarks

Being educated in a legal system that primarily acknowledges private property rights, wherein people normally want to know what is theirs,[154] they want to know how to protect what is theirs from harm caused by others, including Government, the introduction of the notion of public trusteeship, linked to water as 'a common resource', and the replacement of exclusive use rights (previously regarded as 'property') with discretionary water allowances, is seen as an exception of uncertain dimensions that, as indicated in section A above, raises questions about the property rights regime within which water as a natural resource is regulated in South Africa.

From a property law perspective, this paper contributed to the development of legal scholarship to the extent that it highlights new and important dimensions of the interface between property and water. The concept of public trusteeship, which forecloses private exclusion rights, and which is used as a tool to regulate water resources in South Africa's water sector, reveals important dimensions to the management of water in the public space.

150 *Van der Schyff*, note 18, p. 383–384.

151 Such interpretation of the concept of public trusteeship is justified by parameters set by the NWA for advancing the public interest. For instance, section 2 of the NWA states that the nation's water resources are to be protected, used, developed, conserved, managed and controlled in ways which take into account factors such as, *inter alia*, meeting the basic human needs of present and future generations; promoting equitable access to water; redressing the results of past racial and gender discrimination; promoting the efficient, sustainable and beneficial use of water in the public interest.

152 *Germarié Viljoen*, South Africa's water crisis: The idea of property as both a cause and solution, Law Democracy & Development 21 (2017), p. 191.

153 See paragraph C above.

154 *Thomas Merrill / Henry Smith*, What Happened to Property in Law and Economics?, The Yale Law Journal (2001), p. 357.

Water can, for example, not be alienated into private ownership; it is subject to a public trustee fiduciary obligation to safeguard the natural resource; and is accountable to the public for decisions taken or not taken.

The first part of this article acquainted the reader with some approaches to the notion of 'public spaces'. It was indicated that it is not possible to pin down a concise definition of the notion, but showed the variety of approaches thereto or interpretations thereof; how water as natural resource fits into the 'public space'; and emphasised the necessity of a specific and unique regulatory regime for water in the 'public space' in South Africa.

Part two of the article provided insight into the 'public space' wherein Germany's water resources are managed. The study showed that the WHG's dedication of Germany's water resources as *őffentliche Sache,* supplanted existing private law powers over the dedicated water resources, with state management. The state is then not regarded as the proprietor of the country's water resources, but manages the resources on behalf of the nation as *der őffentliche Sachherr*. The *őffentliche Sachherr* is cloaked with a duty to ensure that the country's water resources are used, protected, conserved, managed and controlled to keep the water in a good condition and to serve the public interest. The public space regime wherein Germany's water resources are regulated, consequently operates on the principle of allocating water use entitlements at the discretion of the state. Once a permit or license is allocated, it affords a right to the holder thereof to use water, but it does not provide its holder any legal title to the water. The allocated water rights are administrative use rights, and are subject to conditions. The authorisation by license or permit therefore merely provides the holder thereof a revocable right to use a body of water.

The German water law approach improves understanding and interpretation of the concept of public trusteeship in the South African water law to the extent that the German model provides clarity on the nature, form, extent, limits and protection of access and use rights that can be acquired in water in the public space. When the concept of public trusteeship is interpreted with the principles provided by the German law example, the concept affected the regime wherein South Africa's water resources are managed by elevating the public interest above any private interests in the resource and defining the National Government's claim to the resource as purely fiduciary. The concept of public trusteeship hence replaced the previous system of exclusive water use rights with a system of administrative water use rights. Water uses were therefore removed from the scope of private property and placed in a public law management regime. We are therefore witnesses to a transformation in which property rights were redefined, often to the disadvantage of property owners that previously enjoyed access to water as an 'extension' of land ownership.

This paper further provided clarity to the meaning and parameters of the management of water that 'belongs to all' by bringing to the fore a set of rights and duties that describes the nature, form, extent, limits and protection of access and use rights to water that reside with the public. The National Government, in its entirety, is obliged to ensure that use and access rights to water resources are structured, allocated, protected and governed in such a way that it meets the needs and purposes of society as a whole, as well as the needs of indi-

viduals of current and future generations. In fact, the public trustee (national government) and all its repositories with decision-making power, is obliged to consider and to give effect to the state's constitutional mandate and the fundamental principles and objectives of the NWA. The public trustee can and should be held liable if he/she fails to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways that take into consideration such factors as *inter alia* meeting the basic human needs of present and future generations,[155] promoting equitable access to water,[156] redressing the results of past racial and gender discrimination,[157] and promoting the efficient, sustainable and beneficial use of water in the public interest.[158]

The reality, twenty years down the line, is however that the implementation of the NWA remains problematic. Although water technically 'belongs to all people', most water allocated through water use licensing remains in the hands of the white minority.[159] On the other hand, the South African Human Rights Commission recently launched an investigation into whether human rights have been violated by the ongoing daily spillage of raw sewage into the Vaal River. These circumstances bring into question the successful implementation of the NWA and the optimal use of public trusteeship in pursuance of the intended purposes of the Act. It is submitted that much remain to be established as far as the application of the public trusteeship regulatory regime are concerned. In the meantime, it is submitted that the 'public space' wherein water resources in South Africa is being managed, is not an open space where 'anything goes'. The public trusteeship paradigm, as interpreted herein, can and should be used as a tool to achieve a sensible and useful distribution of water in the public space. In fact, the concept of public trusteeship could, among others, be used sensibly to transform inequalities in the water sector by elevating the public interest above those of private individuals.

155 Section 2(a) of the NWA.

156 Section 2(b) of the NWA.

157 Section 2(c) of the NWA.

158 Section 2(d) of the NWA.

159 *Barbara Schreiner / Pinimidzai Sithole / Barbara van Koppen*, Water Permit Systems, Policy Reforms and Implications for Equity in South Africa, http://africa.iwmi.cgiar.org/wp-content/uploads/sites/2/2017/04/Water-Permitting-South-Africa-Country-Report-PI_IWMI-March-2017.pdf (last accessed on 19 February 2019).