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On the beach – A critical analysis of the ownership and public trust provisions of the National Environmental Management: Integrated Coastal Management Act 24 of 2008

David Warren Freedman

951059874

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Supervisor:

Professor Michael Kidd

2025

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ACRONYMS

MLRA	Marine Living Resources Act
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NEM: BA	National Environmental Management: Biodiversity Act
NEM: PAA	National Environmental Management: Protected Areas Act
NEM: ICMA	National Environmental Management: Integrated Coastal Management Act
NEM: WA	National Environmental Management: Waste Act
NEM: AQ	National Environmental Management: Air Quality Act
NWA	National Water Act
NFA	National Forests Act

ABSTRACT

Section 2 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (the "NEM: ICMA") provides that one of the objects of the Act is to "preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations".

In order to give effect to this object, section 11(1) of the NEM: ICMA vests ownership of coastal public property in the "citizens of the Republic" and declares that "coastal public property must be held in trust by the state on behalf of the citizens of the Republic". Section 11(2) goes on to provide that coastal public property is "inalienable and cannot be sold, attached or acquired by prescription and rights over it cannot be acquired by prescription".

The state's duties and responsibilities as the public trustee of coastal public property are set out in more detail in section 12 of the NEM: ICMA. This section declares that the state, in its capacity as the public trustee of all coastal public property, must:

> "(a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and
>
> (b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations".

While sections 11 and 12 of the NEM: ICMA regulate the classification, legal status, management and administration of coastal public property, section 13 of the Act regulates public access to the coast. It provides, *inter alia*, that:

> "(1) Subject to this Act and any other applicable legislation, any natural person in the Republic:
>
> (a) has a right of reasonable access to coastal public property; and
>
> (b) is entitled to use and enjoy coastal public property, provided such use:
>
> (i) does not adversely affect the rights of members of the public to use and enjoy coastal public property;
>
> (ii) does not hinder the state in the performance of its duty to protect the environment; and
>
> (iii) does not cause an adverse effect.
>
> (1A) Subject to subsections (2) and (3), no person may prevent access to coastal public property".

When these provisions are compared with the equivalent provisions in the NEM: ICMA's predecessor, namely the Seashore Act 21 of 1935, the following points may be made:

First, unlike the Seashore Act, which regulated the classification and legal status, the right to access and use, and the power to manage and administer, the "sea" and the "seashore", the NEM: ICMA regulates a new public thing (*res*), namely "coastal public property", which encompasses a much broader area than the sea and the seashore and a much wider variety of natural resources.

Second, also unlike the Seashore Act, which vested ownership of the sea and the seashore in the State President, section 11(1) of the NEM: ICMA vests ownership of coastal public property in the citizens of the Republic of South Africa. It thus brings to an end what Professor Johan van der Vyver has eloquently referred to as the étatisation of public property.

Third, while section 11(1) of the NEM: ICMA vests ownership of coastal public property in the citizens of South Africa, it does not vest the right to access, use and enjoy this space in the citizenry. Instead, section 13 of the Act separates these rights from the ownership of coastal public property and vests them in "any natural person in the Republic".

Fourth, apart from separating the right to access and use coastal public property from the ownership of this space, sections 11 and 12 of the NEM: ICMA also separate the right to manage and administer, as well as to conserve, protect and enhance, coastal public property from the right of ownership of this space and vests it in the state as the coastal public trustee.

As these points indicate, a distinction may be drawn between those provisions of sections 11, 12 and 13 that regulate the classification and legal status of coastal public property, those provisions that regulate the management, administration, conservation and protection of coastal public property and those provisions that regulate public access to coastal public property. The first set of provisions may be referred to as the "ownership provisions", the second set as the "public trust provisions", and the third set as the "public access provisions".

These three sets of provisions give rise to a number of complex and difficult questions. Among them are the following:

(1) Have the ownership provisions of section 11(1) of the NEM: ICMA simply codified the common law principles governing the classification and legal status of the sea and the seashore as *res publicae*, or have they introduced an entirely new form of statutory public ownership into South African coastal law?

(2) Given that the entitlements to access, use, manage and administer coastal public property have been separated from the ownership of coastal public property and vested in other entities, does the right of ownership confer any meaningful entitlements on the citizenry, or is it simply a bare or nude form of ownership?

(3) If the ownership of coastal public property does not confer any meaningful entitlements on the citizenry, as appears to be the case, what purpose do the ownership provisions of section 11 of the NEM: ICMA serve, other than to confirm the public nature of coastal public property? Do the ownership provisions have any jurisprudential significance?

(4) Have the public trust provisions of sections 11 and 12 of the NEM: ICMA simply incorporated the renowned United States (US) Public Trust Doctrine into South African coastal law, or have they established a uniquely South African public trust concept for managing, administering, conserving, protecting and enhancing coastal public property?

(5) Apart from the environmental management principles set out in section 2 of National Environmental Management Act 107 of 1998 (NEMA) and the specific provisions of the NEM: ICMA itself, do the public trust provisions of sections 11 and 12 confer any additional powers and rights or impose any additional duties and obligations on the state as the public trustee?

(6) If the public trust provisions of sections 11 and 12 of the NEM: ICMA do impose additional powers and rights, or duties and responsibilities, on the state as the public trustee, what is the nature, scope and content of those powers, rights, duties and responsibilities?

The goal of this thesis, therefore, is to investigate and address these questions through a critical analysis of the ownership and public trust provisions of sections 11 and 12 of the NEM: ICMA. More particularly, the goal of this thesis is to investigate the classification and legal status of coastal public property; the legal nature and purpose underlying the right of ownership of coastal public property vested in the citizens of the Republic; the legal nature and purpose underlying the coastal public trust concept; and the powers, rights, duties and responsibilities this concept imposes on the state as the public trustee.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

1.1.1 Apartheid and the South African coast

The South African coast is over 3000 km long. It stretches from the border with Mozambique in the East to the border with Namibia in the West and is surrounded by the Indian, Southern and Atlantic oceans. Although parts of the coast are characterised by coastal cliffs, river gorges and rocky shores, most of it is made up of long sandy beaches.[1] One of the most iconic of these beaches is Clifton Fourth Beach. As its name indicates, this beach is one of four located in the exclusive suburb of Clifton in the City of Cape Town. One of the distinguishing features of Fourth Beach is that it consists of almost pure white quartzite sand. Another is that it is protected by Lions Head Mountain from Cape Town's notorious south-easterly wind. It is not surprising, therefore, that Fourth Beach has been awarded the coveted Blue Flag status.[2]

Given its glamorous location, natural beauty and protection from the wind, Fourth Beach is very popular with Capetonians and tourists, many of whom remain on the beach until late at night during the summer months. On occasion, however, Fourth Beach's popularity gives rise to tensions between beach-goers and the surrounding residents. These tensions leapt into national prominence on the evening of Sunday, 23 December 2018, when beach-goers were approached by employees of Professional Protection Alternative (PPA) – a private security company contracted by home-owners and residents of Clifton to provide security services for them – and allegedly told to pack-up and leave the beach on the basis that it closed at 20h00, which is roughly the same time that the sun sets.[3]

Although both black and white beachgoers were approached by the PPA employees and allegedly told to leave Fourth Beach, the actions of these security guards were condemned as racist and reminiscent of apartheid beach policies, initially, by beachgoers who were directly affected by the conduct of the security guards and, subsequently, by political parties, civil

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[1] See Department of Environmental Affairs and Tourism (DEAT) *Our Coast, Our Future: Costal Policy Green Paper: Towards Sustainable Coastal Development in South Africa* (1998) at 96–113.

[2] SA History Online "Clifton and Camps Bay Beaches, Cape Town", available at https://www.sahistory.org.za/place/clifton-and-camps-bay-beaches-cape-town, accessed 9 March 2020.

[3] Parliamentary Monitoring "Group Clifton Fourth Beach Closure to Public: Inquiry" (4 February 2019), available at https://pmg.org.za/committee-meeting/27819/, accessed 9 March 2020, and Portfolio Committee on Environmental Affairs "Report of the Portfolio Committee on Environmental Affairs on the Parliamentary Enquiry into the Alleged Eviction of the Beach Goers at Clifton Fourth Beach on 23 December 2018" (20 March 2019), available at https://pmg.org.za/committee-meeting/28190/, accessed on 9 March 2020 at 2.

society organisations and several prominent politicians.[4] After details of the incident were widely publicised in the mainstream press and on social media, protests, as well as a ceremony aimed at cleansing the beach and the country of the "demon of racism" under the banner of #ReclaimClifton, took place on Friday, 28 December 2018. During this ceremony, a sheep was brought onto the beach, given water to drink from the sea and then slaughtered amidst chants, songs and dances. The slaughtering of a sheep on a public beach generated further conflict and controversy.[5]

In response to the accusations levelled against it and its employees, the PPA argued that it had been brought in to assist City of Cape Town law enforcement officers after two teenage girls were raped in the area, that beachgoers had simply been advised and not compelled to leave Fourth Beach for their own safety, and that none of its employees had prevented anyone accessing the beach or removed anyone from the beach. The City, however, denied that it had requested assistance from, or had any sort of agreement or relationship with, PPA and the South African Police Service stated that it had no record of any rapes being reported in the area in November and December.

These conflicting accounts were subsequently investigated by the National Assembly's Portfolio Committee on the Environment, Forestry and Fisheries. In its final report, the Portfolio Committee found, *inter alia*, that PPA was not authorised to tell beachgoers to leave Fourth Beach and that its actions curtailed people's freedom. Apart from supporting an investigation by the Private Security Industry Regulatory Authority into complaints levelled against PPA, however, the Committee did not recommend that any other action should be taken against the company.[6]

As Haffejee points out, the public outcry and strong emotions expressed in response to this incident may be traced back to the humiliation black beachgoers experienced during the apartheid era as a result of the indignities visited upon them by the policy of racially segregated beaches or – as it is more commonly known – beach apartheid. Telling black beachgoers to

[4] Staff Reporter (2018) "ANC slams private security company for ordering citizens off Clifton beach", available at https://www.iol.co.za/news/south-africa/western-cape/anc-slams-private-security-company-for-ordering-citizens-off-clifton-beach-18617023, accessed on 13 March 2020.
[5] O Mjo "Timeline: Rites, racism and rights clash on Clifton's pristine sands" *TimesLive* (31 December 2018), available at https://www.timeslive.co.za/news/south-africa/2018-12-31-timeline-rites-racism-and-rights-clash-on-cliftons-pristine-sands/, accessed on 13 March 2020.
[6] Parliamentary Monitoring "Group Clifton Fourth Beach Closure to Public: Inquiry" (4 February 2019), available at https://pmg.org.za/committee-meeting/27819/, accessed 9 March 2021, and Portfolio Committee on Environmental Affairs "Report of the Portfolio Committee on Environmental Affairs on the Parliamentary Enquiry into the Alleged Eviction of the Beach Goers at Clifton Fourth Beach" on 23 December 2018' (20 March 2019), available at https://pmg.org.za/committee-meeting/28190/, accessed on 9 March 2021 at #.

leave a beach in post-apartheid South Africa, therefore, will inevitably resurrect memories of these painful experiences and raise suspicion that this racist policy is being perpetuated in the present. In her memorable phrase, "beaches are places of fun, but also of pain".[7]

Although public amenities, including beaches, were segregated along racial lines long before the National Party came to power in 1948 and began to implement its policy of apartheid or separate development,[8] this practice was extended and intensified in 1953 when Parliament passed the Reservation of Separate Amenities Act.[9] This Act provided that "any person" who was in charge of, or who had control of, "any public premises or any public vehicle" could, whenever he deemed it expedient, set apart or reserve such premises or vehicle "for the exclusive use of persons belonging to a particular race or class".[10] Public premises themselves were defined as including "any land, enclosure, building, structure, hall, room, office or convenience to which the public has access", but did not include a public road or street.[11]

As the definition of "public premises" set out above indicates, beaches were not included in the definition of this concept when the Act was initially passed. Instead, they were added in 1960 when Parliament passed the Reservation of Separate Amenities Amendment Act.[12] This amendment expanded the definition of "public premises" by providing that the term "land" includes the "sea and the seashore as defined in section 1 of the Seashore Act".[13] The sea was defined in section 1 of the Seashore Act as "the sea and the bed of the sea within the three-mile limit",[14] and the seashore as "the land situated between the low-water mark[15] and

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[7] F Haffajee "I swim where I like? Or does beach apartheid linger on?" *Daily Maverick* (8 January 2019), available at https://www.dailymaverick.co.za/article/2019-01-08-i-swim-where-i-like-or-does-beach-apartheid-linger-on/, accessed on 13 March 2020. See also M Swart "Drawing a line in the sand on racism" *Mail and Guardian* (3 January 2019), available at https://mg.co.za/article/2019-01-03-00-drawing-a-line-in-the-sand-on-racism/, accessed on 13 March 2020, and A Deumert "Racism and the politics of the beach" *Diggit Magazine* (28 November 2019), available at https://www.diggitmagazine.com/column/politics-beach-racism, accessed on 13 March 2020.

[8] JM Rogerson "Kicking sand in the face of apartheid: Segregated beaches in South Africa" (2017) 35 *Bulletin of Geography – Socio Economic Series* 94 at 97. See also *R v Carelse* 1943 CPD 242.

[9] 49 of 1953.

[10] Section 2(1). Section 2(2) made it a criminal offence for a member of one racial group or class intentionally to enter a public premise or public vehicle that had been set aside or reserved for the exclusive use of persons belonging to another racial group or class.

[11] Section 1.

[12] 10 of 1960.

[13] 21 of 1935.

[14] The "three miles limit" was defined in section 1 of the Seashore Act as the "distance of three nautical miles out to sea from the low-water mark".

[15] The "low-water mark" was defined in section 1 of the Seashore Act as the "lowest line to which the sea recedes during periods of ordinary spring tides".

the high-water mark".[16] These areas were classified as public things (*res publicae*)[17] and ownership was vested in the State President,[18] for the "general use and enjoyment of the whole community".[19]

Despite the steps taken by Parliament to include the sea and seashore expressly in the definition of public places that could be reserved for the exclusive use of a particular race, not every local authority was willing to exercise this power or to exercise it to its fullest extent.[20] In order to address the uneven implementation of the Act, Parliament amended it in 1972 when it passed the Sea and Seashore Amendment Act.[21] This amendment conferred the power to reserve the sea and the seashore for the exclusive use of a particular race on provincial authorities by providing that the executive committee of a province was deemed to be the person who was in charge of, or who had control of, the sea and the seashore for the purposes of section 2 of the Reservation of Separate Amenities Act.[22]

Besides segregating public premises, including the sea and the seashore, on the basis of race, the Reservation of Separate Amenities Act expressly provided that separate amenities did not have to be equal. Section 3 of the Act thus stated that the reservation of public premises or vehicles for the exclusive use of a particular race or class was not invalid simply because no

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[16] The "high-water mark" was defined in section 1 of the Seashore Act as the "highest line reached by the sea during ordinary storms occurring during the most stormy period of the years, excluding exceptional or abnormal floods".

[17] Together with common things (*res communes*) and corporate things (*res universitatis*), *res publicae* were classified as those things that were excluded from property (*res extra nostrum patrimonium*) or were not subject to commerce (*res extra commercium*). An important consequence of this classification is that they could not be privately owned. Instead, they were owned by the Roman people, in Roman law, and by the prince or state, in Roman-Dutch law. Apart from the sea (mare) and the seashore (*mare litus*), *res publicae* included harbours (*porta*), perennial rivers (*flumina*), public roads (*via publicae*) and the river-banks of privately-owned rivers. These classifications and concepts are discussed in detail in Chapter 2.

[18] Section 2(1) of the Seashore Act stated in this respect that

> "… the State President shall be the owner of the seashore and the sea, except any portion thereof which was lawfully alienated before the commencement of this Act or may be alienated hereafter under this Act or under any other law".

[19] *South African Shore Angling Association v Minister of Environmental Affairs* 2002 (5) SA 511 (SECLD) at 519. See also *Consolidated Diamond Mines of South West Africa (Ltd) v Administrator, South West Africa* 1958 (4) SA 572 (A) at 643 and *Telkom v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal* 2003 (4) SA 23 (SCA) at para 30.

[20] V Møller & L Schlemmer *Attitudes Towards Black Integration: A Comparative Study of Black and White Reactions to Multiracial Beaches in Durban* (Centre for Applied Social Studies, University of Natal: 1982) at 7.

[21] 38 of 1972.

[22] Section 2A(1). This section was inserted into the Reservation of Separate Amenities Act by section 5 of the Seashore Amendment Act. Apart from conferring the power on the executive committee of a province to reserve the sea and seashore for the exclusive use of a particular race (s 2A)(1)), section 2A also provided that the executive committee could assign this power to a local authority by declaring it to have charge or control of a specified portion of the sea or seashore. Following such a declaration, the local authority would be deemed to be the person who was in charge of or, who had control of, that part of the sea and the seashore for the purposes of section 2 of the Reservation of Separate Amenities Act (s 2A(2)). These amendments gave local authorities the ability to enforce beach-apartheid through fines and imprisonment.

similar premise or vehicle was set aside or reserved for the exclusive use of any other race or class,[23] or that a premise or service provided for another race or class was "not substantially similar to or of the same character, standard, extent or quality" as those set aside or reserved for the exclusive use of a particular race or class.[24] In other words, it abolished the separate but equal principle.

Given these provisions, it is not surprising that the manner in which the Reservation of Separate Amenities Act was implemented favoured white South Africans over black South Africans. Not only was most of the sea and the seashore set aside or reserved for whites, but so were the most attractive and accessible beaches.[25] In 1977, for example, the Durban Municipal Council – which had been delegated authority over the beaches that fell within its municipal boundaries – reserved 2100 metres of its coastline for whites (22% of the population), 650 metres for Africans (46% of the population), 550 metres for Indians (28% of the population) and 300 metres for coloureds (4% of the population).[26] The white beaches were also provided with public amenities, shark nets and lifeguards, while the black beaches were ill-suited for recreational use and some were even dangerous. They were also located further from the city and thus more inaccessible.[27]

1.1.2 Remedying the mischief of apartheid

Although the Reservation of Separate Amenities Act was repealed in 1990,[28] by itself this was not sufficient to remedy the harm caused by beach-apartheid. Following the transition to democracy in 1994, therefore, the newly elected African National Congress (ANC) government adopted an ambitious legal and policy framework for the coast. This framework not only declared that the coast must be retained as a national asset, but also recognised the right of every person to access and benefit from the opportunities provided by the coast, irrespective of

[23] Section 3(a).
[24] Section 3(b).
[25] See JM Rogerson "Kicking sand in the face of apartheid: Segregated beaches in South Africa" (2017) 35 *Bulletin of Geography – Socio Economic Series* 94 at 99-103.
[26] See V Møller & L Schlemmer *Attitudes towards black integration: A comparative study of black and white reactions to multiracial beaches in Durban* (Centre for Applied Social Studies, University of Natal: 1982) at 39 and 45.
[27] See G Thompson *Surfing, gender and politics: Identity and society in the history of South African surfing culture in the twentieth*-century (PhD thesis, University of Stellenbosch, 2015) at 32, footnote 6. Despite the fact that the provisions of the Act, and the manner in which they were implemented, infringed the common law right of every member of the public to freely access and use the sea and the seashore for lawful purposes, they were consistently upheld by the courts (see *S v Naicker, S v Attawari* 1963 (4) SA 610 (N); *Richards v Port Elizabeth Municipality* 1990 (4) SA 770 (SE); *Waks v Jacobs* 1990 (1) SA 913 (T); *Jacobs v Waks* 1992 (1) SA 521 (A); and J Glazewski "Towards a Coastal Zone Management Act for South Africa" (1997) 4 *SAJELP* 1 at 13).
[28] Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990.

their race. In addition, it identified the coast as a valuable natural resource which could make an important contribution to the reconstruction and development of South Africa, but only if its diversity, health and productivity were maintained. The coast, therefore, had to be recognised as a distinctive and interconnected system and managed in a co-ordinated and integrated manner.

The formal adoption of this new framework can be traced back to the *White Paper for Sustainable Coastal Development,* which was published in 2000.[29] As its title indicates, the *White Paper* adopted "sustainable coastal development" as the ANC government's long-term, ideal vision for the coast. This vision, the *White* Paper stated, expressed the government's "intention to address the legacy of apartheid and enhance the capacity of current and future generations to realise their potential, within the context of maintaining diverse, healthy and productive coastal ecosystems".[30] The most effective way of achieving this vision, the *White Paper* stated further, was by replacing the existing fragmented, sectoral and un-coordinated approach to managing the coast with a coordinated, holistic and integrated approach that viewed the coast as a distinct, complex and interrelated system.[31]

After identifying integrated coastal management as the most appropriate mechanism for achieving sustainable coastal development, the *White Paper* formulated 21 goals and 62 objectives, all of which were aimed at providing detailed directions for achieving the vision of sustainable coastal development through integrated coastal management.[32] These goals and objectives were organised into five themes, namely Theme A: Governance and Capacity Building; Theme B: Our National Asset; Theme C: Coastal Planning and Development; Theme D: Natural Resource Management; and Theme E: Pollution Control and Waste Management.[33]

The second theme provided that the coast must be retained as a "national asset for the benefit of all South Africans",[34] and set out the government's official position insofar as the

[29] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000). The *White Paper* was preceded by a Green Paper published in 1998 (see Department of Environmental Affairs and Tourism *Coastal Policy Green Paper* (1998) and a *Draft White Paper for Sustainable Coastal Development* published in 1999 (see Department of Environmental Affairs and Tourism *Draft White Paper for Sustainable Coastal Development* (1999)).
[30] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at paras 2.2.2 and 5.1.
[31] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at para 2.2.3 and 6.2.
[32] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at para 7.1.
[33] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at para 7.2.
[34] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at Goal B.1.

public's right to physically access the sea and the seashore was concerned, as well as the state's duties as the "legal custodian of all coastal state assets".[35]

As far as the public's right to physical access to the coast was concerned, the *White Paper* provided in Goal B.1 that the state must ensure that the public has a right of physical access to the sea and to and along the seashore on a managed basis. In order to achieve this goal, two objectives were identified by Goal B.1. The first objective declared that the state must provide opportunities for public access at appropriate coastal locations,[36] and the second objective declared that public access must be managed in a manner that minimises adverse impacts and resolves incompatible uses.[37]

As far as the state's duties as the legal custodian were concerned, the *White Paper* provided in Goal B.4 that the state must fulfil its duties as "legal custodian of all coastal state assets" on behalf of the people of South Africa. In order to achieve this goal, five objectives were identified in Goal B.4. One of these objectives provided that the state must retain ownership and ensure effective management of coastal waters and the seashore,[38] and another that the state must retain ownership of and ensure effective management of public land along the seashore.[39]

These various goals and objectives were translated into law when Parliament passed the National Environmental Management: Integrated Coastal Management Act[40] (NEM: ICMA) in 2008. Although various provisions of this Act regulate the legal status, management and administration of the coast, the most significant for the purposes of this thesis are set out in section 11, section 12 and section 13.

Section 11 declares that:

> "(1) The ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the state on behalf of the citizens of the Republic.

[35] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at Goal B.4.
[36] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at Objective B1.1.
[37] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at Objective B1.2.
[38] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at Objective B4.1.
[39] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000) at Objective B4.2. Apart from these two objectives, Goal B4 also provided that the state must retain, manage, reinstate and extend the admiralty reserve (Objective B4.3); that coastal resources under the control of parastatals must be managed in the public interest and that coastal land must not be alienated for private purposes (Objective B4.4); and that the state must introduce innovative mechanisms to redress historically granted rights that conflict with the *White Paper* (at Objective B4.5).
[40] 24 of 2008.

(2) Coastal public property is inalienable and cannot be sold, attached or acquired by prescription and rights over it cannot be acquired by prescription".

Section 12 provides that:

"The state, in its capacity as the public trustee of all coastal public property, must:

(a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and

(b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations".

Finally, section 13 stipulates that:

"(1) Subject to this Act and any other applicable legislation, any natural person in the Republic:

(a) has a right of reasonable access to coastal public property; and

(b) is entitled to use and enjoy coastal public property, provided such use:

(i) does not adversely affect the rights of members of the public to use and enjoy coastal public property;

(ii) does not hinder the state in the performance of its duty to protect the environment; and

(iii) does not cause an adverse effect.

(1A) Subject to subsections (2) and (3), no person may prevent access to coastal public property.

(2) This section does not prevent prohibitions or restrictions on access to, or the use of, any part of coastal public property:

(a) which is or forms part of a protected area;

(b) to protect the environment, including biodiversity;

(c) in the interests of the whole community;

(d) in the interests of national security;

(e) in the national interest.

(3) (a) No access fee may be charged for access to coastal public property without the approval of the Minister.

(b) The Minister may by notice in the *Gazette* publish maximum fees for access to coastal public property or infrastructure located therein, payable to persons in general or a category of persons.

(c) Any person or organ of state may apply to the Minister to charge a fee in excess of the maximum published in terms of paragraph (a).

(d) The provisions of paragraph (a) shall not apply to fees for the use of facilities or activities which are located on or in coastal public property.

(4) The Minister, before granting approval for the imposition of a fee, must require a public participation process in accordance with Part 5 of Chapter 6 to enable interested and affected parties to make representations.

(5) Subsections (3) and (4) do not apply to coastal public property:
   (a) for which a coastal use permit has been issued in terms of section 65; or
   (b) that is, or forms part of, a protected area, or a port or harbour".[41]

It is important to note that this is not the first occasion on which the state, or a specific organ of state, has been designated as the public trustee of an environmentally significant natural resource. Instead, similar provisions appear in a number of other specific environmental management Acts. Before turning to discuss sections 11, 12 and 13 in more detail, it will be helpful to describe the other public trust provisions that Parliament has adopted.

1.2 THE PUBLIC TRUST CONCEPT IN SOUTH AFRICA

Apart from coastal public property, Parliament has also designated the state, or a specific organ of the state, as the public trustee of several other natural resources, including water, protected areas, biodiversity and forests. This designation made its first appearance in 1998 when the National Water Act[42] (NWA) was passed. Section 3 of this Act declares that

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

In the same year, the public trust concept was also included as a national environmental management principle in the National Environmental Management Act[43] (NEMA). Section 2(4)(o) reads in this respect as follows:

> "[t]he environment is held in public trust for the people, thus the beneficial use of environmental resources must serve the public interest, and the environment must be protected as the people's common heritage".

[41] Section 13 should be read together with section 18 of the NEM: ICMA. While section 13 provides horizontal access to coastal public property (i.e. access *along* coastal public property), section 18 provides vertical access (i.e. access *to* coastal public property from inland areas).
[42] 36 of 1998.
[43] 107 of 1998.

Five years later, the state was designated as the public trustee of protected areas and a year later as the public trustee of biodiversity. Most recently, it has been designated as the public trustee of coastal public property. Section 3 of the National Environmental Management: Protected Areas Act[44] (NEM: PAA) thus states that:

> "[i]n fulfilling the rights contained in section 24 of the Constitution, the state through the organs of state implementing legislation applicable to protected areas must *(a)* act as the trustee of protected areas in the Republic; and *(b)* implement this Act in partnership with the people to achieve the progressive realisation of these rights".

And section 3 of the National Environmental Management: Biodiversity Act[45] (NEM: BA) stipulates that:

> "[i]n fulfilling the rights contained in section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity must *(a)* manage, conserve and sustain South Africa's biodiversity and its components and genetic resources; and *(b)* implement this Act to achieve the progressive realisation of those rights".

Most recently, section 2A of the National Forests Act[46] (NFA) reads as follows:

> "The national government, as the public trustee of the nation's forestry resources, acting through the Minister, must ensure that these resources, together with the land and related ecosystems which they inhabit, are protected, conserved, developed, regulated, managed, controlled and utilised in a sustainable and equitable manner, for the benefit of all persons and in accordance with the constitutional and developmental mandate of government".

Although each of the statutes referred to above uses different terms, it is submitted that these "public trust concepts" are not entirely unrelated to one another. Instead, they form a loosely related body or *corpus* of public trust concepts that share certain attributes and goals. This is because:

- the NWA, the NEM: PAA, the NEM: BA and the NEM: ICMA form part of a single

[44] 57 of 2003.
[45] 10 of 2004.
[46] 84 of 1998. The public trust provisions were inserted by section 2 of the National Forests Amendment Act 1 of 2022. These provisions have not yet been brought into operation.

suite of specific environmental management Acts;[47]

- the NEMA provides a framework within which the other three statutes must be interpreted and applied;[48] and
- the specific provisions of the NWA, NEM: PAA, NEM: BA and NEM: ICMA are aimed at giving effect to and serving as an extension of the general principle set out in section 2(4)*(o)* of the NEMA.[49]

1.3 A PRELIMINARY ANALYSIS

In light of the discussion set out above, the following (preliminary) points may be made with respect to sections 11, 12 and 13 of the NEM: ICMA:

First, unlike the Seashore Act, which regulated the classification and legal status, the right to access and use, and the power to manage and administer, the "sea" and the "seashore", the NEM: ICMA regulates a new public thing (*res*), namely "coastal public property", which encompasses a much broader area than the sea and the seashore and a much wider variety of natural resources.[50]

Second, also unlike the Seashore Act, which vested ownership of the sea and the seashore in the State President, section 11 of the NEM: ICMA vests ownership of coastal public property in the citizens of the Republic of South Africa. It thus brings to an end what Van der Vyver has eloquently referred to as the étatisation of public property.[51]

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[47] Apart from the NWA, the NEM: PAA, the NEM: BA and the NEM: ICMA, the suite of national specific environmental management Acts also includes the Environmental Conservation Act 73 of 1989, the World Heritage Conservation Act 49 of 1999, the National Environmental Management: Air Quality Management Act 39 of 2004 and the National Environmental Management: Waste Act 59 of 2008.

[48] As Oosthuizen, Van der Linde & Basson point out,

> "As an overarching framework law, NEMA … recognises and provides for complimentary subsidiary and sectoral laws to be adopted in order to afford greater and more specific protection to various environmental aspects including aspects such as biodiversity, water resource management, protected areas and waste management".

See M Oosthuizen, M van der Linde & E Basson "National Environmental Management Act 107 of 1998 (NEMA)" in ND King, HA Strydom & FP Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* 3 ed (2018) at 128. See also J Glazewski *Environmental Law in South Africa* 3 ed (2013) at 7–8; and M Kidd *Environmental Law* 2 ed (2011) at 35.

[49] Section 2(1)*(e)* of the NEMA provides that the principles set out in s 2

> "apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment".

This section is informed by ss 7(2) and 24 of the Constitution which, when read together, provide that all three spheres of government and all organs of state must respect, protect, promote and fulfil people's right to an environment that is not detrimental to their health or well-being.

[50] Coastal public property is defined in section 1 of the NEM: ICMA as "coastal public property referred to in section 7". Section 7 defines coastal public property by describing the various components that taken together comprise this new thing. These components are discussed in some detail in Chapter 3.

[51] See JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) at 216.

Third, while section 11 of the NEM: ICMA vests ownership of coastal public property in the citizens of South Africa, it does not vest the right to access, use and enjoy this space in the citizenry. Instead, section 13 of the Act separates these rights from the ownership of coastal public property and vests them in "any natural person in the Republic".

Fourth, apart from separating the right to access and use coastal public property from the ownership of this space, sections 11 and 12 of the NEM: ICMA also separate the right to manage and administer, as well as to conserve, protect and enhance, coastal public property from the right of ownership of this space and vests it in the state as the coastal public trustee.

As this preliminary analysis indicates, a distinction may be drawn between those provisions of sections 11, 12 and 13 that regulate the classification and legal status of coastal public property, those provisions that regulate the management, administration, conservation and protection of coastal public property and those provisions that regulate public access to coastal public property. The first set of provisions may be referred to as the "ownership provisions", the second set as the "public trust provisions", and the third set as the "public access provisions".

These three sets of provisions give rise to a number of complex and difficult questions. Among them are the following:

(1) Have the ownership provisions of section 11 of the NEM: ICMA simply codified the common law principles governing the classification and legal status of the sea and the seashore as *res publicae*, or have they introduced an entirely new form of statutory public ownership into South African coastal law?

(2) Given that the entitlements to access, use, manage and administer coastal public property have been separated from the ownership of coastal public property and vested in other entities, does the right of ownership confer any meaningful entitlements on the citizenry, or is it simply a bare or nude form of ownership?

(3) If the ownership of coastal public property does not confer any meaningful entitlements on the citizenry, as appears to be the case, what purpose do the ownership provisions of section 11 of the NEM: ICMA serve, other than to confirm the public nature of coastal public property? Do the ownership provisions have any jurisprudential significance?

(4) Have the public trust provisions of sections 11 and 12 of the NEM: ICMA simply incorporated the United States (US) Public Trust Doctrine into South African coastal law, or have they established a uniquely South African public trust concept for

managing, administering, conserving, protecting and enhancing coastal public property?

(5) Apart from the environmental management principles set out in section 2 of NEMA and the specific provisions of the NEM: ICMA itself, do the public trust provisions of sections 11 and 12 confer any additional powers and rights or impose any additional duties and obligations on the state as the public trustee?

(6) If the public trust provisions of sections 11 and 12 of the NEM: ICMA do impose additional powers and rights, or duties and responsibilities, on the state as the public trustee, what is the nature, scope and content of those powers, rights, duties and responsibilities?

The goal of this thesis, therefore, is to investigate and address these questions through a critical analysis of the ownership and public trust provisions of sections 11 and 12 of the NEM: ICMA. More particularly, the goal of this thesis is to investigate the classification and legal status of coastal public property; the legal nature and purpose underlying the right of ownership of coastal public property vested in the citizens of the Republic; the legal nature and purpose underlying the coastal public trust concept; and the powers, rights, duties and responsibilities this concept imposes on the state as the public trustee.

1.4 THE RESEARCH QUESTIONS

As pointed out above, the goal of this thesis is to critically analyse the ownership and public trust provisions of sections 11 and 12 of the NEM: ICMA to investigate the classification and legal status of coastal public property; the legal nature and purpose underlying the right of ownership of coastal public property vested in the citizens of the Republic; the legal nature and purpose underlying the coastal public trust concept; and the powers, rights, duties and responsibilities this concept imposes on the state as the public trustee.

More specifically, the goal of this thesis is to answer the following questions:

(i) Have the ownership provisions of section 11 codified the common law principles governing the classification and legal status of the sea and the seashore, or have they introduced a new form of statutory public ownership?

(ii) Have the ownership provisions of section 11 conferred any meaningful entitlements on the citizenry as owners?

(iii) If the ownership provisions have not conferred any meaningful entitlements on the citizenry, what is the underlying purpose of these provisions?

(iv) Have the public trust provisions of sections 11 and 12 incorporated the US Public Trust Doctrine into South African coastal law, or have they introduced a uniquely South African coastal public trust concept?

(v) If sections 11 and 12 have introduced a uniquely South African coastal public trust concept, what is the legal nature and underlying purpose of this concept?

(vi) Have the public trust provisions of sections 11 and 12 imposed additional powers, rights, duties and responsibilities on the state as the public trustee?

1.5 THE RESEARCH METHODOLOGY

This is a doctrinal study and is based on a desk-top review of appropriate and relevant materials. This methodology is commonly used in the field of law. In terms of this approach, a legal issue that is capable of sustaining in-depth research must be identified and translated into one or more research questions. After the research questions have been formulated, the legal concepts, principles and rules that apply to the issue must be located, structured and described in a coherent, concise and logical manner. These legal concepts, principles and rules must then be analysed, taking into account, *inter alia*, academic commentary, comparative legal systems, policy considerations and theoretical frameworks. This analysis must be aimed at answering the research questions. These answers must be persuasively justified and may be followed by recommendations and suggestions for legal reform or further study. The materials on which this method relies are traditionally divided into two categories, namely primary legal materials and secondary legal materials. The primary materials include case law, statute law and the old authorities. The secondary materials include books, chapters in books, journal articles, policy documents, theses and dissertations and so on.

1.6 THE STRUCTURE OF THE STUDY

This thesis is divided into seven chapters. These are as follows:

Chapter One: Introduction

The purpose of this chapter is to introduce the reader to the study. Apart from the background to the study, the goal of the study, the research questions, the methodology and the structure of the study are set out in Chapter One.

Chapter Two: The Classification and Legal Status of the Sea and the Seashore

The purpose of this chapter is to provide a historical context within which a critical analysis of the ownership provisions of section 11 of the NEM: ICMA may be conducted. After a brief introduction, the chapter engages in a discussion of the legal principles and rules governing the classification and legal status of the sea and the seashore in Roman law. This discussion is followed by an examination of the public's right to access and use the sea and the seashore, the state's power to regulate the sea and the seashore and the boundaries of the sea and the seashore in Roman law. Following this examination, the chapter goes on to investigate the same four topics in Roman-Dutch law and the Seashore Act, namely the classification and legal status of the sea and the seashore, the public's right to access and use the sea and the seashore and the boundaries of the sea and the seashore.

Chapter Three: The Classification and Legal Status of Coastal Public Property

In light of the historical analysis in Chapter Two, the purpose of this chapter is to critically analyse the ownership provisions of section 11 of the NEM: ICMA. This critical analysis is located within a broad overview of the NEM: ICMA as a whole. After a brief discussion of the background to, and objects of, the NEM: ICMA, the chapter engages in a detailed examination of the composition and boundaries of the coastal zone, as well as the classification and legal status of coastal public property. Following this examination, the chapter sets out and describes the coastal institutions, coastal management programmes and coastal regulatory and enforcement mechanisms. It then turns to consider the implications of the Supreme Court of Appeal's judgment in *Gongqose v Minister of Agriculture, Forestry and Fisheries*[52] for the provisions of the NEM: ICMA and its relationship to African customary law.

Chapter Four: The Classification, Nature and Justification of Public Property in Anglo-American-Australasian Jurisdictions

The purpose of this chapter is to go beyond the doctrinal approach adopted in Chapter Three and to critically analyse the ownership provisions of section 11 of the NEM: ICMA from a more theoretical perspective. This theoretical analysis is based on the body of work produced by Anglo-American-Australasian public property scholars, such as Carol Rose, Gregory Alexander and John Page. After a brief discussion justifying the decision to rely on common law public property scholars rather than civil law public property scholars, the chapter

[52] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA).

examines the different property regimes that may be found in common law jurisdictions, namely common, public and private property. It then focuses on the scope and content of public ownership. Following Page's lead, this discussion is divided into three sections. These are the incidents of public ownership, the spectrum of public ownership and rethinking ownership. The chapter then turns to examine the normative justifications underlying public property as argued by Grey, Rose and Alexander. Rose's arguments in favour of inherently public property as a resource that promotes human sociability are applied to the ownership provisions of section 11.

Chapter Five: The United States Public Trust Doctrine

After concentrating on the ownership provisions of section 11 of the NEM: ICMA in Chapters One, Two and Three, this thesis turns to explore the public trust provisions of sections 11 and 12 in Chapters Five and Six. This exploration will be based on and engage with the approach adopted by South African water resource public trust scholars to the public trust provisions of section 3 of the National Water Act (NWA).[53] However, before embarking on this investigation of the water resource and coastal public trust provisions, it will be helpful to study the United States (US) Public Trust Doctrine in some detail. Although most South African water resource public trust scholars agree that the US Public Trust Doctrine has not been incorporated into South African law as a whole, they accept that it may be taken into consideration as a persuasive source of law given its long history, rich jurisprudence and wide variety of concepts, principles and rules. After briefly discussing the historical origins of the US Public Trust Doctrine, the chapter examines the "traditional" approach to the Doctrine. This examination is followed by an investigation of the manner in which the Doctrine has been transformed over the past 55 years, largely as a result of the emergence of the modern environmental movement and Joseph Sax's public trust scholarship. The Doctrine's continuing supervisory duty and Michael Blumm's arguments in favour of treating the Doctrine as a remedy are also reviewed.

Chapter Six: The South African Coastal Public Trust Concept

The purpose of this chapter is to critically analyse the public trust provisions in sections 11 and 12 of the NEM: ICMA. This analysis is based on and engages with the approach adopted by South African water resource public trust scholars to the public trust provisions in section 3 of the NWA. Relying on the US Public Trust Doctrine as a persuasive source of law, scholars

[53] 36 of 1998.

such as Van der Schyff, Young, Viljoen and Harding have analysed various aspects of the water resources public trust provisions, including the classification and legal status of water resources, the identity and nature of the public trustee, the identity and nature of the trust beneficiaries, and the fiduciary obligations the water resources public trust imposes on the national government as the trustee. Focusing only on the classification and legal status of water resources and the fiduciary duties imposed by the water resources public trust on the national government as the public trustee, this chapter levels certain criticisms against the approach adopted by the water resource public trust scholars and proposes alternative ways of analysing these two aspects. These alternative approaches are then applied to the coastal public trust concept. Certain findings are made in light of these arguments.

Chapter Seven: Findings and Recommendations

The purpose of this chapter is to extract and summarise the findings and arguments made in this study and, in light of those findings and arguments, to answer the research questions. In addition, the purpose of this chapter is to make recommendations for law reform (if any) and to identify areas of further study.

CHAPTER TWO

THE CLASSIFICATION AND LEGAL STATUS OF THE SEA AND THE SEASHORE

2.1 INTRODUCTION

As stated in Chapter One, the purpose of this chapter is to provide a historical context within which a critical analysis of the ownership provisions of section 11 of the National Environmental Management: Integrated Coastal Management Act[1] (NEM: ICMA) may take place. It begins with a discussion of the legal principles and rules governing the classification and legal status of the sea and the seashore in Roman law. Apart from the classification and legal status of the sea and the seashore, the public's right to access and use these public things, the state's power to regulate them and the boundaries of the sea and the seashore in Roman law are examined. Following this examination, the chapter turns to investigate the same four topics, first, in Roman-Dutch law and, second, in terms of the Seashore Act,[2] namely the classification and legal status of the sea and the seashore, the public's right to access and use these things, the state's power to regulate them and the boundaries of the sea and the seashore. This chapter is divided into five sections. Besides this introduction, the Roman law principles and rules are discussed in section 2.2, the Roman-Dutch law principles and rules in section 2.3 and the provisions of the Seashore Act in section 2.4. The conclusion is set out in section 2.5.

2.2 ROMAN LAW

2.2.1 The classification and legal status of the sea and the seashore in Roman law

Together with air (*aer)* and running water (*aquae profluens*), the sea (*mare*) and the seashore (*mare litus*) were classified in late classical Roman law as "common things" (*res communes*). *Res communes* were defined as those things that, by natural law, were freely available to all people and, accordingly, were not susceptible to either public or private ownership.[3] It

[1] 24 of 2008. Section 11 of the NEM: ICMA provides that "[t]he ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the State on behalf of the citizens of the Republic".

[2] 21 of 1936.

[3] *Institutes of Justinian*, translated by JB Moyle (1913) (hereafter *Inst*) 2.1.1; *Digest of Justinian*, T Mommsen and P Krueger (eds) translated by A Watson (1985) (hereafter *D*) 1.8.2.1; *D* 43.8.3.1; and *D* 47.10.13.7. Things that could be owned by private persons were classified as things included in property (*res in nostro patrimonio*) or things subject to commerce (*res in commercio*). Although the Romans did not describe them in this manner, the natural resources encompassed by the category of *res communes* may be defined in more modern terms as

followed, therefore, that *res communes* could not be owned by the Roman people as a whole or by individual Roman citizens. Given this fact, they were classed in Roman law, initially, as things that were excluded from property (*res extra nostrum patrimonium*) and, subsequently, as things that were not subject to commerce (*res extra commercium*).[4]

In the second book of his *Institutes*, the emperor Justinian summarised these principles as follows:

> "In the preceding book, we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows. Thus, the following are by natural law common to all – the air, running water, the sea, and consequently the seashore".[5]

"open access" commons. Open access commons are those which individuals are free to use without any significant constraints, but do not have the right to exclude others from freely using. As Hardin has pointed out, the problem with open access commons is that individuals are incentivised to use the natural resource to maximise their own immediate benefit without taking any steps to conserve or protect the resource for future use. If all of the users adopt the same logic, he points out further, the natural resource will soon be decimated through over-use and underinvestment. Famously, Hardin referred to this outcome as the "tragedy of the commons" (see G Hardin "The tragedy of the commons" (1968) 162 *Science* 1243).

[4] *Inst* 2.1 pr; and *D* 1.8.2 pr-1. See also CG van der Merwe "Things" in *LAWSA Vol 27* 2ed (2014) at para 30; G Muller, R Brits, J Pienaar and Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) at 31; and JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) 261 at 264. Although most scholars treat *res extra nostrum patrimonium* and *res extra commercium* as synonymous, Yiannopoulos correctly points out that the first category is much narrower than the second. This is because *res extra nostrum patrimonium* encompasses those things that have been excluded only from private ownership usually for practical reasons, while r*es extra commercium* encompasses those things that have been excluded from all private law relations, usually for policy reasons (see AN Yiannopolous "Introduction to the law of things: Louisiana and comparative law" (1961-1962) 22 *Louisiana Law Review* 757 at 765). Given that it is the broader category, for the reminder of this thesis we will simply use the phrase *res extra commercium*.

[5] *Inst* 2.1 pr-1. The legal category of *res communes* emerged in the late classical period of Roman law (190 CE - 235 CE), but the concept itself has been traced back to the Greek Stoics and their theories on the origin and development of human culture. The first Roman source in which the idea appears is Plautus' comic play *Rudens* written around 190 BC. In this play, a fisherman claims ownership of his catch on the grounds that "the sea is undoubtedly common to all people" (lines 696-675). Initially, the legal category of *res communes* included only three items, the air, the sea and the seashore. For example, in his fifty-seventh book on the Praetorian Edict, the Severan jurist Ulpian states that "[t]he sea and its shores are certainly common to all, just like the air" (*D* 47.10.13.7). Running water was added to this list by his colleague, Marcian. In the third book of his *Institutes*, Marcian writes that "[t]hese things also are common to all by natural law: air, running water, the sea and therefore the shores of the sea" (*D* 1.8.2 pr-1). Given the overlap between the two versions, it can be said with some confidence that Justinian's description of *res communes* was taken almost directly from Marcian's, although without acknowledging him. (see MJ Schermaier "*Res Communes Omnium:* The history of an idea from Greek philosophy to Grotian jurisprudence" (2009) 30 *Grotiana* 20 at 39; BW Frier "The Roman origins of the Public Trust Doctrine" (2019) 32 *Journal of Roman Archaeology* 641 at 643; and JB Ruhl and AJ McGinn "The Roman Public Trust Doctrine: What was it, and does it support an atmospheric trust" (2020) 47 *Ecology Law Quarterly* 117 at 166).

Apart from *res communes*, other categories of things were also classified as being *res extra commercium*, namely "public things" (*res publicae*) and "corporate things" (*res universitatis*).

Res publicae were defined as those things that belonged to the Roman people as a whole and, therefore, could be used by them.[6] In other words, they were subject to public ownership, but not private ownership. *Res publicae* included harbours (*porta*), perennial rivers (*flumina*), public roads (*via publicae*) and the river-banks of privately-owned rivers.[7] *Res universitatis* were defined as those things that belonged to a corporate body such as a city and included theatres (*theatre*), sports grounds (*stadia*) and municipal baths.[8]

Besides these three categories of things (which Gaius grouped together as things governed by human law (*res humani iuris*)),[9] a separate category of things (which Gaius grouped together as things governed by divine law (*res divini iuris*))[10] was also classified as *res extra nostrum patrimonium* or *res extra commercium*.[11] *Res divini iuris* were divided into three categories, namely sacred things (*res sacrae*), religious things (*res religiosae*) and sanctified things (*res sanctae*).[12] *Res sacrae* were those things consecrated to the heavenly gods, such as temples and the sacred contents of temples, such as the altar.[13] *Res religiosae* were those consecrated to the nether gods, such as graveyards, sepulchres and tombs,[14] and *res sanctae* were those that had been placed under the special protection of the gods, such as the gates and walls of a city.[15]

For the purposes of this thesis, the distinction between *res communes* and *res publicae* is the most significant. Unfortunately, the Roman jurists did not clearly identify the principled basis on which they distinguished *res communes* from *res publicae* and, consequently, the distinction

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[6] It is important to note that the "public" in *res publicae* was not the Roman state. Instead, it was the "unorganised public", that is, the Roman people (see G Resta "Systems of public property" in M Graziadei and L Smith (eds) *Comparative Property Law: Global Perspectives* (2017) 216 at 226).
[7] *Inst* 2.1.2; *Inst* 2.1.4; *D* 1.8.4.1; and *D* 1.8.5 pr. See also CG van der Merwe "Things" in *LAWSA Vol 27* 2ed (2014) at para 31; G Muller, R Brits, J Pienaar and Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) at 32; and JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) 261 at 264.
[8] *Inst* 2.1.6 and *D* 50.16.15. See also G Muller, R Brits, J Pienaar and Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) at 35; and JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) 261 at 265.
[9] *Institutes of Gaius*, translated by F de Zulueta (1935) (hereafter *G*) 2.2.
[10] *G* 2.2.
[11] Following the Reformation, *res divini iuris* are no longer classified as *res extra nostrum patrimonium* or *res extra commercium*. Instead, they are now capable of being privately owned and are classified as *res in nostro patrimonio or res in commercio*) (see D van Zyl *History and Principles of Roman Private Law* (1977) at 122).
[12] CG van der Merwe "Things" in *LAWSA Vol 27* 2ed (2014) at para 44; G Muller, R Brits, J Pienaar and Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) at 36; and JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) 261 at 264.
[13] *Inst* 2.1.8 and *D* 1.8.6.3.
[14] *Inst* 2.1.9; *D* 1.8.6.4; and *D* 1.8.6.5.
[15] *Inst* 1.1.10; *D* 1.8.1 pr; D .1.8.8.2; *D* 1.8.9.3; *D* 1.8.9.4; and *D* 1.8.11.

between these two categories appears to have been quite fluid.[16] It was not unusual, therefore, for a specific thing, such as the seashore, to be classified as common by one Roman jurist and as public by another Roman jurist. For example, Marcian described the seashore as a *res communis*,[17] while Ulpian described it as a *res publica*.[18] Like Ulpian, Celsus also described the seashore as a *res publica*.[19]

Although the Roman jurists did not clearly identify the principled basis on which they distinguished *res communes* from *res publicae*, modern scholars have attempted to do so. In her 2003 article titled, "Romans, roads and romantic creators: Traditions of public property in the information age", Rose argues that the rationale for *res communes* is what she refers to as the "Impossibility Argument". This argument provides that some natural resources, such as the air, running water and the sea, are incapable of being "captured", "enclosed", or subjected to any other "act of exclusive appropriation" because of their diffuse and wide-ranging physical character and, for these reasons, are classified as common rather than public or private things.[20]

Apart from the air, running water and the sea, Rose identifies another category of *res communes*, namely stocks of wild animals and fish. Although some stocks are small and localised, she explains, most are so dispersed that it is impossible to exercise control over them in their entirety. As she puts it, "whale stocks span the oceans, butterflies and humming birds cross continents". Rose acknowledges, however, that advances in technology have made it increasingly possible to reduce diffuse and wide-ranging resources to exclusive control and thus render them capable of being privately owned. In other words, to "propertize" them. The range of things that are impossible to "capture" or "enclose", therefore, is shrinking.[21]

A similar argument is made by Robbie, who contends that the air, running water and the sea were classified as *res communes* by the Roman jurists because their defining characteristic is that they cannot be appropriated in their entirety since they are constantly moving or so plentiful that they have no fixed boundaries.[22] While the air, running water and the sea are incapable of being appropriated, Robbie argues, the same point cannot be made with respect to the seashore. Instead, the seashore is capable of being appropriated and, strictly speaking, Ulpian and Celsus were correct; it should have been categorised as a *res publica*, rather than a

[16] W Buckland *A Textbook of Roman Law from Augustus to Justinian* 3ed (1963) at 184.
[17] *D* 1.8.2.1.
[18] *D* 39.2.24 pr.
[19] *D* 43.8.3 pr.
[20] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 93.
[21] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 94.
[22] J Robbie *Private Water Rights in Scots Law* (PhD thesis, University of Edinburgh, 2012) at 15.

res communis. However, she argues further, the seashore was probably regarded as an accessory to the sea by the majority of Roman jurists and thus also as a *res communis*.[23]

While the rationale for classifying certain natural resources as *res communes* is based on their physical (i.e. unbounded) nature, Rose argues, the rationale for classifying harbours, perennial rivers, public roads, the use of privately-owned river banks and other similar physical spaces as *res publicae* cannot be based on the same grounds. This is because these spaces are physically capable of being "captured" or "enclosed" and, consequently, can be appropriated. Instead of their physical nature, therefore, these spaces were, and still are, classified as *res publicae* on the basis of normative arguments.[24] The key normative argument here, she explains, is that these physical spaces usually take the form of mobility or travel lanes that can be used for commercial, military, navigation, telecommunication and transportation purposes between distant locations.[25] It is important to protect the public nature of these mobility or travel lanes by classifying them as public rather than private things for two reasons:

First, because mobility lanes are often long and thin, it is relatively easy for adjacent landowners to create bottlenecks and obstructions and, in this way, to take effective control of an entire lane. To prevent opportunistic bottlenecks and obstructions and thus protect public access to these mobility lanes, they must be classified as public rather than private things.[26]

Second, because mobility lanes connect places and people over a wide area, they create trading networks. These trading networks promote commerce, and commerce itself "permits and encourages specialization, and in so doing, wider commerce exponentially enhances the value of all parties' property". To facilitate this networking process, however, the public must have continuing access to these mobility lanes.[27]

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[23] J Robbie *Private Water Rights in Scots Law* (PhD thesis, University of Edinburgh, 2012) at 15. This argument is not entirely convincing. Given that the landward and seaward boundaries of the seashore (the high and low-water marks) are ambulatory, it is submitted that the seashore is also constantly moving and, therefore, difficult to appropriate in its entirety. It was thus correctly classified as a common thing by Marcian and other late classical jurists.

[24] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 96. See also RA Epstein "Property rights: Long and skinny" (2020) 14(1) *International Journal of the Commons* 567. DOI: https://doi.org/10.5334/ijc.993.

[25] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 97.

[26] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 97.

[27] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 98. A unique characteristic of property which has a networking effect, Rose argues, is that it is not depleted or destroyed by overuse. Instead, the more it is used the more productive and valuable it becomes. She refers to this as the "Comedy of the Commons" rather than the Tragedy of the Commons (see CM Rose "The comedy of the commons: Commerce, custom, and inherently public property" (1986) 53 *University of Chicago Law Review* 711). The notion of the comedy of the commons is discussed in more detail in Chapter Four of this thesis).

Apart from these two reasons, Rose writes, it is important to note that the concept of *res publicae* is not antagonistic to the concept of private property. Instead, it "works hand in glove with a regime in which most resources are the subject of private property". Protecting public access to mobility lanes by classifying them as *res publicae* would make little to no sense without an underlying system of private property and private trade. "The openness of trade routes presumes that the users of these routes have their own incentives to trade and that those incentives come in large part from private ownership".[28]

2.2.2 The public's right to access and use the sea and the seashore in Roman law

Although *res communes* were not susceptible to either public or private ownership, everyone was entitled to access and use these things in Roman law freely. The right to use *res communes* seems to have been classified as a private law right by the Roman jurists. This is because an interference with a person's use of these things could be remedied by way of the *actio injuriarum*. This principle is usually traced back to Ulpian, who based it on an opinion of Pomponious. In this opinion, Pomponius argued that since the use of *res publicae* was already protected by the *actio injuriarum* and that an interference with the use of *res publicae* was similar to an interference with the use of *res communes,* it followed that an interference with the use of *res communes* should also be protected by the same remedy.[29]

The right to access and use *res communes* freely, and especially the right to access and use the sea and the seashore, was discussed in some detail by the Roman jurists. For example, Marcian stated that everyone was entitled to access the seashore to fish, provided they kept clear of houses, buildings and monuments (tombs).[30] Ulpian took this a step further when he wrote that not only was everyone entitled to fish, but also to cast their nets in the sea.[31] For his part, Gaius stated that everyone had the right to haul fishing nets from the sea onto the seashore and to dry them there.[32] In addition, he also wrote that those who fish in the sea had the right to erect a hut on the seashore to take shelter.[33]

Apart from these entitlements, the Roman jurists also stated that everyone was entitled to construct a building in the sea or on the seashore, provided they did not interfere with the

[28] CM Rose "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89 at 100.
[29] *D* 47.10.13.7. See also *D* 47.11.1.1.
[30] *D* 1.8.4 pr. See also *Inst* 2.1.1.
[31] *D* 47.10.13.7.
[32] *D* 1.8.5 pr. See also *Inst* 2.1.5.
[33] *D* 1.8.5.1. See also *Inst* 2.1.5.

public's right to use and enjoy these things.[34] In such a case, the builder would acquire ownership of the portion of the sea or seashore on which the building had been erected.[35] However, this right of ownership was a temporary one. This is because the portion of the sea or the seashore on which the building had been constructed would revert to being a *res communis* as soon as the building collapsed or was demolished. Or, to put it another way, the person who erected the building would lose ownership of the portion of the sea or the seashore on which the building had stood as soon it collapsed or was demolished.[36]

The temporary nature of this right to acquire ownership of a portion of the sea or the seashore through building was highlighted by Marcian when he wrote the following:

> "This principle is taken as far as to the conclusion that people who build there are constituted owners of the ground, but only as long as the building remains there. Conversely, when the building collapses then, as if by right of *postliminium*, the place reverts to its former condition, and if someone builds in that same place it becomes his".[37]

Even though these rules undermine the classification of the sea and the seashore as *res communes*, they appear to have been adopted after wealthy Romans began building large villas along the coast of central Italy and, in particular, the Bay of Naples during the late Republic. These villas were used, not only for pleasure, but also for commercial purposes. While some owners engaged in traditional agricultural practices, such as growing olives and planting vines, others took advantage of the demand for fresh fish in Rome and built artificial fish ponds (*piscinae*) on the shores below their properties. These artificial fish ponds extended beyond the shore and out into the sea. They were cut out of rocky shelves or built using hydraulic concrete, which had recently been discovered. They were divided into separate enclosures for different species of fish and equipped with openings, pipes and channels. The sea tides were used to replenish the water in the fishponds and to keep them well-oxygenated.[38]

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[34] *D* 1.8.6 pr; *D* 41.1.14 pr; *D* 41.1.30 and *D* 41.1.50.
[35] *D* 1.8.6 pr; *D* 39.1.1.18; *D* 41.1.14 pr; and *D* 41.1.30.4.
[36] *D* 1.8.6 pr and *D* 41.1.14.1. Although some Roman jurists argued that the portion of the sea or seashore would revert to being a *res communis* as soon as the building collapsed or was destroyed (see, for example, Marcian (*D* 1.8.6 pr) and Paulus (*D* 18.1.51)), other jurists argued that it would become an unowned thing (*res nullius*) and if someone else built on that portion of sea or seashore, he would become the owner (see, for example, Neratius (*D* 41.1.14.pr) and Pomponius (*D* 41.1.30.4)).
[37] *D* 1.8.6 pr.
[38] A Marzano *Roman Villas in Central Italy: A Social and Economic History* (2007) at 13; A Marzano *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (2013) at 235; and GPR Metraux *The Roman Villa in the Mediterranean Basin* (2018) at 125. See also H Pringle "How ancient Rome's 1% highjacked the beach" *Hakai Magazine* 5 April 2016. Available at: https://hakaimagazine.com/features/how-ancient-romes-1-hijacked-beach/, accessed 19 January 2022.

As Frier has pointed out, the construction of these artificial fish ponds – some of which were as large as two football fields – must inevitably have influenced the manner in which the Roman jurists conceived of and gave expression to the legal principles governing the sea and the seashore, especially those governing the temporary acquisition of ownership of a portion of the sea and the seashore by building.[39] Instead of characterising these legal principles as confused and contradictory, therefore, it may be more helpful to view them as a pragmatic response to the development of marine aquaculture. By conferring a temporary right of ownership on those villa owners who built these fishponds, the jurists achieved two important goals. First, they facilitated the development and growth of a lucrative and important industry by granting villa owners security of title, at least while their fish ponds were in existence; and, second, they ensured that the sea and the seashore would remain common property and thus accessible to everyone in the long run by circumventing the principles governing the accession of buildings to land (*inaedificatio*).[40]

Finally, it is important to note that with one possible exception, it was not necessary to obtain the consent of the state to use and enjoy the sea and the seashore in the various ways described above.[41] The exception relates to the right to construct a building in the sea or the seashore. While most of the Roman jurists stated that everyone was entitled to exercise this right, provided the building did not interfere with the public's right to use these things, Pomponius went a step further and stated that it was also necessary to obtain a decree from the praetor authorising the construction of the building.[42]

2.2.3 The state's power to regulate the sea and the seashore in Roman law

Although the sea and the seashore were classified in Roman law as *res communes* and, consequently, were not susceptible to either public or private ownership, the state nevertheless had the authority, not only to regulate the manner in which the public exercised their rights to

[39] BW Frier "The Roman origins of the Public Trust Doctrine" (2019) 32 *Journal of Roman Archaeology* 641 at 645.
[40] N Ziha and M Sukacic "Troubled waters: Croatian seashore as *res extra commercium in commercio*" 2023 *Pravni Vjesnik* 7 at 9.
[41] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 620.
[42] *D* 41.1.50. In his *Commentarius ad Pandectas,* Voet discussed the public's right to build in the sea or on the seashore and acquire ownership thereof in some detail. Insofar as the obligations not to inconvenience the public and to obtain authorisation from the praetor were concerned, Voet explained that while the first requirement (not to inconvenience the public) was strictly necessary, the second (to obtain authorisation from the praetor) was not. Even though the second requirement was not strictly necessary, he explained further, it was nevertheless advisable to obtain the praetor's authorisation to build in the sea or on the seashore as protection against any allegation that the building inconvenienced the public or a third party and, therefore, should be taken down (Johannes Voet *Commentarius ad Pandectas* (translated by P Gane (1957) at 1.8.4).

access and use the sea and the seashore, but also to grant special rights in these things to private persons. The state's authority to grant special rights in these things was derived from its sovereign power (*imperium*) and not from its ownership (*dominium*) of the sea and the seashore. This is because it did not own these things.[43]

The sorts of special rights the state could grant to private persons were referred to by, *inter alia*, Ulpian and Plautius. In *D* 47.10.13.7, Ulpian writes that according to the older jurists, a person could lease or hire the right to fish from the state and that this lease was protected by an interdict, and in *D* 47.10.14, Plautius writes that a special right to the exclusive use of the sea and the seashore for a particular purpose could be granted by the state, and that these special rights were also protected by an interdict. As we have already seen, in *D* 41.1.50, Pomponius stated that the praetor could grant a decree authorising the construction of a building in the sea or on the seashore and that such a decree would protect the builder's ownership of that portion of the sea or the seashore from any allegation that it interfered with the public right to access and use those things.[44]

2.2.4 The boundaries of the sea and the seashore in Roman law

Apart from the landward boundary of the seashore, the Roman jurists did not define any of the other boundaries associated with the sea or the seashore.[45] This is most probably because the landward boundary is the dividing line between private property and public property and is more likely to give rise to disputes than any of the other boundaries, at least from a private law perspective. The landward boundary of the seashore is defined by Celsus as the furthest line reached by the flow of the sea (the *maximus fluctus*)[46] and, in similar terms, by Javolenus as the line reached by the waves at their "furthest point" (the *maxime fluctus*).[47] These definitions were repeated in slightly more detail in the *Institutes* of Justinian, where he stated that the seashore extends to the furthest line reached by the flow of the sea during ordinary winter storms (the *hibernus maximus fluctus*).[48] These definitions were adopted almost verbatim in

[43] G Samuel "On the beach: What can beaches reveal about legal reasoning and categorisation?" (2017) 12 *Journal of Comparative Law* 187 at 195.
[44] See section 2.2.2 above.
[45] RW Lee *An Introduction to Roman-Dutch Law* (1931) at 130.
[46] *D* 50.16.96.
[47] *D* 50.16.112.
[48] *Inst* 2.1.3. Although the Roman jurists did not define the seaward boundary of the seashore, Lee suggests that it extends as far as the "lowest ebb" (see RW Lee *An Introduction to Roman-Dutch Law* (1931) at 130, footnote 5).

Roman-Dutch law and examined in great detail by the Appellate Division (as it then was) in its judgment in *Pharo v Stephan*.[49] This case is discussed in detail below.[50]

2.3 ROMAN-DUTCH LAW

2.3.1 Introduction

As its name indicates, Roman-Dutch law is a combination of the Roman law of Justinian, as adopted in the "Reception", and medieval Dutch law, derived mainly from Germanic customary law.[51] Unlike Roman law, Germanic customary law did not classify the sea and the seashore as *res communes*. This is because Germanic customary law did not distinguish between *res extra commercium* and *res in commercio*. This distinction was uniquely Roman.[52]

Instead of categorising the sea and the seashore as *res communes*, Germanic customary law included them in the list of regalian rights (*regalia*). The *regalia* encompassed a wide range of powers, prerogatives and rights that vested in the prince (the *princeps*)[53] in his capacity as the sovereign.[54] They were divided into two categories, namely major (*regalia maiora*) and minor (*regalia minora*). The *regalia maiora* encompassed the political and administrative powers of the *princeps* and could not be alienated (such as the power to appoint officials, appropriate fines and demand military service), and the *regalia minora* included the economic and property rights of the *princeps* and could be alienated (such as the rights in respect of public roads, navigable rivers, the sea and the seashore).[55]

Although the concept of regalian rights in Germanic customary law may be traced back to the early Middle Ages (which ran from the fifth to the ninth centuries) when the Frankish kings combined the powers, prerogatives and rights they appropriated from the Roman state with those that they acquired through conquest,[56] these rights became prominent in the high Middle Ages (which ran from the tenth to the thirteenth centuries), largely as a result of the conflict between the Holy Roman Emperor, Frederick I Barbarossa (1122-1190) and the

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[49] 1917 AD 1.
[50] See section 2.3.5.
[51] HR Hahlo and E Khan *The South African Legal System and its Background* (1968) at 329.
[52] JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) 261 at 266.
[53] Unlike the Roman emperors, the medieval emperors did not enjoy or exercise comprehensive powers. Instead, they shared their power with other rulers, including kings, dukes and counts. Medieval jurists, therefore, used the term "prince" or *princeps* to refer to all rulers (see K Pennington *The Prince and the Law 1200 – 1600: Sovereignty and Rights in Western Legal Tradition* (1993) at 3).
[54] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 621.
[55] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 621. See also HR Hahlo "The great South-West African diamond case: A discourse" (1959) 76 *SALJ* 151 at 163.
[56] JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) 261 at 267.

autonomous city-states of northern Italy, especially those in the Lombard region, the most important of which was the city-state of Milan.[57]

After he was crowned King of Germany in Aachen on 9 March 1152, Frederick sought to restore the power, prestige and revenue of the Holy Roman Empire, which had been in decline for over 50 years.[58] One of the key threats facing the empire was the growing autonomy and wealth of the city-states in northern Italy, many of which had been granted regalian rights by previous emperors or had simply usurped them. However, given that they fell outside the system of feudal control, these city-states were reluctant to give up their hard-earned liberties and revenues and opposed Frederick's attempts to centralise (re-centralise) power in himself and his court.[59]

To address this threat, Frederick convened two Diets at Roncaglia; the first in 1154 and the second in 1158. While the first Diet was aimed at crowning Frederick as King of Italy,[60] receiving the feudal oath of fealty from his vassals and holding a high court of the realm to redress grievances; the second was aimed at clarifying and, in the process of doing so, reclaiming Frederick's regalian rights from the powerful city-states.[61] At this Diet, Frederick commissioned the four great doctors of Roman law at the University of Bologna (Martinus, Bulgaris, Jacobus and Hugo) to identify the powers, prerogatives and rights that were due to him in his capacity as King of Italy.[62]

After the four doctors had completed their work and presented him with a list of *regalia* in Italy, Frederick published this list in the form of a *constitutio* known as the *Constitutio de Regalibus*. This *constitutio* was subsequently incorporated into the *Libri Feudorum*,[63] which was a compilation of Italian and especially Lombard feudal laws. Despite its Italian focus, the *Libri Feudorum* was accepted as an authoritative statement of feudal law across most of Europe. In its third and final form (the so-called Accursian recension), the *Libri Feudorum* was

[57] Although the Holy Roman Empire's boundaries changed significantly over its approximately 800-year history, at the time Frederick was crowned emperor in 1155 the empire consisted of three kingdoms, namely the Kingdom of Germany (in central Europe), the Kingdom of Italy (in southern Europe) and the Kingdom of Burgundy (in western Europe). Each kingdom was made up of numerous principalities, duchies, counties, prince-bishoprics and autonomous city-states (see J Whaley *The Holy Roman Empire: A Very Short Introduction* (2018) at 3 and 46).
[58] DR Carr "Frederick Barbarossa and the Lombard League: Imperial regalia, prescriptive rights and the northern Italian cities" (1989) 10 *Quidditas* 29 at 30.
[59] DR Carr "Frederick Barbarossa and the Lombard League: Imperial regalia, prescriptive rights and the northern Italian cities" (1989) 10 *Quidditas* 29 at 30-32.
[60] Following his coronation as the King of Italy in Pavia on 24 April 1155, Frederick was crowned as the Holy Roman Emperor in Rome on 18 June 1155 and as the King of Burgundy in Arles on 30 June 1178.
[61] DR Carr "Frederick Barbarossa and the Lombard League: Imperial regalia, prescriptive rights and the northern Italian cities" (1989) 10 *Quidditas* 29 at 30 and 31.
[62] The four great doctors enlisted the help of 28 lawyers from the city-states. One from each major city.
[63] See Lib. 2, tit. 56.

included in older editions of the *Corpus Juris Civilis* as a tenth collation of the Novels (the *decima collatio novellarum*).[64]

The *regalia* listed in the *Constitutio de Regalibus* dealt with a wide range of matters. One category dealt with administrative and legal matters, such as the appointment of magistrates, profits from fines and penalties and the property of those who had committed treason, had been convicted of crimes, or had entered into incestuous marriages. A second category focused on military matters (such as the right to commandeer carriages and ships), and the right to impose special taxes to fund royal expeditions. A third category related to commercial and economic matters, for example, the ownership of public roads, navigable rivers, the banks of navigable rivers and harbours; the income from fisheries and salt mines; the right to mint coins; the right to demand tolls for the transit or use of bridges; and the right to claim ownership of all land without an owner, all silver mines and treasure trove.[65]

Although the sea and the seashore were not included in this list, Kotze JA pointed out in his concurring judgment in *Surveyor-General (Cape) v Estate De Villiers* that the list was not complete and that all those things that had been categorised as *res communes* or *res publicae* in Roman law were also included in the *regalia*. The Counts of Holland, he pointed out further, were not slow to claim these rights as their *domeynrechten* and the principle that the

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[64] MJ Ryan *The Libri Feudorum and the Roman Law* (PhD thesis, University of Cambridge, 1993) at 13-77. Instead of neutralising the threat that the city-states posed to the Holy Roman Empire, Frederick's decision to reclaim his regalian rights intensified the conflict between him and the city-states. In order to protect their liberties, the city-states came together and formed the Lombard League. After defeating the imperial army at Legnano in 1176, a settlement was reached between Frederick and the League in 1183. This settlement effectively overturned the decision taken at the Diet of Roncaglio in 1158 (see G Raccagni "When the emperor submitted to his rebellious subjects: A neglected and innovative legal account of the 1183 Peace of Constance" (2016) 131 *English Historical Review* 519).

[65] DR Carr "Frederick Barbarossa and the Lombard League: Imperial regalia, prescriptive rights and the northern Italian cities" (1989) 10 *Quidditas* 29 at 30-31. An English translation of the regalian rights reclaimed by Frederick at the Diet of Roncaglia and included in Book 2, title 55 of the *Libri Feudorum* may be found in A Stella *The Libri Feudorum (the 'Bookf of Fiefs'): An annotated English translation of the Vulgata Recension with Latin Text* (2023) at 191. This translation reads as follows:

> "Regalian rights are: 'arimanniae' [i.e., jurisdiction over free men]; public roads; navigable rivers and [rivers] that can be made navigable; harbours; shore dues; trade dues commonly called 'tolls'; coinage; profits from fines and penalties; vacant goods, and those which have been legally taken away from the unworthy, unless they have been specifically granted to someone; the goods of those who contracted incestuous marriages, of those convicted, and of outlaws, in accordance with what is specified in the novel constitutions; [the requisition of] services concerning regular and extraordinary transport, carriages, and ships; extraordinary taxation for the most felicitous expedition of his royal majesty; the power to appoint magistrates for the administration of justice; silver mines and public palaces, in the cities where it is customary; revenues from fisheries and saltpans; the goods of those who commit the crime of lese majesty; half of the treasure that is found4 on public or ecclesiastical land—the treasure is to belong to [the emperor] entirely, if he has made effort [in finding it]".

See also Fordham University *Internet Medieval Sourcebook: Barbarossa and the Lombards*. Available at: https://sourcebooks.fordham.edu/source/barbarossa-lombards.asp, accessed 10 January 2022.

domeynrechten belonged to the Dutch Dukes and Counts was recognised by the majority of Dutch jurists. Kotze JA put these points as follows:

> "When we come to the Dutch law, we observe that, in common with the rest of Western Europe, the jurists of the Netherlands recognised the authority of the *Libri Feudorum,* in which it is laid down *(lib. 2, tit.* 56) that public roads, navigable rivers and harbours, etc., are included under the designation of *regalia.* These were sovereign rights vested inherently in a supreme prince or king, or originally usurped by some powerful subordinate. These rights were divided into major and minor. The former, consisting of those inseparably connected with the dignity and supremacy of the *Princeps* or State, as, for instance, the sovereign right to make war or peace, were held to be inalienable. Not so, however, in the case of the latter, which were considered capable of alienation. The list of *regalia* mentioned in *lib. 2, tit.* 56, was not regarded as a complete one, for there were many other rights falling within the same category. Thus, all things, the use of which was common and public by the Roman law, and others such as tithes, etc., came to be embraced in the number. The Dutch Dukes and Counts were not slow in claiming these *regalia,* including the seashore and its accessions, as their *domeynrechten.* The principle that the right to these *domeynrechten* belonged to the Count of Holland was, as rightly observed by Professor Lee in his *Introduction to the Roman-Dutch Law,* generally recognised by the jurists".[66]

In the same judgment, Kotze JA also explained that while the *regalia maiora* could not be alienated, the *regalia minora* or *domeyn-goederen* – of which the sea and the seashore formed a part – could be alienated or granted by the Counts of Holland in fee to others, provided this did not seriously infringe the rights of the public. However, following the war with Spain, the authority of the Counts was replaced by the States of Holland and all rights in and to the *domeyn-goederen* were vested in the States. While the States of Holland initially allowed the Chamber of Accounts to alienate portions of the *domeynen,* this changed in 1620 when it passed a resolution prohibiting any future "alienation, sale, transfer or pledge, or, other cession of the country's *regalia domeynen* or other public rights and property of whatsoever nature", unless expressly authorised by a special resolution passed by the States in their public capacity.[67] This prohibition was also referred to by Solomon JA in his concurring judgment when he held that "[i]t is difficult in the first place to conceive of the Crown deliberately granting to a private

[66] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 621-622. In his main judgment, Innes CJ also stated at 593 that

> "[i]n the course of time, and probably under the influence of the feudal system, [the Roman law concept of *res communes*] was modified in Western Europe and the seashore came to be regarded as *res publicae,* which vested in the *princeps*. That certainly was the position under Roman-Dutch law."

[67] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 622-623. This resolution may be found in the Groot Plakaet Boek 3 at page 719.

individual a portion of the seashore, which is part of its *regalia* or domain, and which was by law inalienable".[68]

2.3.2 The classification and legal status of the sea and the seashore in Roman-Dutch law

As Kotze JA stated in *Surveyor-General (Cape) v Estate De Villiers*, the majority of Dutch jurists accepted that the sea and the seashore formed a part of the *regalia* or *domeynen* and that the ownership of these areas was vested, initially, in the Counts of Holland and, subsequently, in the States of Holland.[69] Among those Dutch jurists whose works Kotze JA referred to were Grotius,[70] Voet,[71] and Van Leeuwen.[72] Each will be discussed in turn, starting with Grotius.

Like the Roman jurists, Grotius distinguished between *res extra commercium* and *res in commercio*. Insofar as *res extra commercium* were concerned, however, he did not follow the Roman example and distinguish between *res communes, res publicae* and *res universitatis.* Instead, Grotius adopted his own unique approach and distinguished between those things that belong to "all persons in common" and those that belong to "some great community of persons".[73] Insofar as things that belonged to "some great community of persons" were concerned, Grotius distinguished further between those that belonged to a "whole civil community" and those that belonged to a "smaller community".[74] Unfortunately, Grotius did not define any of these categories; he merely provided examples to illustrate them.

Insofar as things that belong to "all persons in common" were concerned, Grotius explained that this category included the air and the sea.[75] This meant that strangers and natives of the Netherlands could freely sail their boats and fish in the open sea, even close to the Dutch coast.[76] Apart from the air and the sea, the sand beneath the sea and the covered shore were also classified as things that belonged to "all persons in common".[77] As its name indicates, the

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[68] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 608.
[69] GC van der Merwe "Things" in *LAWSA First Reissue* Vol 27 (2002) at para 213 and PJ Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) at 26.
[70] Hugo Grotius *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (translated by RW Lee (1926)). Hereafter *Inleidinge.*
[71] Johannes Voet *Commentarius ad Pandectas* (translated by P Gane (1957)). Hereafter *Commentarius.*
[72] Simon van Leeuwen *Censura Forensis Theoretico-Practica* (translated by AJ Foord (1884). Hereafter *CF*.
[73] Grotius *Inleidinge* 2.1.16.
[74] Grotius *Inleidinge* 2.1.24.
[75] Grotius *Inleidinge* 2.1 17. Grotius's argument that the air and the sea should be categorised as things belonging to all persons was criticised by Van der Keessel. He argued that it was incorrect to classify the air and the sea as things that could be owned because they are impossible to appropriate in their entirety and could not be classified as things in the legal sense. Although the air and the sea could not be owned by all people, Van der Keessel argued further, the could be used and enjoyed by everyone (see Dionysius Godefridus van der Keessel *Praelectiones Iuris Hodierni ad Hugo Groti Introductionem ad Iurisprudentiam Hollandicam* (translated by P van Warmelo et al, 1963) 2.1.17. Hereafter *Prael ad Gr Inst.*
[76] Grotius *Inleidinge* 2.1.18.
[77] Grotius *Inleidinge* 2.1 21.

covered shore was that part of the seashore that was covered with seawater at half-tide. Given that these things belonged to "all persons in common", they could be used and enjoyed by everybody as long as, in doing so, they did not injure anybody.[78]

In his commentary on these classifications, Van der Keessel argues that while the manner in which Grotius classified the sea (i.e. as a thing belonging to "all persons in common") is more or less similar to the manner in which the Roman jurists classified this area (i.e. as a *res communis*), the manner in which he defined the seashore was quite different. This is because the Roman jurists did not define the seashore simply as the area covered at half-tide, but rather as the area covered by the highest tide (*maximus fluctus*) during the stormiest period of winter.[79] Grotius's definition of the seashore, therefore, was much narrower than the Roman law definition.

While the covered shore belonged to "all persons in common", Grotius explained further, the open shore (that is, the area of the shore above the reach of the half-tide) belonged to "the people of the country", by which he appears to have meant the "whole civil community".[80] Apart from the open shore, navigable rivers, lakes and other navigable waters, as well as the beds of such rivers and waters and their banks so far as they were for the greater time covered by water, also belonged to the "whole civil community".[81] The "whole civil community", therefore, could impose tolls and other charges for the use of navigable rivers by foreigners in order to conserve them.[82]

In light of these points, Grotius concluded by stating that all of those things which, during the feudal period, were allocated to the Counts now belonged again to the "whole civil community" (*dese burgerlike gemeenschap*) as its property.[83] Although Grotius uses the phrase "the whole civil community" (*dese burgerlike gemeenschap)*, in his commentary on this text, Van der Keessel translates it as the "Republic of Holland".[84] As Van der Vyver points out, this suggests that in Roman-Dutch law, it was not the people but rather the state that was the successor-in-title to the *princeps* and, thus, the holder of all regalian rights.[85]

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[78] Grotius *Inleidinge* 2.1 22.
[79] Van der Keessel *Prael ad Gr Inst* 2.1.17
[80] Grotius *Inleidinge* 2.1.21.
[81] Grotius *Inleidinge* 2.1.25; 2.9.7 and 2.9.9. In his commentary on this text, Van der Keessel argues that navigable rivers, lakes and other navigable waters, as well as the beds of such rivers and waters and their banks belong to a specific community of people, namely the citizens of Holland as a whole. They do not belong to a large community of people or to a particular city (see Van der Keessel *Prael ad Gr Inst* 2.1.25).
[82] Grotius *Inleidinge* 2.1.26
[83] Grotius *Inleidinge* 2.1.29.
[84] Van der Kessel *Prael ad Gr Inl* 2.1.29.
[85] See JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* 261 at 274.

While Grotius distinguishes between the sea, the bed of the sea and the covered shore (which he argues were owned by "all persons in common"), on the one hand, and the open shore (which he argued was owned by "the whole civil community" (i.e. the Republic of Holland)), on the other hand, none of the other Roman-Dutch jurists, or at least none of those who discussed the classification of things, made a similar distinction. Instead, they simply stated – often in very brief terms – that the seashore fell into the *regalia* or domains of the *princeps*.

In his *Commentarius ad Pandectas,* Voet thus begins his discussion of the classification of things with an in-depth examination of Roman law.[86] After concluding this discussion, he turns to Roman-Dutch law and makes two very brief points. First, he states that in Roman-Dutch law, the "shores of the sea and [public] rivers were classified as a part of the *regalia* or domains of the emperors". Second, he states that an important consequence of this classification is that in Roman-Dutch law, unlike in Roman law, the public is no longer entitled to use the seashore without the consent of the emperor or the person to whom the emperor had entrusted the care of his domains. Voet put these principles as follows:

> "But by our customs and those of other nations, the shores of the sea and rivers are reckoned among the regalia or domains of the Emperors. Thus, if you except navigation and its consequences, their use is not common to all. Nor is everyone allowed to fish with nets in a river. Much less is it allowed to build in the bed of a river, apart from reinforcement of the bank, nor on the shore of the sea, nor to lead water from a river, nor to put up mills unless an express grant has been obtained from the Emperor, or from the person to whom the care of the domains has been entrusted. The result is that this obtaining of leave, which under Roman law was a matter of precaution, is now one strictly of necessity".[87]

Unlike Grotius and Voet, Van Leeuwen does not refer explicitly to the sea or the seashore. Instead, he focuses on rivers and harbours. Van Leeuwen states in this respect that according to the "most recent law and the practice of nations [rivers and harbours] are ranked with royal property". This means that "a toll can be imposed on those who navigate them" and that the right to fish is the prerogative of the sovereign only and of those to whom the right has been granted by the sovereign.[88]

Any doubts about the inclusion of the sea and the seashore in the *regalia* or *domeynen*, however, were settled by Professor JM Kemper in the revised version of his *Ontwerp van het*

[86] Voet *Commentarius* 1.8.1-8.
[87] Voet *Commentarius* 1.8.9.
[88] Van Leeuwen *CF* 2.1.7

Burgerlijk Wetboek,[89] which has been described by Hahlo and Khan as a pure distillation of Roman-Dutch law in the final stage of its development.[90] Article 953 of the *Ontwerp* thus states that

> "[a]lso belonging to the domains of the state are public roads; beaches; navigable streams and rivers; the beds and banks of navigable streams and rivers; accretions, mud flats and salt marshes that have been deposited by the sea on beaches or the mouths of rivers, especially where they ebb and flow; islands and sandbanks, which arise in the beds of public rivers; . . . ; but only insofar as no person can show, by means of a legal right or possession, that he or she has acquired an exclusive right to any of the areas mentioned above."

Despite the fact that the majority of Dutch jurists accepted that the sea and the seashore formed a part of the *regalia* or *domeynen* and that the ownership of these areas was vested, first, in the Counts of Holland and, later, in the States of Holland, in *Colonial Government v Town Council of Cape Town*,[91] De Villiers CJ cast some doubt on whether this rule had been received in South Africa when he held that the state simply enjoys a "supreme right of control" over the seashore and not ownership.

The facts of this case were as follows. The Town Council of Cape Town had reclaimed land from the sea along the shore of Table Bay without first obtaining permission from the Colonial Government. The Town Council, nevertheless, considered itself to be the owner of the reclaimed land and began developing it. When the Colonial Government became aware of the Town Council's actions, it applied to the Supreme Court for an order declaring it to be the owner of the reclaimed land and interdicting the Town Council from using or developing it.

In response to this application, the Town Council argued that it had acquired ownership of the reclaimed land on various grounds, including by accession in the form of alluvion (*alluvio*). The Supreme Court rejected these arguments and found in favour of the Colonial Government. In arriving at this decision, De Villiers CJ briefly discussed the legal status of the seashore. He held in this respect that the "Crown is not the owner of the [seashore] in the same sense that it owns Crown land above the high-water mark". Instead, it simply enjoys the "supreme right of

[89] JM Kemper *Ontwerp van het Burgerlijk Wetboek voor het Koningrijk der Nederland.aan de Staten-Generaal aangeboden den 22sten November 1820* 2ed (1864).
[90] HR Hahlo and E Khan *The South African Legal System and its Background* (1968) at 565. This statement was referred to with approval by the Supreme Court of Appeal in *Linvestment CC v Hamersly* 2008 (3) SA 283 (SCA) at para 23. See also Simon van Leeuwen *Het Roomsch-Hollandsch Recht* (translated by JG Kotze (1881)) 2.4.2 and Simon a Groenewegen van der Made *Tractus de Legibus Abrogatis et inusitatis in Hollandia vicniisque regionibus, Ad Inst* 2.1.2.
[91] *Colonial Government v Town Council of Cape Town* (1902) 19 SC 87.

control" over the seashore, which includes the right to claim ownership of the land when it is no longer covered by water.[92]

This controversial finding was explicitly rejected by both Innes CJ and Kotze JA in their judgments in *Surveyor-General (Cape) v Estate De Villiers*.[93] In his main judgment, Innes CJ held that in light of the fact that the seashore is no longer classified as a thing that cannot be owned at all (i.e. a *res communis*), "the *dominium* of the beach must be in someone; and, in my opinion, it is in the Crown".[94] In his concurring judgment, Kotze JA held that "it would have been more accurate [for De Villiers CJ] to have said that, while the ownership of the seashore is in the Crown, the public has the free right of its lawful use. This right of the public will, however, cease where, as stated by the late Chief Justice, the land is no longer covered or washed by the waves, for then it will have lost its character of seashore, and vest absolutely in the Crown".[95]

2.3.3 The public's right to access and use the sea and the seashore in Roman-Dutch law

As pointed out above, in his *Commentarius ad Pandectas*, Voet stated that in his day, the sea and the seashore were included among the *regalia* or the domains of the emperor and, apart from navigation, that the right to use these things and especially the right to build on the seashore, was no longer common to all. Instead, it was vested in the emperor.[96] It followed, therefore, that the public was not entitled to access and use the seashore without the consent of the emperor or the person to whom the emperor had entrusted the care of his domains. An important consequence of this change was that, unlike in Roman law, where it was simply advisable to obtain the consent of the emperor before accessing or using the seashore,[97] in Roman-Dutch law, it was a strict requirement.

This approach, however, was not shared by the majority of Roman-Dutch jurists, including Bort and Gudelinus, both of whom wrote extensively on this topic. While they agreed that the sea and the seashore were included in the *regalia* or domains of the emperor, they rejected the notion that the right to use the sea and the seashore was no longer common to all. Instead, they drew a distinction between the ownership of the sea and the seashore, on the one

[92] *Colonial Government v Town Council of Cape Town* (1902) 19 SC 87 at 96.
[93] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588.
[94] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 594.
[95] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 624-625.
[96] Voet *Commentarius* 1.8.9. See section 2.3.2 above.
[97] See section 2.2.3 above.

hand, and the right to use these things, on the other. Unlike the right of ownership, they argued, the right to use and enjoy the sea and the seashore remained common to all.

In his *Tractate van de Domeynen van Holland*, Bort begins his discussion by explaining that in Roman law "all rivers, streams and other public waters, together with the banks" were categorised as common things and thus "everyone could use and fish [in them]".[98] However, he explained further, in Dutch law, this rule was no longer followed. Although everyone was still entitled to use the rivers, streams and other public waters, together with their banks, the ownership of these things belonged to the state and was vested in the Count. Bort put these principles as follows:

> "But with us this is not followed, for the use of the rivers, streams other public waters, together with their banks, indeed remain common, but the ownership and jurisdiction of these things appertain to the state and have been conceded to the Count".[99]

And in his *Commentaria de Jure Novissimo*, Gudelinus drew the same distinction when he stated that "[t]he position of roads, of the sea, of rivers, of beaches and of river banks is indeed such that anyone is free to use these for travelling, for navigation, for fishing, for putting ships ashore, and if someone is prevented from using them it is an *injuria*". However, he stated further, the emperor had the power to regulate the use of these things. For example, the emperor could

> "forbid that on occasion water is drawn from a public river, or conversely to allow that a building is erected in a public place, provided that this does not lead to the harming of someone . . . nay even occasionally something of this kind can be obtained from the emperor to the detriment of private persons".[100]

The distinction drawn by Bort and Gudelinus between the ownership of *res publicae*, on the one hand, and the right to access and use them, on the other hand, was accepted by the Appellate Division in its seminal judgment in *Surveyor-General (Cape) v Estate De Villiers*. The facts of this case were as follows. The respondents owned a piece of land in Fish Hoek called the Fish Hoek Estate (Estate). The Estate was originally granted in perpetual quitrent to a certain Mr Andries Bruins by the Governor of the Cape Colony, Lord Charles Somerset, in

[98] Petrus Bort *Tractate van de Domeynen van Holland* cap 5 note 1. Hereafter *Tractate van de Domeynen*"
[99] Bort *Tractate van de Domeynen* cap 5 note 2.
[100] Petrus Gudelinus *Commentaria de Jure Novissimo*, V, 3.

June 1818. In the deed of grant, the Estate was described as extending "S.E. to the [seashore]". Despite this description, a diagram attached to the deed did not show the south-eastern boundary as the seashore (i.e. the high-water mark), but mistakenly as a straight line running close to the sea from fixed points. Apart from describing the boundaries of the Estate, the original deed of grant also imposed certain conditions on Mr Bruins and his successors-in-title. One of these was that "fishing shall be as heretofore, and the strand [i.e. the seashore] itself quite open to the public".

Almost a century later, the respondents – who were successors-in-title to Mr Bruins – alienated a portion of the Estate to a third party and applied to the Surveyor-General for an amended title deed. This application gave rise to a conflict between the respondents and the Surveyor-General with respect to the south-eastern boundary. The respondents argued that this boundary was the high-water mark and not the straight-line boundary mistakenly depicted on the diagram. The Surveyor-General, however, refused to accept this argument and insisted that it was the straight-line boundary. To resolve this dispute, the respondents agreed to accept the straight-line boundary and an amended title deed reflecting this agreement was issued in January 1918.

At the time the amended title deed was issued, a railway line running from Kalk Bay to Simonstown had also been constructed over a portion of the Estate (construction began in 1889 and was completed in 1890). This railway line was located inland from the straight-line boundary but relatively close to the sea.

Two years after the amended title deed was issued, the respondents took the portion of the Estate that was located between the railway line and the straight-line boundary, surveyed it into a number of plots, and then sold these plots at public auction to prospective buyers. Following these sales, the respondents submitted a general plan and a sub-divisional diagram of each plot to the Surveyor-General for approval. The Surveyor-General, however, refused to give his approval unless the respondents included a condition in every sub-divisional diagram explicitly stating that because each plot was a "part of the strand", it was "subject to the condition that it shall be quite open to the public" (the "quite-open to the public" condition).

The Surveyor-General based his decision not to grant approval unless the "quite open to the public" condition was included in every sub-divisional diagram on the following grounds:

First, in the late 1800s, witnesses had observed the high tide coming up to and crossing, not only the straight-line boundary, but also the line where the railway was subsequently

located and that the high tide must have come up this far when the original deed was granted in 1818 as well.

Second, although the high tide no longer came up beyond the line where the railway was located as a result of physical changes made to the land itself, that portion of the Estate (i.e. the portion between the railway line and the straight-line boundary) still formed a part of the seashore.

Third, given that the plots were located on this portion of the Estate, it was important to include the "quite open to the public" condition in each diagram to warn prospective buyers of the fact that the plots could not be privately owned or, if they could be privately owned, that they retained their public character and that the public was entitled to use them as of right.

Since the "quite open to the public" condition would leave the buyers of each plot with no more than bare ownership of their respective plots, the respondents refused to include this condition in the sub-divisional diagrams and applied to the Cape Provincial Division of the Supreme Court for an order compelling the Surveyor-General to register them without the condition. The Cape Provincial Division granted the order, and the Surveyor-General then appealed to the Appellate Division. A majority of the Appellate Division (Innes CJ, Kotze, Solomon and Wessels JJA) found in favour of the respondents and dismissed the appeal. Although all five judges of appeal wrote separate judgments, the leading judgment was written by Innes CJ.

In his main judgment, Innes CJ began his analysis by setting out the legal principles governing the ownership and use of the sea and the seashore, first, in Roman law and, second, in Roman-Dutch law (most of which are set out above).[101] Insofar as the right to use the seashore was concerned, Innes CJ confirmed that in Roman-Dutch law, this right remained in the hands of the public, even though the ownership of the seashore was vested in the Crown. He went on to point out, however, that the extent of the public's right to use the seashore was the subject of debate among the Dutch jurists.

> "Falling no longer under the category of *res nullius,* the *dominium* of the beach must be in someone;, and in my opinion, it is in the Crown. But it does not follow that the rights of the public have been extinguished, though the extent of those rights is a matter upon which the authorities are not entirely harmonious. According to *Bort* (c. 5, sec. 2) the right of public user remained as in Roman-Dutch Law in spite of the fact that the ownership and control had been vested in the state. *Voet (1.8.9)* took a narrower view. As the seashore, he said, was included under the regal property, its use was not common to all; leave had to be obtained from the

[101] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 593-594.

> *princeps*, whose permission, advisable merely under Roman Law, had under Dutch Law become an absolute necessity. He was dealing more particularly with user for such purposes as the building of a pier or other similar structures upon the beach".[102]

After setting out these legal principles, Innes CJ turned to apply them to the facts. In this respect, he made the following finding

First, although the witnesses called by Surveyor-General had shown that the land on which the plots were located (i.e. between the railway line and the straight-line boundary) was covered by the sea at high tide when the original deed was granted in 1818 and for the remainder of that century,[103] this land did not form a part of the Estate during that period. This is because the south-eastern boundary of the Estate during that period was the high-water mark and not the straight-line mistakenly depicted on the original diagram. The straight-line replaced the high-water mark only when the amended title deed was issued in 1918.[104]

Second, given that the land on which the plots were located did not form part of the Estate when the original grant was made in 1818, the "quite open to the public" condition was not aimed at retaining the public nature of this area. At that time and for the remainder of the 1800s, it was and remained a part of the seashore and, thus, public property. The purpose of the condition, therefore, was to impose a public servitude on the Estate in terms of which members of the public were entitled to free access across the Estate to use and enjoy the seashore beyond it.[105]

Third, the nature and location of the south-eastern boundary of the Estate changed in 1918 when the respondents agreed to replace the high-water mark with the straight line depicted in the diagram at the Surveyor-General's insistence. By that time, however, the physical nature of the land on which the plots were located (i.e. between the railway line and the straight-line boundary) had also changed as a result of measures taken to protect the railway

[102] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 594.
[103] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 596. See also Solomon JA's judgment at 608.
[104] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 595. See also Solomon JA's judgment at 607. In his concurring judgment, Kotze JA held that the evidence did not clearly establish that the area between the railway line and the straight-line boundary had been covered by the high-tide and, consequently, that it formed part of the seashore when the original deed was granted in 1818. It was possible, therefore, that this area had always been dry land (at 626-628). Given that the Surveyor-General had not shown that this area ever formed a part of the seashore, there was no basis on which he could refuse to approve the sub-divisional diagrams unless the respondents inserted the "being part of the strand" and "open to the public" condition in them.
[105] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 595. See also Solomon JA's judgment at 607 and Kotze JA's judgment at 616 and 619.

line from sand and wind and, consequently, the high-tide no longer covered this area.[106] Instead, it had been pushed back a considerable distance.[107]

Fourth, given that the land on which the plots were located was not covered by the high tide when the amended title deed was issued in 1918 and also not when the sub-divisional diagrams were submitted to the Surveyor-General for approval in 1921, it followed that they no longer formed a part of the seashore. This is because the maxim "once foreshore, always foreshore" does not apply in South Africa. Instead, the maxim that applies in South Africa is "[w]hen land ceases to be washed by its tides, it loses the characteristic of the shore".[108] Accordingly, this land could properly be classified as reclaimed land,[109] which was initially vested in the state, but which was granted (perhaps mistakenly) to the respondents when the amended title deed was issued in 1918.[110]

In light of these findings, Innes CJ concluded, the Surveyor-General's argument that the portion of the Estate between the railway line and the straight-line boundary still formed a part of the seashore was wrong and, consequently, there was no legal basis on which he could insist that the words "being part of the strand" should be inserted in the sub-divisional diagrams and, consequently, that the condition that it must be "quite open to the public" must fall away.[111]

In his concurring judgment, Kotze JA also confirmed that in Roman-Dutch law, the public retained its right to use the seashore even though ownership of this area was vested in the Count and later the States of Holland. After confirming that the seashore was included in the *regalia* and thus fell into the category of *domeyn-goederen*, he turned to consider the rights of the public to use this area. Kotze JA summed up the legal principles as follows:

> "But did the foreshore belong to the Count or State in such a way that the public ceased to have the right of free access and the legitimate use of the seashore? The answer to this must be in the negative, for, as pointed out by *Guelin* (*supra*), the use of the seashore may be common and public and yet it belongs to the Prince, who has the administration and authority over it. So *Bort* (cap. 5, note 1-2) writes: 'According to Roman law all rivers and public waters and their banks were regarded as *res communes*, and everyone could use and fish in the same. But with us this is not followed, for the use of the rivers and other public waters and their banks

[106] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 596-597. See also Solomon JA's judgment at 610.
[107] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 598.
[108] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 599-600. See also Solomon JA's judgment at 611 and Kotze JA's judgment at 625.
[109] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 600.
[110] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 602.
[111] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 603. See also Solomon JA's judgment at 612.

indeed remain common, but the ownership and jurisdiction of these things appertain to the State and have been conceded to the Count'. The fact that, in order to build on the seashore, permission is necessary by Dutch law, as stated by *Voet* (*supra*, sec. 9), does not militate against this. Where there is no specific law, or recognised custom to the contrary, the general rule of Dutch practice was to follow the principles of Roman law, as *Bort* (cap. 7, note 25) and *Van Leeuwen* (Com. R.D. Law, 2.4.2) remind us. So that we must conclude that, where local law or custom is silent on the point, the public retained its rights to the use of the seashore, although ownership in and jurisdiction over it resided in the Count, and afterwards in the States of Holland. We also read that, where a grant of alienation was made of any State property, it was subject to the proviso that it was not to prejudice the general welfare (*Bort*, cap. 2, note 4); and it was indeed the well-established rule of Dutch law that privileges conceded and grants bestowed by the Prince are not to be recognised in so far as they are contrary to law or the public interests (*Van Leeuwen*, Com. 1.4.3 and *ibi Decker in notis*)".[112]

2.3.4 The state's power to regulate the sea and the seashore in Roman-Dutch law

As was the case in Roman law, in Roman-Dutch law, the prince and later the state also enjoyed the authority to regulate the manner in which the public exercised their rights to access and use the sea and the seashore and to grant rights in these things to private persons. However, in Roman-Dutch law, the state's authority to do so was derived primarily from its public ownership (*dominium*) of the sea and the seashore and not from its sovereign power (*imperium*).

The extent to which the state could grant rights in the sea and seashore to private persons gave rise to complex and difficult questions. Perhaps the most significant of these was whether the state could exercise this power in a manner that substantially impaired or even terminated the public's right to access and use the sea or the seashore, for example, by alienating or leasing a portion of the seashore to a private person or by granting a private person permission to build on the seashore. Bort argued that the state could not. Whenever the state alienates public property, he argued in his *Tractate van de Domeynen van Holland*, that alienation was subject to the proviso that it could not prejudice the general welfare.[113]

This approach was adopted by the Supreme Court in *Anderson & Murison v The Colonial Government*.[114] In this case, the applicants wanted to salvage the cargo and wreck of

[112] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 623.
[113] Bort *Tractate van de Domeynen* cap 2 note 4. As Kotze JA explained in his judgment in *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 584 at 622, because the sea and the seashore fell into the *regalia minora* or *domeyn-goederen*, they could at first be alienated or granted by the Counts of Holland in fee to others, provided this did significantly infringe the rights of the public to access and use these things. However, this changed in 1620 when the States of Holland adopted a resolution prohibiting any future alienation of the *regalia* or *domeynen*, unless expressly authorised by a special resolution passed by the States in their public capacity (see section 2.3.1 above).
[114] (1890-1891) 8 SC 293.

a steamer – named the Wallarah – that had run aground on Dassen Island. The Colonial Government, which owned the island and used it to harvest guano, refused to give the applicants access to the land above the high-water mark, unless they agreed to comply with regulations protecting the sea birds living there and posted a £5000 bond protecting the Government against the loss of any guano. The applicants were not willing to accept these conditions and applied for an order interdicting the Government from obstructing their salvage operation.

The Supreme Court (per De Villiers CJ, Buchanan J concurring) dismissed the application. In arriving at this decision, the Court held that as the common law custodian of the seashore, the government was entitled to regulate the public's right to use the seashore, but only in the interest of the public. This meant that while the government could grant permission to a private person to build on the seashore, that permission was subject to the condition that the right of the public to use the seashore should not be interfered with in a significant manner. It followed, therefore, that "[a]ny structure between the high and low-water marks, which materially interferes with the general use of the shore … would be a nuisance which [the] court would be justified in restraining". In other words, it was not in the power of the government to deprive the public of its right to the free use of the seashore.[115]

However, the extent to which the principles laid down in *Anderson & Murison* correctly reflected the common law position in South Africa is controversial. In *Surveyor-General (Cape) v Estate De Villiers*, Innes CJ noted that the logical application of those principles could lead to remarkable results. For example, it might allow a member of the public "to interdict the construction of important docks upon the margin of a harbour because the work would materially (and inevitably) interfere with the general use of the shore".[116]

Despite their potentially far-reaching consequences, Innes CJ noted further, it was unnecessary for the purposes of the case at hand to investigate the legal limits of the state's ownership of the seashore and the general public's right to free use thereof. Instead, it was sufficient to recognise that the public had "certain rights over the beach for purposes of bathing and recreation without attempting to define their extent".[117]

Apart from Kotze JA, none of the other judges dealt with this issue. In his judgment, Kotze JA disagreed with Innes CJ and found that the principles laid down in *Anderson & Murison* were entirely correct. This is because they were in keeping with the arguments made

[115] *Anderson and Murison v The Colonial Government* (1890-1891) 8 SC 292 at 296-297.
[116] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 594.
[117] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 595.

by Bort and the "well-established rules of Dutch law that privileges conceded and grants bestowed by the Prince are not to be recognised in so far as they are contrary to the law or the public interest (Van Leeuwen *Com.* 1.4.3 and *ibi Decker in notis*)".[118]

While it is true that the "construction of important docks upon the margin of a harbour" may interfere with the general use of the shore, it is also possible that the construction of such docks may improve the general use of the shore. This possibility was recognised by the United States (US) Supreme Court in *Illinois Central Railroad Company v Illinois*.[119] In this case, the US Supreme Court held that, as a general rule, the state is not entitled to dispose of land that is submerged by tidal or navigable water because it is held in public trust for the people. However, the state may do so where the interests of the people in the use and enjoyment of such waters would be improved "by the erection of wharves, docks and piers therein".[120] Given this possibility, it may be argued that the criticisms levelled by Innes CJ against the judgment in *Anderson & Murison* are misplaced and that the approach adopted by Kotze JA should be preferred.

Although it was unnecessary for the Appellate Division to investigate the extent to which the state could grant rights in the sea and seashore to private persons in *Estate De Villiers,* the Court was required to do so in its subsequent judgment in *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa*.[121]

The facts of this case were as follows.[122] The appellant (Consolidated Diamond Mines or CDM) was a South African company formed in 1920. Shortly after it was formed, CDM acquired the assets of various amalgamated German companies operating in South West Africa (SWA), as it was then called. While SWA was still a German Protectorate, these companies had been granted the exclusive right – by the German Imperial Government – to prospect and mine for minerals (including diamonds) in an area they owned called the "Sperrgebiet" (the "prohibited area"). This grant was made in terms of the German Imperial Mining Ordinance of 8 August 1908, which was the applicable mining law throughout the dispute. The Sperrgebiet itself was defined in the grant as, *inter alia*, the area bounded "north by the 26th degree of

[118] *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 623-624.
[119] 146 US 387 (1892).
[120] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452. This judgment is discussed in detail in Chapter 5 of this thesis.
[121] 1958 (4) SA 572 (A).
[122] For a detailed discussion of the background to this judgment, see HR Hahlo "The great South-West African diamond case: A disclosure" (1959) 76 *SALJ* 151. See also IA Maisels *A Life at Law: The Memoirs of IA Maisels, QC* (1998) at 108.

latitude, south by the northern bank of the Orange River, *west by the Atlantic Ocean*, and east by a line running at a distance of 100 kilometres from the seashore and parallel thereto".

The exclusive right to prospect and mine for minerals in the Sperrgebiet was initially granted by the German Imperial Government to a company named the Deutsche Kolonial Gesellschaft (DKG) after diamonds were discovered in the area in 1908. The following year, the Imperial German Government gave the DKG permission to exercise its exclusive prospecting and mining rights for a period of three years (i.e. from 1908 to 1911) and, in addition, to assign these rights to another company named the Metallurgische Gesellschaft of Frankfort-on-the-Main. After receiving this permission, the DKG and Metallurgische Gesellschaft formed a new company named the Deutsche Diamanten Gesellschaft (DDG) for the purposes of carrying out their joint venture and the DKG duly assigned its prospecting and mining rights to the DDG.

Following this assignment, the German Imperial Government entered into an agreement with the DDG, which confirmed all of the prospecting and mining rights that had been assigned to DDG by DKG. In addition, this agreement provided that the grant of these rights would be extended beyond 1911, but in favour of the Government of the German Protectorate of SWA. However, the Protectorate Government would be obliged to transfer its rights to explore and exploit the Sperrgebiet to a new company to be formed by the DDG together with the Protectorate Government. To give effect to this agreement, the Imperial German Government promulgated an Ordinance in 1910 granting the Protectorate Government itself the exclusive right to prospect for and mine all minerals in the Sperrgebiet.

As a result of World War One, the new company was never formed. Instead, SWA was occupied by South African forces, and following the end of the war, South Africa was granted a mandate over the territory. After the mandate was granted, the newly appointed Administrator of SWA issued Proclamation 11 of 1920, in which the boundaries of the Sperrgebiet were "more accurately" defined. However, the phrase "west by the Atlantic ocean" was retained as the western boundary. In the same year, CDM acquired the assets of DDG and then entered into an agreement with the Administrator. This agreement provided, *inter alia*, that the exclusive right to prospect and mine for all minerals in the Sperrgebiet conferred on the Protectorate Government and now held by the Administrator would be extended for a period of 50 years and that all of the rights that were supposed to be transferred to the new company would be transferred to CDM.

After this agreement was signed by CDM and the Administrator, CDM commenced prospecting and mining operations in the Sperrgebiet. However, in 1957, the Administrator

unexpectedly issued a Proclamation in which he granted a company named the Suidwes-Afrika Prospekteerders (Edms) Bpk the exclusive right to prospect and mine for all minerals in an area described as follows:

> "from a point on the high-water mark of the Atlantic Ocean on the northern bank of the Orange River, thence in a northerly direction along the high-water mark directly opposite Dias Point, thence due west into the sea to a point 800 yards west of the high-water mark of the [Atlantic] Ocean, thence in a southerly direction parallel to the high-water mark of the said ocean and 800 yards from to a point due west of the point of beginning, thence due east to the point of beginning".

After this Proclamation was issued, CDM applied to the High Court of South-West Africa for an order declaring that it was vested with the sole and exclusive right to prospect and mine for minerals in the Sperrgebiet and that this included the seashore. The key issue the High Court had to decide was whether the phrase "west by the Atlantic Ocean" encompassed the seashore or not. CDM argued that it did, while the Administrator argued that it did not. The High Court found against CDM and dismissed the application. CDM then appealed to the Appellate Division, which upheld the appeal.

In arriving at this decision, the Appellate Division (per Fagan CJ, Malan and Schreiner JJA concurring) considered and rejected a number of arguments made by the Administrator. One of these was that the phrase "west by the Atlantic Ocean" could not include the seashore because that would extinguish the public's right to freely use the seashore in the Sperrgebiet and, accordingly, the power to do so fell outside the state's authority as the custodian of the seashore on behalf of the public.[123]

In his majority judgment, Fagan CJ began by acknowledging that the public was entitled to use the seashore for certain simple purposes, such as "to go onto it, to bathe, to fish, to dry nets and to draw up boats" and that any substantial interference with these rights would be an unlawful act.[124] At the same time, however, an examination of the authorities showed that the state was entitled to grant "special rights" to corporations or private individuals that went beyond those enjoyed by the public, including the right to alienate part of the seashore, provided this did not significantly prejudice the public welfare.[125]

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[123] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 621A.
[124] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 621H.
[125] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 621H-622A.

In terms of South Africa's modern constitutional system, Fagan CJ held, he was prepared to assume that the power to grant these special rights – which included prospecting and mining – could not be derived from the state's ownership of the seashore. Instead, it could be derived only from legislation, from a power conferred by legislation, or from an act of state of equivalent authority.[126] Even where the power to grant these special rights has been authorised via one of these methods, the state could not exercise this power in a manner that significantly prejudices the public welfare, unless an Act of Parliament provides otherwise.[127]

After setting out these principles, Fagan CJ turned to apply them to the facts. In this respect, he made a number of findings. Among these were the following:

First, while the Imperial Mining Ordinance of 1905 expressly prohibited prospecting on public roads, public squares, railroads and cemeteries, it did not expressly prohibit prospecting on the seashore. Given that the common law did not prohibit prospecting and mining on the seashore or contain a presumption against granting a right to prospect and mine on the seashore, it followed that there was no basis on which to imply such a prohibition in the Ordinance.[128]

Second, there was no reason to consider what the position would have been if the right to prospect or mine had been granted in an area where it would have seriously interfered with the use of the seashore by the general public. However, it was important to note that these sorts of interferences are not uncommon and can be found in docks, wharves and other harbour installations, such as shipbuilding yards. In these sorts of cases, special measures may have to be adopted, but that was not an issue in this case.[129]

Third, the Sperrgebiet encompassed a huge territory of over 10 000 square miles, most of which was a desert and thus sparsely inhabited. The coastline itself was 240 miles long. In light of these physical features, a person who wanted to walk along the shore, swim and fish in the sea, or draw up a boat would be able to do so for miles and miles without being obstructed or prevented from doing so by prospecting and mining operations.[130]

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[126] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 622D-E.
[127] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 621G
[128] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 622E-H.
[129] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 622H-623A.
[130] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 623B-D.

In light of Fagan CJ's judgment, the limits that the law imposed on the state's common law custodial ownership of and the public's right to use the seashore prior to the coming into operation of the Seashore Act may be summed up as follows:

(i) Although the custodial ownership of the sea and the seashore was vested in the state, the public retained its common law rights to access and use these things for simple purposes, such as to "go onto it, bathe, fish, dry nets and draw up boats".

(ii) In its capacity as the custodial owner of the sea and the seashore, the state was entitled to regulate the manner in which the public exercised its common law rights to access and use these things for the simple purposes described above.

(iii) However, the state's authority to regulate the manner in which the public used and enjoyed the sea and the seashore was restrained. It could not exercise these regulatory powers in a manner that substantially impaired the public welfare.

(iv) Apart from regulating the public's common law rights to access and use the sea and the seashore, the state could also grant special rights to private persons that went beyond those enjoyed by the public, including the right to alienate the sea and the seashore.

(v) The state's authority to alienate and grant other special rights in the sea and the seashore to private persons was not derived from its common law powers as the custodial owner, but rather from its police powers as the sovereign authority.

(vi) Given that the authority to alienate and grant other special rights was derived from the state's police powers as the sovereign authority and not from its custodial ownership, any such grant had to be authorised by legislation.

(vii) Unless it expressly or implicitly provided otherwise, legislation authorising the state to alienate or grant other special rights to private persons should not be interpreted and applied in a manner that seriously prejudiced the public welfare. There was a rebuttable presumption against serious interference with the public's common law right to access and use the sea and the seashore.

(viii) To determine whether an interference was serious or not, a court had to adopt a broad perspective and consider whether the public had been prevented from freely using a substantial portion of the seashore or only a minor portion.

2.3.5 The boundaries of the sea and the seashore in Roman-Dutch law

Insofar as the boundaries of the seashore in Roman-Dutch law are concerned, the majority of Dutch jurists simply adopted the Roman law definition of this area without any comment. As we have already seen, there were at least three relevant Roman law texts: two in the *Digest*

(one by Celsus[131] and the other by Javolenus)[132] and one in the *Institutes* of Justinian.[133] Among those Dutch and French jurists who did discuss the Roman law texts were Josephus Averanius (1681-1746), Arnold Vinnius (1588-1657) and Jacques Cujacius (1522-1590). The manner in which these jurists interpreted the texts and especially the text of the *Institutes* was examined in detail by the Appellate Division in *Pharo v Stephan*.[134]

In this case, the respondent (Stephan) owned land adjacent to the Atlantic Ocean in Paternoster. He sued the appellant (Pharo), who owned a fishery, for damages for trespass in the Cape Provincial Division of the Supreme Court. Stephan based his claim on the ground that the landward boundary of the seashore was the high-water mark and that on various occasions between 19 June and 12 September 1915, Pharo had drawn his fishing boats up past the high-water mark onto Stephan's land and, consequently, that he (Pharo) had committed an act of trespass.

The Cape Provincial Division found in favour of Stephan and ordered Pharo to pay him £10 in damages. Pharo then appealed to the Appellate Division. Given that both parties accepted that the landward boundary of the seashore was the high-water mark, the key issue the Appellate Division had to determine was whether the high-water mark was the line reached by medium tides (the ordinary high tide), as Stephan argued, or the furthest line reached by the sea during the stormiest period of the year, which in Paternoster is during the winter months, as Pharo argued.

The Appellate Division (per Innes CJ, Solomon JA and Maasdorp JA) agreed with Pharo and held that the landward boundary of the seashore is the furthest line reached by the sea during the stormiest period of the year. In arriving at this decision, Solomon JA began his analysis by focusing on the manner in which the high-water mark was defined in the three Roman law texts referred to above and especially the manner in which it was defined in the *Institutes*.

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[131] *D* 50.16.96. This definition read as follows in Latin: "*Litus est, quousque maximus fluctus a mari pervenit*". In *Pharo v Stephan* 1917 AD 1 at 13, Maasdorp JA translated it as follows: "The shore extends so far as the highest flood from the sea reaches".

[132] *D* 50.16.112. This definition read as follows in Latin: "*Litus publicum est eatenus quae maxime fluctus exaestuat*". In *Pharo v Stephan* 1917 AD 1 at 13, Maasdorp JA translated it as follows: "The public shore extends as far as the flood rises at its highest".

[133] Inst 2.1.3. This definition read as follows in Latin: "*Est autem litus maris, quatenus hibernus fluctus maximus excurrit*". In *Pharo v Stephan* 1917 AD 1 at 13, Maasdorp JA, translated it as follows: "The seashore extends as far as the greatest winter flood runs up". He also noted that this definition "may be taken as the last word in the Roman law on the subject" (1917 AD 1 at 13).

[134] In *Pharo v Stephan* 1917 AD 1 at 13. See also *Divisional Council, Port Elizabeth v Divisional Council, Uitenhage* (1868) 1 Buch 40 at 46.

Although there are some differences in the wording of each definition, Solomon JA held, they all contain the phrase "*maximus fluctus*" which clearly showed that, unlike in English law, the high-water mark in South Africa is not an average or medium line. Instead, it is the line of maximum "*fluctus*". While the meaning of the word *maximus* was clear, the meaning of *fluctus* was not. Did it mean the flow of the tide, in which case the phrase *maximus fluctus* would mean the line reached by the highest tide in ordinary weather, or did it mean the flow of the sea over the land irrespective of its cause, in which case the phrase would mean the furthest line reached by the sea due to the actions of the moon or of storms?[135]

Even though the word *fluctus* was broad enough to include both the flow of the tide and the flow of the sea, Solomon JA held further, if the Roman jurists had wanted to define the high-water mark as the line reached by the highest tide in ordinary weather and not the furthest line reached by the sea irrespective of the cause, it is much more likely that they would have used the word *aestus* rather than the word *fluctus*. While the word *aestus* refers to more than just the tide, it is the more appropriate word to use when speaking of tides than the word *fluctus*.[136]

When it came to deciding whether this was, in fact, what the Roman jurists meant, Solomon JA then held, Roman-Dutch law was not particularly helpful. With very few exceptions, the Dutch jurists simply repeated the Roman law definitions without any comment. An important exception, however, was Averanius. Given that the Mediterranean has virtually no tides, he argued, the definition of the seashore in the *Institutes* of Justinian must have referred to that sea and not to the open ocean.[137]

In addition, Averanius argued further, it made no sense for the *Institutes* to refer to the highest tide on a coast where there is no tide. It also made no sense for the *Institutes* to speak of the highest tide in winter on a coast where the highest tides do not take place in winter. The phrase "*maximus fluctus"*, therefore, must have referred to the flow of the sea. The introduction in the *Institutes* of the word *hibernus* in the phrase *maximus fluctus*, was also significant. This is because, even though it was normally used to denote the winter season, it could also be used to denote the stormy season, as was the case here.[138]

It followed, therefore, Averanius concluded, that the definition in the *Institutes* meant that the high-water mark was defined in Roman law as the highest line reached by the flow of

[135] *Pharo v Stephan* 1917 AD 1 at 7.
[136] *Pharo v Stephan* 1917 AD 1 at 7.
[137] *Pharo v Stephan* 1917 AD 1 at 8.
[138] *Pharo v Stephan* 1917 AD 1 at 8.

the sea during stormy weather. Apart from the fact that Averanius's arguments were convincing, Solomon JA held further, they were also supported by other Dutch jurists, such as Paulus Voet. It was important to note, however, that the reference to the stormy weather was a reference to ordinary winter storms and not to abnormal or exceptional storms. Solomon JA then summed up his findings:

> "The conclusion then to which I come is that the definitions in the *Corpus Juris*, which are all substantially to the same effect, were adopted by the Roman-Dutch jurists, and that by *maximus fluctus (hibernus*) they understand the furthest line reached by the sea during the ordinary winter storms, excluding an exceptional or abnormal flood. And if that is the Roman-Dutch Law on the subject we must accept it as binding upon us, unless we are justified on some good legal ground in rejecting it. … No doubt from the point of view of convenience there is much to be said for taking the ordinary spring tide as marking the limit of the shore, for it is a line which can be fixed with tolerable accuracy. That, however, is not a sufficient reason for adopting it if it is inconsistent with the Roman-Dutch Law. And indeed if it is once understood that we are concerned not with abnormal flows of the sea under the influence of exceptional storms, but with the flow during the usual winter storms of each year, there should be no great difficulty in definitely fixing the limit of the shore".[139]

After setting out these principles, Solomon JA applied them to the facts. In light of the fact that Pharo had conceded that at least on one occasion he had drawn his fishing boats up past the furthest line reached by the sea during the ordinary winter storms and that he had threatened to do so again, it was clear that he had committed an act of trespass and that the award of £10 in damages was entirely appropriate for such an act.[140]

In his concurring judgment, Maasdorp JA also found that the Roman law definition of the high-water mark was accepted as the law of Holland and that this definition provided that "the seashore extended as far as the water of the sea rose at its highest, whether the rising of the water was caused by tides or the wind".[141]

2.4 THE SEASHORE ACT

2.4.1 The classification and legal status of the sea and the seashore in the Seashore Act

The common law provisions governing the sea and the seashore were replaced with statutory provisions when the Seashore Act was passed in 1936.[142] This Act regulated the legal status of

[139] *Pharo v Stephan* 1917 AD 1 at 9.
[140] *Pharo v Stephan* 1917 AD 1 at 10-11.
[141] *Pharo v Stephan* 1917 AD 1 at 14.
[142] 21 of 1936.

the sea and the seashore by vesting ownership of these areas in the State President.[143] Section 2(1) of the Act reads as follows:

> "Subject to the provisions of this Act, the State President shall be the owner of the seashore and the sea, except any portion thereof which was lawfully alienated before the commencement of this Act or may be alienated hereafter under this Act or under any other law".

Although the Seashore Act itself did not define the scope and content of the State President's ownership, in *South African Shore Angling Association v Minister of Environmental Affairs*,[144] the High Court held that the State President "[did] not own the sea and the seashore in the civil law sense of the concept" because these things were for the "general use and enjoyment of the whole community",[145] and in his dissenting judgment in *Consolidated Diamond Mines of South West Africa (Ltd) v Administrator, South West Africa*, Steyn JA held that the state is "merely the custodian of the seashore on behalf of the public".[146]

It is submitted that these somewhat vague dicta are capable of being interpreted in one of two ways.

First, the ownership vested in the State President was based primarily on the concept of private ownership rather than on the concept of a custodian. In terms of this interpretation, the state's interest in the sea and the seashore was similar to but not the same as that of a private owner. This is because the state's rights and powers as the owner were limited by its inherent duties toward the general public. In other words, the state held a modified form of private ownership.

Second, the ownership vested in the State President was based primarily on the concept of a custodian rather than on the concept of private ownership. In terms of this interpretation, the state's interest in the sea and the seashore was not similar to that of a private owner. Instead, they were confined entirely to conserving and managing the sea and the seashore on behalf of the general public and protecting the public's right to access and use it.

In light of the fact that section 2 of the Seashore Act was the culmination of the process of étatisation of the sea and the seashore in South Africa, as well as the dominant role that the

[143] Section 2(1).
[144] 2002 (5) SA 511 (SECLD) at 519.
[145] *South African Shore Angling Association v Minister of Environmental Affairs* 2002 (5) SA 511 (SECLD) at 519.
[146] 1958 (4) SA 572 (A) at 643. See also *Telkom v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal* 2003 (4) SA 23 (SCA) at para 30.

concept of private ownership enjoyed at that time, it is submitted that the first interpretation is the more likely of the two.

2.4.2 The public's right to access and use the sea and the seashore in the Seashore Act

Like Roman and Roman-Dutch law, the Seashore Act also distinguished between the ownership of the sea and the seashore, which was conferred on the State President, and the right to access and use these things, which was conferred on the public. Insofar as the scope and content of the public's right to use the sea and the seashore were concerned, the Act did not expressly address this issue. Instead, it simply preserved the public's common law rights of access and use.

Section 13(1)(c) thus provided that nothing in the Seashore Act affected "any rights of any member of the public to use the seashore or the sea" unless such a right was inconsistent with "any title, lease, permit, authority, delegation or regulation lawfully issued, entered into, granted or made" in terms of the Act. As Fagan CJ noted in *Consolidated Diamond Mines of South West Africa*, the general public's common law rights encompassed both commercial and recreational uses, such as the right to swim and fish in the sea and the right to dry nets and draw up boats.[147]

While the common law rights to access and use the sea and the seashore were preserved by section 13(1)(c) of the Seashore Act, it is important to keep in mind that these rights could be exercised by black South Africans only with respect to those parts of the seashore that had been reserved for their use and enjoyment in terms of section 10 of the Seashore Act or the Reservation of Separate Amenities Act, which expressly provided that separate amenities did not have to be equal.[148] As was discussed in the previous chapter, these Acts were implemented in a manner that favoured white South Africans over black South Africans. Those parts of the seashore that were reserved for the use and enjoyment of black South Africans were often inaccessible and of an inferior quality when compared to those reserved for white South Africans.[149]

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[147] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 621H-622A.
[148] 49 of 1953.
[149] See JM Rogerson "Kicking sand in the face of apartheid: Segregated beaches in South Africa" (2017) 35 *Bulletin of Geography – Socio Economic Series* 94 at 99-103.

2.4.3 The state's power to regulate the sea and the seashore in terms of the Seashore Act

While the Seashore Act simply codified the common law principles governing the ownership of the sea and the seashore and preserved the public's common law rights to use these natural resources (albeit along racial lines), it made far-reaching changes to the state's power to regulate them. Arguably, the most significant of these changes related to the power to alienate the sea and the seashore.

The Seashore Act provided in this respect that, not only was the Minister[150] entitled to alienate (or lease) any portion of the sea and the seashore for a purpose specifically authorised by the Act or by any other law, but he could also alienate these natural resources for any other purpose, provided he obtained the consent, by resolution, of the National Assembly. [151]

Besides this general authority to alienate, the Seashore Act also conferred a more specific power on the Minister to alienate (or lease) a portion of the sea or the seashore to any local authority.[152] However, this power was subject to two conditions:

(i) First, a right acquired by a local authority could not be transferred to any person other than a local authority or the government without the approval, by resolution, of the relevant provincial legislature.[153]

(ii) Second, the Minister could, at any time, resume for a government or public purpose any such right, subject to the payment of compensation for improvements as agreed on or decided by an arbitrator.[154]

As the provisions set out above indicate, the Minister's power to alienate the sea and the seashore was not entirely unrestrained. Instead, it could be exercised only if certain requirements were satisfied, for example, that the purpose was authorised or that the consent of the National Assembly or the relevant provincial legislature was obtained. These

[150] The power to administer several provisions of the Seashore Act was assigned to the Premier of each of the four coastal provinces in terms of section 235(8) of the Constitution of the Republic of South Africa, Act 200 of 1993 (see *Government Gazette* 16346; GNR 27; 7 April 1995). The term "Minister", therefore, is defined in a manner that includes these provincial premiers. Section 1 thus provides that the term Minister

> "insofar as a provision of this Act is applied in or with reference to a particular province, means the competent authority to whom the administration of this Act has under section 235(8) of the Constitution of the Republic of South Africa, 1993, been assigned in that province, save that in relation to the seashore and the sea within any port or harbour which in terms of any law falls under the control and management of the Administration, 'Minster' means the Minister of Transport".

[151] Section 6(1). This section was not assigned to the coastal provinces in terms of section 235(8) of the Constitution of the Republic of South Africa, Act 200 of 1993. The powers set out in this section, therefore, could not be exercised by the provincial premiers.

[152] Section 4(1).

[153] Section 4(2)(a).

[154] Section 4(2)(b).

requirements, however, were procedural and not substantive in nature. In addition, they did not require the Minister to take the interests of the public into account.

Besides explicitly conferring the right to alienate a portion of the sea or the seashore on the Minister, the Seashore Act also extended the Minister's power to lease and grant other rights in the sea and seashore. However, the power to lease was made subject to certain restrictions, the most important of which were, first, that the sea and the seashore could be let only for a purpose specifically authorised by the Act; and, second, that the Minister had to be of the opinion that such letting was in the public interest. Insofar as the power to lease and grant lesser rights was concerned, the Seashore Act provided:

(i) that the Minister could, on any conditions he considered expedient, let the sea and the seashore for any of the purposes specifically authorised by the Act.[155] Before doing so, however, the Minister had to be of the opinion that such letting either was in the public interest or would not seriously affect the public's enjoyment of the sea and seashore.[156]

(ii) that the Minister could, on any conditions he considered expedient, permit the removal of any material, except precious stones as defined in the Precious Stones Act,[157] natural oil, precious metals or any base mineral as defined in the Mining Rights Act,[158] or any aquatic plant, shell or salt as defined in the Sea Fisheries Act,[159] from the sea or the seashore.[160]

Apart from the powers set out above, the Seashore Act also provided that the Minister could make regulations to control the use of the seashore, bathing in the sea, the removal of materials from the sea or the seashore, the dumping of rubbish in the sea or on the seashore and so on.[161]

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[155] Section 3(1)(a) – (o). The authorised purposes for which the Minister could let the sea or seashore were as follows: the erection of bathing boxes or tents; the erection of beach shelters; the erection of tea-rooms and refreshment places; the training of horses; the holding of races and the provision of places for recreation, amusement or display; the provision of landing sites for aircraft and the establishment of aerodromes; the construction of breakwaters, sea walls, promenades, embankments, esplanades, buildings and other structures; the construction of bathing pools and enclosures; the erection of whaling stations or fish-canning or other factories; to legalise any encroachments; the carrying out of any work of public utility; the laying of drainage or sewage systems; the laying of water-pipes or cables; the erection of boat-houses; or the carrying out of work which in the opinion of the Minister serves a necessary or useful purpose.

[156] Proviso to section 3(1).

[157] 73 of 1964. This Act was repealed by Minerals Act 50 of 1991 and the Minerals Act in turn repealed by the Mineral and Petroleum Resources Development Act 28 of 2002.

[158] 20 of 1967. This Act has been repealed by the Precious Metals Act 37 of 2005.

[159] 58 of 1973. This Act has been repealed by the Sea Fishery Act 12 of 1988.

[160] Section 3(2).

[161] Section 10.

2.4.4 The boundaries of the sea and the seashore in the Seashore Act

The "sea" was defined in section 1 of the Seashore Act as "the water and the bed of the sea below the low water mark and within the territorial waters of the Republic including the water and bed of any tidal river and of any tidal lagoon," and the "seashore" as "the water and land between the low-water mark and the high-water mark."

The low-water mark was defined, also in section 1, as the "lowest line to which the water of the sea recedes during periods of ordinary spring tides"; and the high-water mark as "the highest line reached by the water of the sea during ordinary storms occurring during the stormiest period of the year, excluding exceptional or abnormal floods". This definition essentially codified the common law.

2.4.5 Analysis and comment

As Van der Vyver has noted, the enactment of the Seashore Act marked the culmination of a long historical process stretching back to classical Roman law in terms of which the classification of the sea and the seashore changed from common property to regalian property and ultimately to state property. Over the same long period of time, the ownership of the sea and the seashore was vested at first in no one, centuries later in the prince and finally in the state in the form of the State President.[162]

An important consequence of this process of ètatisation is that the State President's right of ownership – despite being characterised as custodial in nature – was interpreted as conferring on the state the power to "discriminately exclude the public at large, a particular class of people, or selected individuals from using these areas".[163] It is not surprising, therefore, Van der Vyver argues, that during the apartheid era, the courts consistently upheld regulations governing the use of beaches and bathing in the sea despite the fact that they were racially discriminatory and violated the public interest in the sea and the seashore.

Apart from capping the process of ètatisation, another significant aspect of the Seashore Act was that it explicitly conferred the authority on the state to transfer ownership of and grant lesser rights, especially leases, in the seashore even if this was to the detriment of the public's rights in these areas. The only limitations on the manner in which the state could exercise these

[162] JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) at 261.
[163] JD van der Vyver "The étatisation of public property" in DP Visser (ed) *Essays on the History of Law* (1989) at 261.

powers were the procedural requirements contained in some, but not all, of the provisions of the Act. These limitations were not particularly effective.

2.5 CONCLUSION

The classification and legal status of the sea and the seashore in Roman law, Roman-Dutch law and South African law prior to the coming into operation of the NEM: ICMA, were considered in this chapter. In addition, the public's right to access and use these things, as well as the state's power to regulate them in Roman law, Roman-Dutch law and pre-NEM: ICMA South African law, were discussed. The boundaries of the sea and especially the seashore in all three systems were also examined.

Given the long period of time involved, it is not surprising that the classification and legal status of the sea and the seashore, the public's rights to access and use these things and the state's power to regulate them underwent significant changes from Roman law to Roman-Dutch law and, finally, to pre-NEM: ICMA South African law. The same point, however, cannot be made with respect to the boundaries of the seashore. These remained essentially the same in all three systems.

As Van der Vyer eloquently described it, the classification and legal status of the sea and the seashore underwent a long process of ètatisation. In terms of this process, the classification of the sea and the seashore changed from common property to regalian property and finally to state property. Over the same period of time, the ownership of the sea and the sea-shore was bestowed at first on no one, centuries later on the prince and finally on the state.

While the classification and ownership of the sea and the seashore underwent a process of ètatisation, the public's rights to access and use these things did not. Instead, these rights were separated from the right of ownership in Roman-Dutch law and pre-NEM: ICMA South African law and retained by the public. The public's right to access and use the sea and the seashore included simple commercial and recreational purposes such as bathing, fishing and drying nets.

Although the public retained their common law rights to access and use the sea and the seashore, the state, as the custodial owner, was entitled to regulate the manner in which the public exercised these rights. However, the state's regulatory authority was restrained. It could not exercise its regulatory powers in a manner that seriously prejudiced the public's common law rights to access and use the sea and the seashore.

Apart from regulating the public's common law rights to access and use the sea and the seashore, the state could also alienate and grant other special rights to private persons that went beyond those enjoyed by the public, including the right to prospect and mine. The state's authority to do so, however, was derived from its police powers as the sovereign and not its common law powers as the custodial owner and, as such, had to be authorised by legislation.

The state's authority to alienate, lease and grant other special rights in the sea and the seashore was, in fact, authorised by legislation in the form of the Seashore Act. Although this Act did impose some restrictions on the Minister's powers to do so, these restrictions were procedural and not substantive in nature. It is not surprising, therefore, that they proved to be ineffective in preventing the Minister from implementing the Act in a racially discriminatory manner.

Last, neither the common law principles governing the sea and the seashore nor the Seashore Act was aimed at conserving or protecting the sea and the seashore as a complex, biologically diverse and highly productive, but also vulnerable and threatened ecosystem. It is not surprising, therefore, that they did not provide a legal framework within which a system of integrated coastal management could be adopted and implemented. Integrated coastal management has been defined as a "process that brings together those involved in the development, management and use of the coast within a framework that facilitates the integration of their interests and responsibilities". The aim of this process is "to establish sustainable levels of economic and social activity in … coastal areas while protecting the coastal environment."[164]

The provisions of the NEM: ICMA will be discussed and evaluated in the next chapter of this thesis.

[164] United Kingdom Department of the Environment *Coastal Zone Management towards Best Practice* (1996).

CHAPTER THREE

THE CLASSIFICATION AND LEGAL STATUS OF COASTAL PUBLIC PROPERTY

3.1 INTRODUCTION

In light of the historical context set out in Chapter Two, the purpose of this chapter is to analyse the ownership provisions of the National Environmental Management: Integrated Coastal Management Act (NEM: ICMA).[1] This analysis is located within a broad overview of the Act as a whole. After a brief discussion of the background to, and objects of, the NEM: ICMA, the provisions of the Act that regulate the composition and boundaries of the coastal zone and the classification and legal status of coastal public property are examined. Following this examination, the Chapter turns to investigate the coastal institutions, coastal management programmes and coastal regulatory and enforcement mechanisms envisaged by the Act.

Apart from the topics set out above, Chapter Three also explores the implications of the Supreme Court of Appeal's judgment in *Gongqose v Minister of Agriculture, Forestry and Fisheries*[2] for the NEM: ICMA and its relationship to African customary law. In this ground-breaking case, the Court held that in terms of section 211(3) of the Constitution,[3] customary law rights can be extinguished only by legislation that "specifically deals" with customary law, and such legislation must do so either explicitly or implicitly. The NEM: ICMA does not specifically deal with customary law and, consequently, does not extinguish customary law rights to the coast.

Chapter Three is divided into eight sections. Besides the introduction in section 3.1, the background to the NEM: ICMA and the objects of the Act are considered in section 3.2. This is followed by a discussion of the composition and boundaries of coastal public property in section 3.3 and an exploration of the legal status of coastal public property in section 3.4. Section 3.5 focuses on coastal institutions and coastal management programmes, section 3.6 on regulatory and enforcement mechanisms and section 3.7 on the relationship between African customary law and the NEM: ICMA. The conclusion is set out in section 3.8

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[1] 24 of 2008.

[2] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA).

[3] Constitution of the Republic of South Africa, 1996. Section 211(3) of the Constitution provides that

> "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

3.2 BACKGROUND AND OBJECTS OF NEM: ICMA

3.2.1 Background to the NEM: ICMA

As its title indicates, the *White Paper for Sustainable Coastal Development in South Africa* (2000) identified sustainable coastal development as the democratic government's long-term, ideal vision for the South African coast and argued that the most effective way of achieving this vision was to introduce a system of integrated coastal management.[4] However, the *White Paper* noted that the introduction of such a system would have to be accompanied by a revised legal framework.[5] This is because the existing legal framework was fragmented, administered by different governmental agencies and departments and, in some cases, inappropriate and outdated, particularly when it came to the adoption and implementation of a system of co-ordinated coastal management.[6]

Following the publication of the *White Paper,* therefore, one of the issues the Department of Environmental Affairs had to consider was whether the Seashore Act[7] should simply be revised, or should an entirely new coastal law be adopted? External consultants were appointed to investigate this issue and recommended that an entirely new coastal law should be drafted for a variety of reasons.[8] The Department accepted this recommendation, and the process of drafting a new coastal law began in 2001. After several lengthy delays – some of which related to conflicts over the division of powers between the national and provincial spheres of government – the NEM: ICMA was passed by Parliament in 2008 and assented to by the President in 2009.[9]

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[4] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development in South Africa* (2000) (hereafter the *White* Paper) at paras 5.2 and 6.2.

[5] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development in South Africa* (2000) at para 9.3.2.

[6] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development in South Africa* (2000) at para 9.3.1. See also BC Glavovic and C Cullinan "The coast" in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 868 at 895

[7] 21 of 1936.

[8] C Cullinan and N Smith *Review of Legal Arrangements Required to Implement the White Paper for Sustainable Coastal Development in South Africa* unpublished report by EnAct International (2000). In this review, Cullinan and Smith argued that the existing legal framework for coastal management was deficient for a number of reasons. Among these were the following: (a) it did not make provision for integrated coastal management institutions and programmes; (b) the legal status of certain coastal areas, including admiralty reserves, estuaries and the seashore did not promote sustainable coastal development; (c) existing development rights in respect of land adjacent to estuaries and the seashore and in coastal flood plains did not promote sustainable coastal development; and (d) the legal mechanisms for implementing and enforcing coastal management plans and rules were inadequate (see BC Glavovic and C Cullinan "The coast" in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 868 at 895).

[9] Apart from sections 11, 65, 66, 95, 96 and 98, the NEM: ICMA was brought into operation on 1 December 2009. Sections 65, 66, 95, 96 and 98 were brought into operation on 5 February 2016 and section 11 on 7

3.2.2 Objects of the NEM: ICMA

As Goble et al. have pointed out,[10] the NEM: ICMA adopts a people-centred, pro-poor approach to coastal management. This approach is reflected in the objects of the Act, which are set out in section 2. This section provides that one of the objects of the Act is to "preserve, protect, extend and enhance the status of coastal public property as being held in trust by the state on behalf of all South Africans",[11] and that another is to "secure equitable access to the opportunities and benefits of coastal public property".[12] In addition, section 2 provides that the Act will achieve these objects by, *inter alia*, "[determining] the coastal zone of the Republic"[13] and managing the coastal zone in a "co-ordinated and integrated" manner.[14] In order to "determine the coastal zone", the NEM: ICMA demarcates the boundaries of the coastal zone and regulates the legal status of coastal public property. Each of these aspects will be discussed in turn in this chapter.

3.3 THE COMPOSITION AND BOUNDARIES OF THE COASTAL ZONE

3.3.1 Introduction

Unlike the Seashore Act, the NEM: ICMA does not apply only to the narrow area where the land meets the ocean, but rather to a much wider area, which it refers to as the "coastal zone". The coastal zone is defined in section 1 of the Act as "the area comprising coastal public property, the coastal protection zone, coastal access land, coastal protected areas, the seashore and coastal waters, and includes any aspect of the environment on, in, under and above such area".[15]

As this definition indicates, Parliament has not included a substantive definition of the coastal zone in the NEM: ICMA.[16] Instead, it defines the coastal zone by identifying and

February 2020. The Act was also extensively amended in 2014 (see National Environmental Management: Integrated Coastal Management Amendment Act 36 of 2014).

[10] BJ Goble, M Lewis, T Hill and M Phillips "Coastal management in South Africa: Historical perspectives and setting the stage of a new era" (2014) 91 *Ocean and Coastal Management* 32 at 37.

[11] Section 2(c).

[12] Section 2(d).

[13] Section 2(a).

[14] Section 2(b).

[15] Section 1.

[16] One of the very first statutes passed specifically to implement a programme of integrated coastal zone management was the United States Coastal Zone Management Act of 1972 (16 USC 1451). In this Act, the United States Congress adopted a substantive definition of the coastal zone. Section 304(1) thus defines the coastal zone as

> "the coastal waters (including lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of

establishing a series of adjacent and overlapping geographic areas within which the Act is applicable, some of which have their own landward and seaward boundaries. These geographic areas include "coastal public property",[17] the "coastal protection zone",[18] and "coastal access land".[19]

The most important of these geographic areas is coastal public property. Not only does it encompass the area where the land meets the sea, but it is also owned by the citizens of South Africa and held in trust by the state on behalf of the citizenry.[20] Coastal public property thus lies at the very centre of the coastal zone.

3.3.2 Coastal public property

Coastal public property replaces the Roman law concepts of the sea and the seashore and, from a property law perspective, may be classified as a new kind of thing or *res*.[21] This new thing, which is described in much greater detail than the sea and the seashore, is made up of different components. These components are set out in section 7 of the NEM: ICMA and may be divided into three categories:

First, those components that are located on the seaward side of the area. These are:

(i) "coastal waters";[22]

(ii) "land submerged by coastal waters, including:

  (a) land flooded by coastal waters, which subsequently becomes part of the bed of coastal waters;[23] and

  (b) the substrata beneath such land";[24]

(iii) "any natural island within the coastal waters".[25]

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several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands and beaches".

For a more detailed discussion of the different ways in which coastal zone boundaries may be delimited see CM Batista "Coastal boundaries" in C Finkl and C Makowski (eds) *Encyclopedia of Coastal Science* (2018) and W Freedman "Integrated coastal management boundaries and South Africa's new Integrated Coastal Management Act" in E Couzens and T Honkonen *International Environmental Law Making and Diplomacy Review 2008* (2009) 167.

[17] Section 7.

[18] Section 16.

[19] Section 18.

[20] Section 11(1).

[21] M Sowman and X Rebelo "The coastal environment" in J Glazewski (ed) *Environmental Law in South Africa* 3ed (2023) at para 11.5.3.2. See also W Freedman "On the beach: The legal status of the sea and the seashore in light of the National Environmental Management: Integrated Coastal Management Act 24 of 2008" in M Kidd and S Hoctor (eds) *Stella Iuris: Celebrating 100 years of Teaching Law in Pietermaritzburg* (2010) 275 at 285.

[22] Section 7(1)(a).

[23] Section 7(1)(b)(i).

[24] Section 7(1)(b)(ii).

[25] Section 7(1)(c).

Second, those components that are located on the landward side of the area. These are:

(i) "the seashore, including:

(a) the seashore of a natural or reclaimed island;[26] and

(b) the seashore of reclaimed land";[27]

(ii) "any admiralty reserve owned by the State";[28]

(iii) any state land declared to be coastal public property;[29] and

(iv) any land that has been reclaimed from the sea in terms of section 7C of the Act.[30]

Third, any natural resources on or in any of the components of coastal public property set out above.[31]

Apart from identifying those components that are included in coastal public property, section 7 of the NEM: ICMA also excludes certain components from coastal public property. These are:

(i) any immovable structure or installation which is located in a port or harbour, either on land or the seabed, and which was lawfully constructed by any organ of state;[32]

(ii) any portion of the seashore below the high-water mark which was lawfully alienated before the Seashore Act took effect;[33]

(iii) any portion of the seashore below the high-water mark which was lawfully alienated in terms of the Seashore Act;[34]

(iv) any portion of an island that was lawfully alienated before the NEM: ICMA took effect;[35] and

(v) any portion of a coastal cliff that was lawfully alienated before the NEM: ICMA took effect and which is not owned by the State.[36]

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[26] Section 7(1)(d)(i).
[27] Section 7(1)(d)(ii).
[28] Section 7(1)(e).
[29] Section 7(1)(f). The declaration of state land as coastal public property is governed by section 8 of the NEM: ICMA.
[30] Section 7(1)(g). The reclamation of land from the sea is governed by sections 7B and 7C of the NEM: ICMA.
[31] Section 7(1)(h).
[32] Section 7(2)(a).
[33] Section 7(2)b).
[34] Section 7(2)(b).
[35] Section 7(2)(c).
[36] Section 7(2)(d). Section 6(4) of the NEM: ICMA provides that the provisions of section 7(2) do not affect: (a) the ownership of an immovable structure, part of an immovable structure, or port or harbour installation of infrastructure; or (b) the control, use and management of the sea space, including turning basins and channels within a port or harbour, that existed prior to the commencement of the Act.

Although the definition of coastal public property consists of various components, the two most important are the "coastal waters" and the "seashore".[37] In most cases, they will determine the landward and seaward boundaries of coastal public property.

Coastal waters are defined in section 1 of the NEM: ICMA as the "internal waters, territorial waters, exclusive economic zone and continental shelf of the Republic referred to in sections 3, 4, 7 and 8 of the Maritime Zones Act, 1994 (Act 15 of 1994), and an estuary"; and the seashore as "the area between the low-water mark and the high-water mark".

The low-water mark is defined, in the same section, as "the lowest line to which coastal waters recede during spring tides", and the high-water mark as "the highest line reached by coastal waters, but excluding any line reached as a result of exceptional or abnormal weather or sea conditions; or an estuary being closed to the sea".

With one exception, these definitions mirror those in the Seashore Act. The exception relates to the high-water mark. Unlike the Seashore Act, which defines the high-water mark as "the highest line reached by the water of the sea during ordinary storms occurring during the most stormy period *of the year*, …", the NEM: ICMA does not refer to a time period at all. As Fisher and Whittal point out, this means that all unexceptional and normal weather and sea conditions can now be considered irrespective of when they occurred.[38]

The fact that the landward boundary of coastal public property is based on the high-water mark gives rise to certain delimitation problems. Perhaps the most significant is that the high-water mark is not based on the application of tidal height datum, but rather on the "swash" caused by the combined action of currents, tides, winds and waves under storm conditions. An important consequence of this approach is that the high-water mark is not a line of constant height (i.e. a contour), but rather a line of variable height that can be ascertained only by observing or identifying the horizontal position of the water as it runs up the shore.[39]

Apart from the Northern Cape Province, the process of identifying the high-water mark has not been carried out on a large scale, and there are no diagrams or maps that accurately depict the high-water mark nationally.[40] It may, therefore, be difficult in practice for a person

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[37] Department of Environmental Affairs and Tourism *The Integrated Coastal Management Bill: A Brief Guide to Assist the Public Participation Process* (2006) at para 9.3.2.

[38] R Fisher and J Whittal *Cadastre: Principles and Practice* (2020) at 532.

[39] R Fisher and J Whittal *Cadastre: Principles and Practice* (2020) at 531-538.

[40] R Fisher and J Whittal *Cadastre: Principles and Practice* (2020) at 567-568. In their monograph, Fisher and Whittal explain that the state has embarked on a "best estimate survey" of the high-water line

> "from aerial or satellite imagery using the boundary of the sand and vegetation as the indicator, or adopting a conservative 3-meter contour line."

Unfortunately, this estimated high-water mark is not necessarily the same as the high-water mark as defined in the NEM: ICMA.

to determine whether he or she is bound by the obligations imposed by the NEM: ICMA. To address this difficulty, as well as any other problems that can arise when it comes to identifying the high-water mark, the Act provides that the Minister may determine or adjust the boundaries of coastal public property by following the procedure set out in section 27 of the Act.

Besides the delimitation problems set out above, the fact that the landward boundary of coastal public property is based primarily on the high-water mark has also been criticised because it excludes the dry-beach area (the beach and dunes located above the high-water mark). One of the recommendations contained in the *White Paper* was that Parliament should consider extending the principle of public ownership to include the dry-beach area.[41] Unfortunately, Parliament appears to have rejected this recommendation. A possible reason for doing so is that some of these areas are privately owned.

However, the exclusion of the dry-beach area from coastal public property may not be as much of a problem as appears at first sight. This is because the definition of coastal public property includes admiralty reserves, which are owned by the state. Admiralty reserves are strips of land that came into existence when the first grants of land were made along the Cape and Natal coasts during the nineteenth century. They are usually about 62 metres wide and are located parallel to and adjoining the landward side of the high-water mark. Most admiralty reserves, therefore, encompass the dry-beach area.[42]

Furthermore, the exclusion of the dry-beach area from coastal public property can be remedied by the fact that sections 8 and 9 of the NEM: ICMA authorise the Minister to:

(i) declare any state-owned land located adjacent to existing coastal public property as coastal public property;[43] and

(ii) acquire private land located adjacent to existing coastal public property for the purpose of declaring it as coastal public property by purchasing it, exchanging it for other land or expropriating it.[44]

[41] Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development in South Africa* (2000) at para 179.

[42] Admiralty reserves are defined in section 1 of the NEM: ICMA as

> "any strip of land adjoining the inland side of the high-water mark which, when this Act took effect, was state land reserved or designated on an official plan, deed of grant, title deed or other document evidencing title or land-use rights as 'admiralty reserve', 'government reserve', beach reserve', 'coastal forest reserve' or other similar reserve".

[43] Section 8.

[44] Section 9.

Apart from describing the components of coastal public property, the NEM: ICMA also identifies the purpose of this area. Section 7A of the Act provides in this respect that the purpose of coastal public property is:

> "(a) to improve public access to the seashore;
> (b) to protect sensitive coastal ecosystems;
> (c) to secure the natural functioning of dynamic coastal processes;
> (d) to protect people, property and economic activities from risks arising from dynamic coastal processes, including the risk of sea-level rise; and
> (e) to facilitate the achievement of the objects of [the] Act".

Section 7A was not included in the NEM: ICMA when it was passed in 2008. This section was included only in 2014 when the Act was amended by the National Environmental Management: Integrated Coastal Management Amendment Act. Section 7A is a significant provision for the following reasons:

First, it favours the promotion of public access to coastal public property and the conservation and protection of the environmental integrity of this area over the promotion of commerce, navigation and trade, which have traditionally been the primary reasons for classifying the coast as a public trust resource, especially in the United States (US). Out of all of the goals listed in section 7A, only one refers to property and economic activities. All of the others refer either to public access or the protection of coastal ecosystems and processes.

Second, the goals listed in section 7A are relevant, not only with respect to coastal public property as a newly created thing or *res* in section 7 of the NEM: ICMA, but also to the coastal public trust concept as a principle of coastal and environmental law in section 11. This is because the coastal public trust concept does not apply to the entire coastal zone, but only to coastal public property as a public trust resource.

Third, given that the goals listed in section 7A apply both to coastal public property and the coastal public trust concept, it follows that the coastal public trust concept must also favour the promotion of public access and the conservation and protection of this area over the promotion of commerce, navigation and trade. Section 7A is thus one of several provisions scattered throughout the Act that give explicit and specific statutory content to the coastal public trust concept created in section 11.

3.3.3 Coastal protection zone

Besides coastal public property, section 16 of the NEM: ICMA also provides for a new regulatory area known as the coastal protection zone. This area consists of a strip of land located adjacent and parallel to the landward side of the high-water mark. It is aimed at facilitating integrated coastal management by extending the ambit of the Act beyond the high-water mark to include as much of the coastal ecosystem as possible.

While the high-water mark forms the seaward boundary of the coastal protection zone, the landward boundary is based principally on two somewhat arbitrary and mechanical administrative criteria: first, a set distance of one kilometre from the high-water mark in non-urban areas and, second, a set distance of 100 metres from the high-water mark in urban areas. The Act itself describes these two criteria as follows:

> "… the coastal protection zone consists of:
>
> …
>
> (d) any land unit situated wholly or partially within one kilometre of the high-water mark which, when this Act came into force:
>
> (i) was zoned for agricultural or undetermined use, or
>
> (ii) was not zoned and was not part of a lawfully established township, urban area or other human settlement;[45]
>
> (e) any land unit not referred to in paragraph (d) that is situated wholly or partially within 100 metres of the high-water mark.[46]
>
> …"

Apart from the land units described above, the coastal protection zone also encompasses certain other areas, the majority of which are environmentally significant and whose boundaries are based on ecological or physical considerations. Section 16 of the NEM: ICMA provides in this respect that the coastal protection zone includes:

(i) any area declared to be a sensitive coastal area in terms of the Environmental Conservation Act 89 of 1973;[47]

(ii) any part of the littoral active zone that is not coastal public property;[48]

(iii) any part of a coastal protected area that is not coastal public property;[49]

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[45] Section 16(1)(d).
[46] Section 16(1)(e).
[47] Section 16(1)(a).
[48] Section 16(1)(b).
[49] Section 16(1)(c).

(iv) any coastal wetland, lake, lagoon, river or dam that is situated wholly or partly within a land unit referred to in section 16(1)(d)(i) or (e) above;[50]

(v) any part of a river that is situated wholly or partially within a land unit referred to in section 16(1)(d)(i) or (e) above;[51]

(vi) any part of the seashore which is not coastal public property;[52]

(vii) any admiralty reserve which is not coastal public property;[53] and

(viii) any land adjacent to any of the areas set out above that would be inundated by a 1:100-year flood or storm.[54]

Besides describing the composition of the coastal protection zone, the NEM: ICMA also identifies the purpose of this area. Section 17 of the Act provides in this respect that the goal of the coastal protection zone is to manage, regulate or restrict land that is adjacent to coastal public property or that plays an important role in the coastal ecosystem to:

"(a) protect the ecological integrity, natural character and economic, social and aesthetic value of coastal public property";

(b) avoid increasing the effect or severity of natural hazards in the coastal zone;

(c) protect people, property and economic activities from risks arising from dynamic coastal processes, including the risk of sea-level rise;

(d) maintain the natural functioning of the littoral active zone;

(e) maintain the productive capacity of the coastal zone by protecting the ecological integrity of the coastal environment; and

(e) make land near the seashore available to organs of state and other authorised persons for:

(i) performing rescue operations; or

(ii) temporarily depositing objects washed up by coastal waters".

Like the "purpose of coastal public property" provisions in section 7A of the NEM: ICMA, the "purpose of coastal protection zone" provisions in section 17 also favour the conservation and protection of the coastal zone over the promotion of commerce, navigation and trade. However, given that the coastal public trust concept does not apply to the coastal protection zone, these goals do not apply to this concept in the same way that the purpose of coastal public property provisions does. Nevertheless, these goals support the argument that the primary aim

[50] Section 16(1)(f).
[51] Section 16(1)(fA).
[52] Section 16(1)(g).
[53] Section 16(1)(h).
[54] Section 16(1)(i).

of the coastal public trust concept is the promotion of public access to and conservation and protection of coastal public property rather than the promotion of commerce, navigation and trade. Section 17A, therefore, can also be regarded as one of several provisions scattered throughout the Act that give content to the coastal public trust concept created in section 11.

3.3.4 Coastal access land

Unlike coastal public property and the coastal protection zone, the NEM: ICMA itself does not demarcate the area encompassed by coastal access land. Instead, section 18 of the Act simply imposes an obligation on coastal municipalities, within four years after the Act comes into operation, to make by-laws that designate strips of land as coastal access land to secure public access to coastal public property.[55]

After it has been designated, coastal access land is automatically subject to a public servitude in terms of which members of the public may use that land to gain access to coastal public property.[56] Apart from designating strips of land as coastal access land, a coastal municipality may, on its own initiative or on request from any interested or affected party, also withdraw the designation of land as coastal access land.[57]

If a municipality fails to designate coastal access land, the Member of the Executive Council (MEC), and failing the MEC, the Minister may designate such land by notice in the *Government Gazette*.[58] Before doing so, the MEC or Minister must first consult the relevant municipality and give it a reasonable opportunity to make representations.[59]

Apart from conferring the power to designate or withdraw the designation of coastal access land on coastal municipalities, the NEM: ICMA also sets out the procedure such a municipality must follow when it exercises these powers,[60] as well as the responsibilities it

[55] Section 18(1). Land that is located within a port or harbour, defence or other strategic facility may be designated as coastal access land only with the consent of the Minister responsible for that facility (s 18(4)).
[56] Section 18(2).
[57] Section 18(5).
[58] Section 18(6).
[59] Sections 18(7) and (8)
[60] Section 19. This section provides that before a municipality designates coastal access land or withdraws such a designation, it must:

> "(a) assess the potential environmental impact of doing so; (b) consult with interested and affected parties; and (c) give notice of the intended designation or withdrawal of the designation to the owner of the land".

bears with regard to coastal access land.[61] Strips of land that have been designated as coastal access land must be included in a municipality's Spatial Development Framework.[62]

To facilitate the designation and management of coastal access land, the Department of Forestry, Fisheries and the Environment has adopted a national coastal access strategy. The purpose of this strategy is to provide a framework within which coastal municipalities must designate coastal access.[63] Together with this strategy, the Department has also adopted a step-by-step guide for coastal municipalities on the practical implementation of the coastal access provisions.[64]

The coastal access land provisions set out in section 18 of the NEM: ICMA must be read together with the access to coastal public property provisions in section 13 of the Act, which provide, *inter alia*, that "every natural person in the Republic has a right of reasonable access to coastal public property, and is entitled to use and enjoy coastal public property". Although the Act itself does not state so explicitly, when sections 18 and 13 are read together, it appears that the primary purpose of section 18 is to provide vertical access to coastal public property, while the primary purpose of section 13 is to provide horizontal access. Vertical access may be described as public access *to the shore*, while horizontal access is public access *along the shore*.

Like the "purpose of coastal public property" provision in section 7A of the NEM: ICMA and the "purpose of coastal protection zone" provisions in section 17, the "coastal access

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[61] Section 20. This section provides that a municipality in whose area coastal access land falls, must:

> "(a) signpost entry points to that coastal access land; (b) control the use of, and activities on, that land; (c) protect and enforce the rights of the public to use that land to gain access to coastal public property; (d) maintain that land so as to ensure that the public has access to the relevant coastal public property; (e) where appropriate and within its available resources, provide facilities that promote access to coastal public property, including parking areas, toilets, boardwalks and other amenities, taking into account the needs of physically disabled persons; (f) ensure that the provision and use of coastal access land and associated infrastructure do not cause adverse effects to the environment; (g) remove any public access servitude that is causing or contributing to adverse effects that the municipality is unable to prevent or to mitigate adequately; (h) describe or otherwise indicate all coastal access land in any municipal coastal management programme and in any municipal spatial development framework prepared in terms of the Municipal Systems Act; (i) perform any other actions that may be prescribed; and (j) report to the MEC within two years of this Act coming into force on the measures taken to implement this section".

[62] Spatial Land Use and Management Act 16 of 2013: section 21(1).

[63] Department of Environmental Affairs *National Coastal Access Strategy for South Africa* (2014).

[64] Department of Environmental Affairs *A Guide for the Designation and Management of Coastal Access in South Africa* (2014). In some coastal areas, the designation of coastal access land has been delayed or frozen as a result of conflicts between coastal municipalities and local communities and private property owners combined with the lack of clear policies and procedures for managing and resolving these conflicts. Sowman and Malan point out that the delays in designating coastal access land can also be traced back to the "many competing demands for coastal land" and the lack of clarity when it comes to negotiating coastal access on state-owned and communal land (see M Sowman and N Malan "Review of progress with integrated coastal management in South Africa since the advent of democracy" (2018) 40(2) *African Journal of Marine Science*121 at 126).

land" provisions in section 18 once again support the argument that the primary aim of the coastal public trust concept is the promotion of public access to and conservation and protection of coastal public property rather than the promotion of commerce, navigation and trade. Section 18, therefore, can also be regarded as one of several provisions scattered throughout the Act that give content to the coastal public trust concept created in section 11.

3.4 THE LEGAL STATUS OF COASTAL PUBLIC PROPERTY

3.4.1 Introduction

Apart from abolishing the historical concepts of the sea and the seashore codified in section 1 of the Seashore Act and replacing them with the new concept of coastal public property, the NEM: ICMA also abolishes the State President's custodial ownership of these *res publicae* as provided for in section 2 of the Seashore Act and replaces it with the South African citizenry's ownership of coastal public property.

Section 11 of the NEM: ICMA provides in this respect that "ownership of coastal property vests in the citizens of the Republic" and that it is "held in trust by the State on behalf of the citizens of the Republic".[65] In addition, section 11 also provides that coastal public property is "inalienable and cannot be sold, attached or acquired by prescription and that rights over it cannot be acquired by prescription".[66]

The State's role as public trustee is dealt with in more detail in section 12 of the NEM: ICMA. This section provides that the

> "state, in its capacity as the public trustee of all coastal public property, must ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community";[67] and that it may "take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations".[68]

In their thought-provoking analysis of the NEM: ICMA, Glavovic, Cullinan and Groenink assert that section 11 has made far-reaching changes to the legal status of the coast because it has replaced the Roman and Roman-Dutch concepts of common things (*res communes*

[65] Section 11(1).
[66] Section 11(2).
[67] Section 12(a).
[68] Section 12(b).

omnium) or public things (*res publicae*) with the United States (US) concept of the Public Trust Doctrine insofar as the law governing the ownership of coastal public property is concerned.[69]

Glavovic, Cullinan and Groenink put this assertion as follows:

> "The effect of these provisions is to introduce the public trust doctrine into South African law related to the coast. This contrasts with the approach taken in earlier drafts of the Bill which sought to reassert the ancient principle recognised by Roman law to the effect that the coast is the common property of everyone. However, there is some precedent for the use of the public trust doctrine in South African legislation. In particular, the National Water Act 36 of 1998 states that the national government, acting through the Minister of Water Affairs, is the public trustee of the nation's water resources. Furthermore, one of the national environmental management principles in NEMA states that: 'The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage'."[70]

Although the US Public Trust Doctrine is discussed in detail in Chapter Five of this thesis, it will be helpful to provide a summary of the doctrine here to better understand Glavovic, Cullinan and Groenink's assertion. Before turning to do so, however, it is important to note that the doctrine is rooted in State and not federal law. An important consequence of this characteristic is that there is no such thing as a single public trust doctrine that spans the entire country. Instead, each of the 50 States has a discrete public trust doctrine with its own unique features. Despite this fact, most commentators agree that they share certain common features.[71] Among the most important of these common features are the following:

First, certain natural resources, such as tidal and navigable waters and the land beneath them, are considered to be inherently common. Given their inherently common nature, legal title to these public trust resources is vested in the state. However, this right is not the same as the legal title the state holds in respect of other property it owns or acquires. Instead, the Public Trust Doctrine imposes certain fiduciary duties on the state, the most important of which is to protect the public's right to use and enjoy public trust resources.[72]

Second, besides vesting legal title in the state, the Public Trust Doctrine also confers certain servitudal rights over public trust resources on the public. These servitudal rights grant

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[69] BC Glavovic, C Cullinan and M Groenink "The coast" in ND King, HA Strydom and FP Retief (eds) *Fuggle and Rabie's Environmental Management in South Africa* 3ed (2018) 653 at 686.
[70] BC Glavovic, C Cullinan and M Groenink "The coast" in ND King, HA Strydom and FP Retief (eds) *Fuggle and Rabie's Environmental Management in South Africa* 3ed (2018) 653 at 686.
[71] W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-6.
[72] W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-6.

members of the public the power to use and enjoy public trust resources for public purposes. Prior to the 1970s, these public purposes were confined largely to commercial activities such as navigation and fishing.[73] Since then, these public purposes have evolved, and today, the modern Public Trust Doctrine encompasses the right to use public trust resources for various other purposes, including the conservation and protection of the environment and recreational purposes.[74]

Third, the servitudal rights conferred by the Public Trust Doctrine on the public are perpetual in nature. An important consequence of this characteristic is that the state's power to alienate public trust resources or to abdicate its fiduciary responsibilities towards them is severely restricted. In *Illinois Central Railroad Company v Illinois*,[75] the US Supreme Court held that while a State may alienate public trust assets to private persons, it may not abdicate its duty to protect the public's right to use and enjoy those assets. The transfer of public trust resources, therefore, must always take place subject to the Public Trust Doctrine.[76]

According to Sax – who is regarded as the father of the modern Public Trust Doctrine – three conceptual principles underlie the doctrine. First, "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs". Second, "certain interests are so particularly the gift of nature's bounty that they ought to be reserved for the whole of the populace". Third, "certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate".[77]

As the brief summary set out above indicates, the US Public Trust Doctrine does not distinguish between the entity that holds title in public trust resources (the state) and the entity that is responsible for managing and administering these assets (also the state). The approach adopted in section 11 of the NEM: ICMA is different. It clearly distinguishes between the entity that owns coastal public property (the citizenry) and the entity that is responsible for managing,

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[73] Public trust scholars in the United States and other jurisdictions usually draw a distinction between a traditional and narrower version of the public trust doctrine and a modern and broader version of the doctrine (see, for example, E van der Schyff "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 13 *PER/PELJ* 122 at 125). The traditional and narrower version applied prior to the publication of Sax's seminal public trust article in the 1970 edition of the *Michigan Law Review* and the modern and broader version has applied since then. It is for this reason that Sax is often referred to as the father of the modern public trust doctrine (see J Sax "The Public Trust Doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan LR* 417).

[74] W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-6

[75] 146 US 387 (1892) at 452-453.

[76] W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-6

[77] J Sax "The Public Trust Doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan LR* 471.

protecting and conserving coastal public property (the state). Given this important difference, it seems unlikely that section 11 has simply replaced the Roman and Roman-Dutch concepts of *res communes* and *res publicae* with the public trust doctrine, as Glavovic, Cullinan and Groenink assert.

Apart from the fact that section 11 distinguishes between the entity that owns coastal public property and the entity that is responsible for managing, protecting and conserving coastal public property, it is also unlikely that Parliament would introduce a completely foreign doctrine into the South African law of the coast without stating so in much clearer language. This is particularly because there is no single and coherent US Public Trust Doctrine; the role, scope and content of the doctrine are contested within the United States itself; and the wholesale introduction of a foreign doctrine into South African law will inevitably give rise to a wide range of complex and difficult questions.[78]

Instead of introducing an entirely new doctrine into the South African law of the coast, it is submitted that the ownership provisions of section 11 of the NEM: ICMA have retained the classification of coastal public property as a *res publica* as that concept was defined, not in Roman-Dutch law, but rather in Roman law.[79] As we have already seen in Chapter 2 of this thesis, in Roman law, *res publicae* were defined as those things that were owned by the Roman people and which the Roman people were consequently entitled to use, whereas, in Roman-Dutch law, *res publicae* such as public roads and public rivers (as well as common things such as the sea and the seashore) were included in the list of regalian rights (*regalia*) and thus defined as those things that belonged to the prince and later the state, but which the people nevertheless were still entitled to access and use.[80]

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[78] Similar arguments have been made by South African water resources public trust scholars. For example, Viljoen argues that it is very unlikely that the US Public Trust Doctrine has been introduced into South African water law by section 3 of the National Water Act for at least two reasons. First, US law is not recognised as an authoritative source of South African law and, accordingly, it would be wrong to classify the US Public Trust Doctrine as a source of the South African water resources public trust. Second, given that each individual State has its own public trust doctrine, it is difficult to say what exactly the US Public Trust Doctrine means and, consequently, which public trust principles should be applied in South Africa (see G Viloen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 190-191; G Viljoen "Critical perspectives on South Africa's groundwater law: Established practice and the novel concept of public trusteeship" (2020) 38 *Journal of Energy and Natural Resources Law* 391 at 402-403; and G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" 2019 *VRU-WCL* 172 at 175).

[79] W Freedman "On the beach: The legal status of the sea and the seashore in light of the National Environmental Management: Integrated Coastal Management Act 24 of 2008" in M Kidd and S Hoctor (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* (2010) 275 at 292.

[80] The contrasting ways in which *res publicae* are defined in Roman law (i.e. as things owned by the Roman people) and Roman-Dutch law (i.e. as things owned by the prince) were clearly set out by the Appellate Division in its judgment in *Butgereit v Transvaal Canoe Union* 1988 (1) SA 759 (A) at 767-769. Although this

Even though the classification of coastal public property as a *res publica* in the Roman law sense of this concept (i.e. as a thing owned by the South African people and not the prince and later the state) has undoubtedly strengthened the public nature of this area,[81] it is difficult to know if the shift from Roman-Dutch to Roman law has any other significance. Apart from the fact that the citizenry as a body does not enjoy legal personality and, consequently, is not in a position to exercise its right of ownership, most of the key entitlements usually associated with the concept of ownership have been separated from the right and vested in other entities. The power to access, use and enjoy coastal public property, for example, has been vested in all natural persons[82] and the power to manage and administer coastal public property has been conferred on the state.[83]

While the points set out above correctly suggest that the classification of coastal public property as a *res publica* in the Roman law sense of this concept does not have an instrumental or practical purpose, scholars such as Freedman, Sowman and Rebelo believe it might have a symbolic purpose. They have argued in this respect that the purpose underlying the classification of coastal public property as a thing owned by the citizenry is to address the state's failure, during the colonial and apartheid eras, to exercise its right of ownership to promote access to the opportunities and benefits of coastal public property, irrespective of race, and to conserve and protect the coastal environment for current and future generations, by divesting the state of its ownership of coastal public property and emphasising its duties and responsibilities as the public trustee, rather than its authority as an owner.[84]

While this suggestion contains valuable insights, it is important to note that it has been made in the absence of any critical engagement with the growing body of research, especially in common law jurisdictions such as Australia, England and the United States, on the concept

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case dealt with public rivers and not the sea and the seashore, the Roman and Roman-Dutch law sources that the Court referred to in its judgment apply to both categories of public things.

[81] Glavovic, Cullinan and Groenink point out that an earlier draft of the Integrated Coastal Management Bill classified coastal public property as the common property of all natural persons (i.e. as a *res communes omnium*). The goal of this classification, they argue, was to "strengthen the status of this area as a public asset although the state would continue to manage it on behalf of the public" (see BC Glavovic, C Cullinan and M Groenink "The coast" in ND King, HA Strydom and FP Retief (eds) *Fuggle and Rabie's Environmental Management in South Africa* 3ed (2018) 653 at 686, footnote 110). Although it is not clear why the classification of coastal public property as a common thing in the Bill was changed to a public thing (*res publicae*) in the Act, the argument is still valid. The classification of coastal public property as a public thing strengthens its status as a public asset.

[82] Section 13(1).

[83] Sections 11(1) and 12.

[84] W Freedman "On the beach: The legal status of the sea and the seashore in light of the National Environmental Management: Integrated Coastal Management Act 24 of 2008" in M Kidd and S Hoctor (eds) *Stella Iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 275 at 292 and M Sowman and X Rebelo "The coastal environment" in J Glazewski (ed) *Environmental Law in South Africa* 3ed (2023) at para 11.6.1.

of public property and the role it should play in society. This public property scholarship has focused largely on the distinctions that may be drawn between different property regimes; the scope and content of public property ownership; and, perhaps most importantly, the normative justifications for public property. Exploring this scholarship will undoubtedly identify further and richer normative justifications for the ownership provisions in section 11 of the NEM: ICMA. However, given the volume of public property research that has been produced in recent years, it is not possible to do justice to it in this chapter. Instead, it will be investigated in Chapter Four of this thesis.

Finally, for the sake of completeness, it must also be noted that section 11 of the NEM: ICMA has brought to an end the centuries-long process of étatisation that began in the Middle Ages and culminated, at least insofar as the sea and the seashore were concerned, with the appointment of the State President as the custodial owner of these things in terms of section 2 of the Seashore Act.

3.4.2 The public's right to access and use coastal public property

Besides conferring a right of ownership of coastal public property on the citizens of the Republic, section 13 of the NEM: ICMA also confers a right of access to coastal public property,[85] as well as a right to use and enjoy coastal public property, on every natural person in the Republic.[86] Like Roman-Dutch law and the Seashore Act, the Act thus distinguishes between the ownership of coastal public property, on the one hand, and the right to access, use and enjoy coastal public property, on the other hand.

Insofar as the scope and content of the rights to access, use and enjoy coastal public property are concerned, the NEM: ICMA does not specifically address this issue. Given the absence of any specific statutory provision(s), it is submitted that the common law principles governing the public's right to access, use and enjoy coastal public property continue to apply. As we have already seen, the common law confers the right on the public to use the coast for commercial and recreational purposes, including the right "to go onto it, to swim, to fish, to dry nets and draw up boats".[87]

While section 13 of the NEM: ICMA confers a right to access, use and enjoy coastal public property on every natural person, it also imposes limits on how these rights may be

[85] Section 13(1)(a)
[86] Section 13(1)(b).
[87] *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa* 1958 (4) SA 572 (A) at 621H-622A.

exercised. The Act provides in this respect that a natural person may not use coastal public property in a manner that adversely affects the right of any other person to use and enjoy coastal public property; hinders the state's duty to protect the environment; or causes an adverse effect.[88] It follows, therefore, that the right to access, use and enjoy coastal public property is an inherently limited one.

Besides the inherent restrictions discussed above, section 13 of the NEM: ICMA also provides that external restrictions may be imposed in certain circumstances or to achieve particular goals. The Act states in this respect that the general right to access, use and enjoy coastal public property does not prevent the state from prohibiting or restricting access to, or the use of, any part of coastal public property which forms part of a protected area. Neither does it prevent the state from prohibiting or restricting access to, or the use of, any part of coastal public property to:

- protect the environment;
- promote the interests of the whole community;
- promote the interests of national security, or
- promote the national interest.[89]

Insofar as the right to access coastal public property is concerned, section 13 of the NEM: ICMA also provides that no fee may be charged to do so without the approval of the Minister.[90] The Minister may, by notice in the Gazette, publish maximum fees for access to coastal public property. These fees may be made applicable to persons in general or to a category of persons.[91] Where the Minister has published such a notice, any person or organ of state may apply to him or her to charge a fee in excess of the maximum.[92] Coastal public property for which a coastal use permit has been granted and coastal public property that is, or forms part of, a protected area, or a port or harbour, is exempted from these fee-related provisions.[93]

The extent to which the provisions set out above apply to "beaches" is controversial. This is because sections 44(1)(a)(ii), 104(1)(b)(ii) and 156(1) and(2) of the Constitution, read together with Part B of Schedule 5, provide that exclusive legislative competence with regard

[88] Section 13(1)(b). Section 13(1A) provides that subject to sections 13(2) and 13(3), no person may prevent access to coastal public property.
[89] Section 13(2).
[90] Section 13(3)(a). The provisions of this section do not apply to fees charged for the use of facilities or activities located on or in coastal public property (s 13(3)(d)).
[91] Section 13(3)(b).
[92] Section 13(3)(c).
[93] Section 13(5).

to a matter falling within a functional area listed in Schedule 5 – one of which is "beaches" – has been allocated to the provincial legislatures and municipal councils. Subject to one exception, this means that Parliament does not enjoy the competence to pass legislation with regard to a matter falling within a functional area of "beaches".

The exception is set out in section 44(2) of the Constitution. This section provides that when it is "necessary" to achieve any of the objects set out in paragraphs (a) to (e) of section 44(2) itself, Parliament may intervene and pass legislation "with regard to a matter falling within a functional area listed in Schedule 5". The objects set out in paragraphs (a) to (e) are as follows:

(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.[94]

Unfortunately, the Constitution itself does not define the functional area of "beaches". However, a useful definition of the term may be found in the Alert Level 3 Lockdown Regulations issued in terms of the Disaster Management Act during the COVID-19 pandemic.[95] Regulation 1 of these Regulations defines a "beach" as

> "the sandy, pebbly or rocky shore:
> (a) between the high-water mark and low-water mark adjacent to:
> (i) the sea; or
> (ii) an estuary mouth extending 1000 meters inland from the mouth: and
> (b) within 100 metres of the high-water mark, excluding private property, including the sea and estuary themselves adjacent to the beach".

[94] The Constitutional Court has interpreted section 44(2) narrowly and held that Parliament may intervene only in compelling circumstances (see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744 (CC) para 335; *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC) para 106l; and *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) para 80.

[95] See the Regulations Amending the Alert Level 3 Lockdown Regulations (Government Notice R 11 in *Government Gazette* 44066 dated 11 January 2021). The Alert Level 3 Lockdown Regulations were published on 28 May 2020 (see Determination of Alert Levels and Hotspots Regulations (Government Notice 608 in *Government Gazette* 43364 dated 18 May 2020).

Further definitions of the word "beach" or a variation thereof may be found in municipal by-laws regulating beaches. For example, in section 1 of the Umlalazi Local Municipality's Beach By-Law, the term "beach" is defined as the "unconsolidated sediment forming the unvegetated edge of the shoreline that extends from the low-water mark inland to higher features of the coast such as dunes, cliffs or vegetated soil, and which is capable of being habitually used by members of the public for bathing purposes".[96]

And, in section 1 of the Knysna Local Municipality By-Law on the Recreational Use of Beaches and Bathing Areas, the term "beach area" is defined as "the sea, seashore and any land owned by the municipality above the high-water mark and adjoining or abutting the seashore and is used or capable of being used by the public for recreational purposes, including any facility, promenade, walkway, sand dune, car park or lawn".[97]

Besides defining the word "beach", these by-laws also regulate the manner in which the general public may exercise their right to access, use and enjoy coastal public property. For example, the Umlalazi Local Municipality Beaches By-Law, *inter alia*, prohibits members of the public from driving in the coastal area. It also regulates the extent to which members of the public may camp, fish or swim in the coastal area.

3.4.3 The state's power to regulate coastal public property

Aside from abolishing the State President's custodial ownership of the sea and the seashore and replacing it with the South African citizenry's symbolic ownership, section 11 of the NEM: ICMA, read together with section 65, also abolishes the Minister's authority to alienate, lease and grant other rights in the sea and the seashore in terms of the Seashore Act and replaces it with the power to issue a coast use permit.

Section 11 of the NEM: ICMA provides in this respect that coastal public property is "inalienable and cannot be sold, attached or acquired by prescription and that rights over it cannot be acquired by prescription".[98] And section 65 provides that the Minister responsible for environmental affairs may list activities that are prohibited within coastal public property,[99] or that require a coastal use permit.[100]

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[96] Umlalazi Municipality By-Laws: Beach By-Laws (Provincial Notice 16 in *KZN Provincial Gazette* 389 dated 11 March 2010).
[97] Knysna Municipality By-Laws: By-Law for the Recreational Use of Beaches and Bathing Areas (*Western Cape Provincial Gazette* 7767 dated 8 May 2017).
[98] Section 11(2).
[99] Section 65(1)(a)(i).
[100] Section 65(1)(a)(ii). When the NEM: ICMA was passed by Parliament in 2008, section 65 did not make provision for coastal use permits, but rather for coastal leases (s 65(1)) and coastal concessions (s 65(2)). Section 65(1) provided in this respect that no one could occupy any part of, construct or erect any building or

Once an activity has been listed by the Minister, a person may not engage in that activity if it has been prohibited,[101] or engage in that activity without a coastal use permit if it requires such a permit.[102] To do so is a criminal offence.[103] When the Minister lists activities that require a coastal use permit, the NEM: ICMA provides that he or she may set different user charges for these permits.[104]

Apart from conferring the power on the Minister to award coastal use permits, section 66 of the NEM: ICMA also imposes certain conditions on the manner in which the Minister may exercise these powers. The Act provides in this respect that a coastal use permit must be awarded for a fixed period of not more than 20 years;[105] may be awarded subject to any conditions determined by the Minister;[106] and must provide for the payment of the user charge set by the Minister.[107]

Finally, it is important to note that a coastal use permit does not relieve the holder from the obligation to obtain any other coastal authorisation required in terms of the NEM: ICMA or any other authorisation in terms of any other legislation.[108] It also does not relieve the holder from the obligation to comply with any other legislation.[109]

As we saw in the previous chapter, the extent to which the state could alienate, lease and grant other rights in the sea and the seashore was a complex and controversial issue. Section 11 has resolved this issue by simply imposing a blanket prohibition on the alienation, sale and acquisition by prescription of coastal public property. This blanket ban represents in a

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structure on or in coastal public property unless they had been awarded a coastal lease by the Minister. Section 65(2) provided that no one could use or exploit any coastal resource derived from coastal public property unless they were empowered to do so by national legislation or had been authorised to do so in terms of a coastal concession by the Minister or an authorization issued under the Marine Living Resources Act. Following extensive amendments to the NEM: ICMA in 2014, the provisions governing coastal leases and coastal concessions were repealed and replaced by those that now govern coastal use permits. According to the Amendment Bill's Explanatory Memorandum, these amendments arose out of the realisation that it was unnecessary to subject every activity in or on coastal public property to a coastal lease or a coastal concession, given that not every activity adversely affected the coastal environment. The decision to replace coastal leases and coastal concessions with coastal use permits, therefore, was aimed at removing the blanket restriction on activities in or on coastal public property and replacing them with a mechanism that regulated only adverse activities which were not appropriately dealt with under other environmental legislation, such as the NEMA EIA Regulations (see Department of Environmental Affairs *Explanator Summary of the National Environmental Management: Integrated Coastal Management Amendment Bill, 2013* Notice 1046 in *Government Gazette* 35988 (21 December 2012). The Minister, therefore, may not include an activity in his or her list if it requires an environmental authorisation in terms of the NEMA.

[101] Section 65(2)(a).
[102] Section 65(2)(b).
[103] Section 79.
[104] Section 65(1)(b).
[105] Section 66(a).
[106] Section 66(b).
[107] Section 66(c).
[108] Section 65(5)(a).
[109] Section 65(5)(b).

significant diminution of the authority of the state and flows from the change in the legal status of coastal public property.

Like the "purpose of coastal public property" provision in section 7A of the NEM: ICMA, the "purpose of coastal protection zone" provision in section 17, and the "coastal access land" provision in section 18, the prohibition on alienation in section 11(2) gives explicit and specific statutory content to the coastal public trust concept created in section 11(1). As discussed above, this prohibition is also regarded as a key feature of the US Public Trust Doctrine.

3.5 COASTAL INSTITUTIONS AND COASTAL MANAGEMENT PROGRAMMES

3.5.1 Coastal institutions established by the NEM: ICMA

(a) Introduction

Apart from demarcating the boundaries of the coastal zone and regulating its legal status, the NEM: ICMA envisages the establishment of a number of coastal institutions whose purpose is to promote a system of integrated coastal management. These institutions are the National Coastal Committee; provincial lead agencies; provincial coastal committees; municipal coastal committees;[110] and voluntary coastal officers.[111]

While the establishment of municipal coastal committees and the appointment of voluntary coastal officers are discretionary, the establishment of national and provincial coastal committees and the designation of provincial lead agencies are mandatory. For the purposes of this chapter, therefore, this section will focus only on the mandatory institutions, namely the National Coastal Committee, provincial lead agencies and provincial coastal committees

(b) The National Coastal Committee

Insofar as the National Coastal Committee is concerned, section 35 of the NEM: ICMA provides that the Minister must establish this committee and determine its powers.[112] This Committee was established in 2024 – 15 years after the Act came into operation – and had its inaugural meeting on 13 August 2024.[113]

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[110] Section 42.
[111] Section 43.
[112] Section 35(1). The Minister is defined in section 1 of the NEM: ICMA as "the Minister responsible for environmental affairs".
[113] Department of Forestry, Fisheries and Environment *Media Statement: Inaugural meeting of the National Coastal Committee marks new era in South African coastal management* (14 August 2024), available at https://www.gov.za/news/media-statements/forestry-fisheries-and-environment-inaugural-meeting-national-coastal, accessed 17 August 2024.

The National Coastal Committee has several functions. The most important of these is to "promote integrated coastal management in the Republic and effective co-operative governance" by co-ordinating the implementation of the NEM: ICMA and the national coastal management programme.[114] More specifically, the National Coastal Committee must:

(i) promote integrated coastal management within each sphere of government, between different spheres of government, and between organs of state and other parties;[115]

(ii) promote the integration of coastal management concerns and objectives into the environmental management and implementation plans referred to in Chapter Three of NEMA;[116]

(iii) promote the integration of coastal management concerns and objectives into national, provincial and municipal development plans and policies;[117] and

(iv) promote the integration of coastal management concerns and objectives into other plans, programmes and policies of organs of state whose activities may create adverse effects on the coastal environment.[118]

Unfortunately, the NEM: ICMA does not prescribe any mechanisms or procedures in terms of which the National Coastal Committee must achieve these goals.

Apart from establishing the National Coastal Committee, section 36 of the NEM: ICMA also confers the power on the Minister to appoint permanent members of this Committee,[119] and to designate its chairperson, who must be an official from the Department.[120] The permanent members appointed by the Minister must, by virtue of the office they hold or the expertise they possess, be able to assist the National Coastal Committee in fulfilling its functions.[121] In addition, the permanent members appointed by the Minister must include a representative from each provincial coastal committee;[122] a representative from each national government department that undertakes or regulates activities that may have adverse effects on

[114] Section 35(3).
[115] Section 35(3)(a).
[116] Section 35(3)(b)(i).
[117] Section 35(3)(b)(ii).
[118] Section 35(3)(b)(iii).
[119] Section 36(1).
[120] Section 36(1A). The Department is defined in section 1 of the NEM: ICMA as "the national department responsible for environmental affairs".
[121] Section 36(2).
[122] Section 36(2A)(a).

the coastal environment;[123] and one or more persons representing the management authorities of coastal protected areas.[124]

(c) Provincial lead agencies

Insofar as provincial lead agencies are concerned, section 38 of the NEM: ICMA provides that the Premier of each coastal province must, within two months of the commencement of the Act, designate a provincial organ of state as the lead agency for coastal management in the province and ensure that there is at all times a lead agency for coastal management in the province. The lead agency is responsible to the MEC.[125]

The provincial lead agency is responsible for the day-to-day implementation of the NEM: ICMA in its province and must:

(i) co-ordinate the implementation of the provincial coastal management programme;
(ii) monitor coastal management in the province;
(iii) monitor the state of the environment in the coastal zone;
(iv) co-ordinate the preparation of provincial state of the coast reports;
(v) provide logistical and administrative support to the provincial coastal committee;
(vi) review reports that relate to the determination and adjustment of coastal boundaries or that relate to policies that may impact the coastal zone;
(vii) promote training, education and public awareness programmes relating to the protection, conservation and enhancement of the coastal environment;
(viii) take all reasonably practical measures to monitor compliance with, and to enforce, the Act, either alone or in co-operation with other enforcement agents; and
(ix) perform any other function assigned to it by the Minister or the MEC under the Act.[126]

(d) Provincial coastal committees

Insofar as provincial coastal committees are concerned, section 39 of the NEM: ICMA provides that the MEC of each coastal province must, within 12 months of the commencement of the

[123] Section 36(2A)(b).
[124] Section 36(2A)(c). When required, the National Coastal Committee itself can invite other persons to participate in its affairs. These invited members may include a representative of a national government department which is not a permanent member; a representative of a municipality that is affected by the issues under consideration by the National Coastal Committee; experts in the fields of coastal management and coastal ecosystems; and any other person who may assist the National Coastal Committee in fulfilling its functions (s 36(2B)).
[125] Section 38(1). The MEC is defined in the NEM: ICMA as "the member of the Executive Council of a coastal province who is responsible for the designated provincial lead agency in terms of this Act".
[126] Section 38(2)(a)-(i). The Premier may assign any of these to another organ of state in the province (s 38(3)).

Act, establish a coastal committee for the province.[127] Although provincial coastal committees have been established in each of the four coastal provinces, none were established within the 12-month limit stipulated by the Act.[128]

Like the National Coastal Committee, the provincial coastal committees have several functions. The NEM: ICMA provides in this respect that they must:

(i) promote integrated coastal management in the province and the co-ordinated and effective implementation of the Act and the provincial coastal management programme;[129]

(ii) advise the MEC, the provincial lead agency and the National Coastal Committee on matters concerning coastal management in the province;[130]

(iii) advise the MEC on developing, finalising, reviewing and amending the provincial coastal management programme;[131]

(iv) promote a co-ordinated and integrated approach to coastal management within the province by providing a forum for dialogue and co-operation between key organs of state and other persons involved in coastal management;[132]

(v) promote the integration of coastal management concerns and objectives into the programmes and policies of other organs of state who activities may cause adverse effects on the coastal environment;[133] and

(vi) perform any other functions delegated to them.[134]

Apart from establishing a provincial coastal committee, section 40 of the NEM: ICMA confers the power on the MEC to determine the composition and appoint the members of the provincial coastal committee.[135] The persons appointed by the MEC must, by virtue of the office they hold or the expertise they possess, be able to assist the provincial coastal committee in fulfilling its functions.[136] In addition, the members appointed by the MEC must include

[127] Section 39(1).
[128] M Sowman and X Rebelo "The coastal environment" in J Glazewski (ed) *Environmental Law in South Africa* 3ed (2023) at para 11.10.4. As Sowman and Rebelo point out, these committees are simply advisory and do not have decision-making authority. This may limit their effectiveness.
[129] Section 39(2)(a).
[130] Section 39(2)(b).
[131] Section 39(2)(c).
[132] Section 39(2)(d).
[133] Section 39(2)(e).
[134] Section 39(2)(f).
[135] Section 40(1).
[136] Section 40(2)(a).

persons with expertise in coastal management; [137] one or more representatives from coastal municipalities;[138] one or more representatives from community-based organisations;[139] and one or more representatives from scientific or coastal research institutes.[140]

3.5.2 Coastal management programmes envisaged by the NEM: ICMA

(a) Introduction

The NEM: ICMA requires each sphere of government to prepare a coastal management programme within four years after the Act commences. While the provincial and municipal coastal management programmes do not have to be approved by a higher level of government, provincial programmes must be consistent with the national programme, and municipal programmes must be consistent with both the national and provincial programmes.

This hierarchical arrangement allows for the development of a strategic and overarching national programme followed by provincial and municipal programmes that include increasing levels of local management detail. The Minister has also been given the power to review provincial programmes, and provincial governments have been given the power to review municipal programmes.

(b) National Coastal Management Programme

The NEM: ICMA distinguishes between the preparation and adoption of a national coastal management programme and the content of such a programme.

Insofar as the preparation and adoption of the national coastal management programme is concerned, section 44 of the NEM: ICMA provides that it must be prepared and adopted by the Minister within four years after the Act takes effect.[141] This programme must also be reviewed at least once every five years[142] and amended when necessary.[143]

Before a national coastal management programme is adopted, the Minister must invite members of the public to submit written representations on or objections to the programme. This invitation must be published in the *Government Gazette*, and members of the public must be given 30 days thereafter within which to submit their representations or objections.[144]

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[137] Section 40(2)(b)(i).
[138] Section 40(2)(b)(ii).
[139] Section 40(2)(b)(iii).
[140] Section 40(2)(b)(iv). The Director-General may also appoint a member of the Department as a non-voting member of a provincial coastal committee (s 40(5)).
[141] Section 44(1)(a).
[142] Section 44(1)(b).
[143] Section 44(1)(c).
[144] Section 44(2).

After the national coastal management programme has been adopted or amended, the Minister must give notice to the public of this fact and that copies and summaries of the programme are available for inspection at specified places. The Minister must also publicise a summary of the programme. The notice must be given within 60 days of the adoption of the national coastal management programme or any substantial amendment to it.[145]

Like the prohibition on alienation of coastal public property in 11(2) of the NEM: ICMA, the obligation to facilitate public participation by inviting members of the public to submit written representations on or objections to the National Coastal Management Programme in section 44(2) gives explicit and specific statutory content to the coastal public trust concept created in section 11(1). Once again, it is interesting to note that promoting public participation in decisions that affect public trust resources is a common feature of the US Public Trust Doctrine.

Insofar as the content of the national coastal management programme is concerned, section 45 of the NEM: ICMA provides that it must be a policy directive on integrated coastal management;[146] and provide for an integrated, co-ordinated and uniform approach to coastal management by organs of state in all spheres of government, non-governmental organisations, the private sector and local communities.[147]

In addition, the national coastal management programme must include the following components:

(i) a national vision for coastal management in the Republic;[148]

(ii) national coastal management objectives;[149]

(iii) priorities and strategies to achieve those objectives; [150]

(iv) performance indicators in respect of those objectives; [151]

(v) norms and standards for the management of the coastal zone and its components; [152]

(vi) a framework for co-operative governance that identifies the responsibilities of different organs of state, including their responsibility towards marginalised or previously disadvantaged communities that are dependent on coastal resources for their livelihood; and that facilitates co-ordinated and integrated coastal management.[153]

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[145] Section 44(3).
[146] Section 45(1)(b).
[147] Section 45(1)(b).
[148] Section 45(2)(a).
[149] Section 45(2)(b).
[150] Section 45(2)(c).
[151] Section 45(2)(d).
[152] Section 45(2)(e).
[153] Section 45(2)(f).

(c) Provincial and municipal coastal management programmes

Apart from some minor differences, the provisions governing the preparation and adoption of provincial[154] and municipal coastal management programmes[155] mirror those governing the preparation and adoption of the national coastal management programme. The same point may be made with respect to the provisions governing the content of provincial[156] and municipal coastal programmes.[157] Apart from some minor differences, they mirror those governing the content of the national coastal management programme.

(d) Review of coastal management programmes

Although the Minister has no authority to accept or reject a provincial coastal management programme, section 54 of the NEM: ICMA provides that he or she may at any time review such a programme.[158] When the Minister reviews a provincial coastal management programme, he or she must determine whether it includes the content prescribed in section 47;[159] is consistent with the National Coastal Management Programme;[160] gives adequate protection to coastal public property;[161] and provides an appropriate policy framework for establishing an effective and efficient system of coastal management.[162]

If the Minister believes that a provincial coastal management programme does not meet all the criteria referred to above, he or she must instruct the MEC to amend or replace the programme within a reasonable period.[163] An MEC who receives such an instruction must amend or replace the provincial coastal management programme by following the same procedure used to prepare and adopt it, except that the new or amended coastal management programme may not be finally adopted without the consent of the Minister.[164]

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[154] Section 46.
[155] Section 48
[156] Section 47.
[157] Section 49.
[158] Section 54(1).
[159] Section 54(2)(a).
[160] Section 54(2)(b).
[161] Section 54(2)(c).
[162] Section 54(2)(d).
[163] Section 54(3). The Minister's instruction must be contained in a notice and the notice must specify the time period within which the MEC must amend or replace the provincial coastal management programme.
[164] Section 54(4). Apart from reviewing a provincial coastal management programme, the Minister may also request an MEC to review a municipal coastal management programme. If the MEC is unable or unwilling to do so within in a reasonable time, the Minister him or herself may review the municipal coastal management programme (s 54(5)).

In the same way that the Minister may review a provincial coastal management programme, section 55 of the NEM: ICMA provides that an MEC may at any time review a municipal coastal management programme.[165] When he or she reviews such a programme, the MEC must determine whether it includes the content prescribed in section 49;[166] is consistent with the national and provincial coastal management programmes;[167] gives adequate protection to coastal public property;[168] and was prepared in a manner that allowed for effective participation by interested and affected parties.[169]

If the MEC believes that a municipal coastal management programme does not meet all the criteria referred to above, he or she must instruct the municipality to amend or replace the programme within a reasonable period.[170] A municipality that receives such an instruction must amend or replace the municipal coastal management programme by following the same procedure used to prepare and adopt it, except that the new or amended coastal management programme may not be finally adopted without the consent of the MEC.[171]

3.6 COASTAL REGULATORY AND ENFORCEMENT MECHANISMS

3.6.1 Coastal regulatory mechanisms created by the NEM: ICMA

(a) Introduction

A variety of regulatory mechanisms have been created by the NEM: ICMA, most of which will be implemented at the provincial level. These include special management areas; coastal management lines; and coastal planning schemes. Although none of these regulatory mechanisms can be described as a key focus of the public trust concept, they may be helpful when it comes to identifying the fiduciary duties and responsibilities that the coastal public trust concept imposes on the state as the public trustee.

(b) Special management areas

So far as special management areas are concerned, section 23 of the NEM: ICMA provides that the Minister may, after consulting the MEC, declare an area that is wholly or partially in the

[165] Section 55(1).
[166] Section 55(2)(a).
[167] Section 55(2)(b).
[168] Section 55(2)(c).
[169] Section 55(2)(d).
[170] Section 55(3). The MEC's instruction must be contained in a notice and the notice must specify the time period within which the municipality must amend or replace the municipal coastal management programme.
[171] Section 55(4).

coastal zone as a special management area or withdraw any such declaration.[172] An area may be declared a special management area only if the environmental, cultural or socio-economic conditions of that area require the introduction of measures that are necessary to:

"(a) attain the objectives of any coastal management programme in the area;
(b) facilitate the management of coastal resources by a local community;
(c) promote sustainable livelihoods for a local community; or
(d) conserve, protect or enhance coastal ecosystems and biodiversity in the area".[173]

After he or she has declared an area as a special management area, section 24 of the NEM: ICMA provides that the Minister may appoint a juristic person, organ of state, traditional council or any other person as the manager for that area.[174] Before authorising the manager to begin managing the special management area, the Minister must make regulations that define the manager's duties and powers and prescribe rules to facilitate the achievement of the objectives for which the special management area was declared.[175]

Apart from appointing a manager and defining his or her duties, section 23 provides that the Minister may also prescribe specific activities which are prohibited in a special management area. When he or she exercises this power, however, the Minister must take the purpose for which the special management area was declared into account.[176]

(d) Coastal management lines

So far as coastal management lines are concerned, section 25 of the NEM: ICMA provides that a MEC must establish or change coastal management lines by publishing regulations in the *Government Gazette*. The purpose of these coastal management lines is:

"(a) to protect coastal public property, private property and public safety;
(b) to protect the coastal protection zone;
(c) to preserve the aesthetic values of the coastal zone; or
(d) for any other reason consistent with the objectives of the Act".[177]

[172] Section 23(1). Before the Minister declares an area to be a special management area, he or she must give interested and affected parties an opportunity to make representations (s 23(2)).
[173] Section 23(3).
[174] Section 24(1) and (2). The manager must have sufficient expertise and capacity to manage the special management area in a manner that will achieve the objectives for which it was established (s 24(2)).
[175] Section 24(3).
[176] Section 23(4).
[177] Section 25(1). In order to facilitate the determination of coastal management lines, the Department of Environmental Affairs has published national guidelines on establishing coastal management lines by MECs

A coastal management line is defined in section 1 of the NEM: ICMA as "a line determined by a MEC … in order to demarcate an area within which development will be prohibited or controlled in order to achieve the objects of [the Act] or coastal management objectives".[178] Given this definition, it is not surprising that section 25 of the NEM: ICMA provides that when a MEC establishes or changes a coastal management line, he or she may prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of the management line.[179]

A local municipality within whose area a coastal management line has been established must delineate the line on a map that forms part of its zoning scheme in order to enable the public to determine the position of the coastal management line in relation to existing cadastral boundaries.[180] Coastal management lines may also be located wholly or partially outside the coastal zone.[181]

(e) Coastal planning schemes

So far as coastal planning schemes are concerned, section 56 of the NEM: ICMA provides that a coastal planning scheme is one that "facilitates the attainment of coastal management objectives by defining areas within the coastal zone or coastal management area which [may or may not be used for specified activities]"; and by "prohibiting or restricting activities or uses [within those areas] that do not comply with the rules of the scheme".[182]

A coastal planning scheme must "be consistent with [the NEM: ICMA], the National Coastal Management Programme; the applicable provincial coastal management programme; and any estuarine management plan applicable in the area". It must also take any other applicable coastal management programmes into account.[183]

(see Department of Environmental Affairs *National Guidelines Towards the Establishment of Coastal Management Lines* (2017)). South Africa's first coastal management line was established in the City of Cape Town by the Western Cape Provincial Minister of Local Government, Environmental Affairs and Provincial Planning on 19 March 2021 (see PN 25 in *Western Cape Provincial Gazette* 8401 of 19 March 2021).

[178] Section 1.

[179] Section 25(1A). Any prohibitions or restrictions imposed by the MEC must be published in the form of regulations. Before making or amending these regulations, the MEC must consult with any local municipality within whose area the set-back line is or will be situated and give affected and interested parties an opportunity to make representations (s 25(1B)).

[180] Section 25(3).

[181] Section 25(4)

[182] Section 56(1).

[183] Section 56(2).

The NEM: ICMA envisages a variety of different coastal planning schemes. It provides in this respect that a coastal planning scheme may be established by the following persons:

(i) the Minister, if it applies either to an area of coastal public property and is established to protect and control the use of marine living resources or to implement national norms and standards, or to an area of the coastal zone that straddles the border between two provinces or the border of the Republic;[184]

(ii) the manager of a coastal protected area, if the planning scheme only applies within that protected area;[185]

(iii) the MEC, if the planning scheme is not one referred to above and applies to an area of the coastal zone within the province;[186]

(iv) the municipality, if the planning scheme is not one referred to above and applies to an area of the coastal zone within the municipality;[187]

(v) the manager of a special management area, if the planning scheme only applies within that area.[188]

Like coastal management plans, the different coastal planning schemes envisaged by the NEM: ICMA are related to one another in a hierarchical manner. The Act provides in this respect that a coastal planning scheme established by:

(i) the Minister takes precedence over any other coastal planning scheme;[189]

(ii) the manager of a coastal protected area takes precedence over any other coastal planning scheme except one established by the Minister; [190]

(iii) the MEC takes precedence over any other coastal planning scheme except one established by the Minister or the manager of a coastal protected area;[191] and

(iv) a municipality takes precedence over any other coastal planning scheme except one established by the Minister, the manager of a coastal protected area or the MEC.[192]

If a coastal planning scheme applies to an area that extends into the sea further than 500 metres from the high-water mark or affects the protection or use of marine living resources, it

[184] Section 56(3)(a).
[185] Section 56(3)(b).
[186] Section 56(3)(c).
[187] Section 56(3)(d).
[188] Section 56(3)(e).
[189] Section 56(4)(a).
[190] Section 56(4)(b).
[191] Section 56(4)(c).
[192] Section 56(4)(d).

may be established only with the consent of the Minister.[193] Similarly, if a coastal planning scheme affects or restricts the navigation of vessels on the sea or restricts vessels from entering or leaving a port or harbour, it may be established only with the consent of the Minister responsible for these activities.[194]

Although coastal planning schemes themselves may not create any rights to use land or coastal waters,[195] section 57 of the NEM: ICMA provides that a municipal coastal planning scheme may "form, and be enforced as part of, a land use scheme adopted by the municipality". In addition, section 57 provides further that a municipality may not adopt a land use scheme that conflicts with any coastal planning scheme established in terms of the NEM: ICMA and that any such conflict must be resolved in favour of the coastal planning scheme.[196]

3.6.2 Coastal enforcement mechanisms created by the NEM: ICMA

(a) Introduction

Apart from the regulatory mechanisms discussed above, the NEM: ICMA also provides a variety of enforcement measures. These include coastal protection and coastal access notices and repair and removal notices.

(b) Coastal protection and coastal access notices

When it comes to coastal protection and coastal access notices, section 59 of the NEM: ICMA states that if the Minister or MEC believes that a person has carried out, is carrying out or intends to carry out an activity that has an adverse effect on the coastal environment or on the rights of a natural person to access, use and enjoy coastal public property, then he or she may issue a coastal protection notice or coastal access notice respectively to that person.[197]

The coastal protection notice or coastal access notice may prohibit the activity;[198] instruct the notified person to take appropriate steps to protect the environment or allow natural persons to access coastal public property;[199] investigate and evaluate the impact of the activity

[193] Section 56(5)(a).
[194] Section 56(5)(b).
[195] Section 56(6).
[196] Section 57.
[197] Sections 59(1) and 59(5). Before the Minister or the MEC may issue a coastal protection notice or a coastal access notice, he or she must consult with the organ of state that has authorised, or is competent to authorise, the activity and give the person to whom the coastal protection notice or coastal access notice is addressed, an opportunity to make representations (section 59(2)). The notice itself must contain the information and instructions set out in section 59(4).
[198] Sections 59(1)(a) and 59(5)(a).
[199] Section 59(1)(b)(i) and 59(5)(b).

on the coastal environment;[200] or stop the activity for a reasonable period to allow for an investigation to be carried out by the Minister or the MEC.[201]

If the notified person fails to comply with the instructions set out in the notice, section 61 of the NEM: ICMA provides that the Minister or MEC may instruct any appropriate person to do so and recover the reasonable cost of doing so from the notified person.[202]

(c) Repair and removal notices

When it comes to repair and removal notices, section 60 of the NEM: ICMA states that if a structure is having or is likely to have an adverse effect on the coastal environment or if it has been erected in contravention of the NEM: ICMA, the Minister or MEC may issue a repair or removal notice to the person responsible for the structure.[203] If the notified person cannot be found, the Minister or MEC may publish a notice in the *Government Gazette* and in a newspaper circulating in the area in which the structure is located for a period of two weeks. The Minister or MEC must also affix a copy of the notice to the structure during the period of the advertisement.[204] If the notified person fails to comply with the instructions set out in the notice, section 61 of the NEM: ICMA provides that the Minister or MEC may instruct any appropriate person to do so and recover the reasonable cost of doing so from the notified person or from the person who is subsequently found to be responsible for the structure.[205]

3.7 COASTAL PUBLIC PROPERTY AND AFRICAN CUSTOMARY LAW

3.7.1 Introduction

While the classification of coastal public property as a thing owned by the citizens of the Republic and held in trust by the state has undoubtedly strengthened the public nature of this area, promoted public access to a valuable natural resource and contributed to its conservation and protection, the provisions of sections 11 and 12 of the NEM: ICMA must be read in light of the principles laid down by the Supreme Court of Appeal (SCA) in *Gongqose v Minister of Agriculture, Forestry and Fisheries*.[206] In this case, the Court held that a customary law right

[200] Section 59(1)(b)(ii).
[201] Section 59(1)(b)(iii).
[202] Section 61.
[203] Section 60(1). Before the Minister or MEC may issue a repair or removal notice he or she must consult with the organ of state that has authorised, or is competent to authorise, the activity and give the person to whom the repair or removal notice is addressed, an opportunity to make representations (section 60(2)). The notice itself must contain the information and instructions set out in section 60(4)
[204] Section 60(5).
[205] Section 61.
[206] 2018 (5) SA 104 (SCA).

can be extinguished only by legislation that "specifically deals" with customary law, and that such legislation must do so either "expressly or by necessary implication".

3.7.2 Gongqose v Minister of Agriculture, Forestry and Fisheries

(a) The facts

The facts of this case were as follows. The appellants – who were all members of the greater Dwesa-Cwebe community in the Eastern Cape – were charged and convicted in the Elliotdale Magistrates' Court of attempting to fish in the Dwesa-Cwebe Marine Protected Area (MPA) without permission, contrary to the provisions of the (now repealed) section 43 of the Marine Living Resources Act (MLRA).[207] This section made it an offence for anyone to fish or attempt to fish in an MPA that had been declared as a "no-take zone" without first obtaining the permission of the Minister for Environmental Affairs.[208]

After they were sentenced, the appellants appealed against their convictions to the Eastern Cape High Court in Mthatha. In addition, the appellants, together with other members of the community, applied for an order reviewing and setting aside the Minister of Environmental Affairs' decision to declare the Dwesa-Cwebe MPA as a "no-take zone". Unfortunately for the appellants, the High Court dismissed both the appeal against their conviction and their application to review the Minister's decision. The appellants then applied to the Supreme Court of Appeal for leave to appeal against their conviction.

In their appeal, the appellants challenged their convictions on the following three grounds:

First, the Dwesa-Cwebe community was governed in part by customary law and in terms of this system of customary law, the appellants were entitled to access and use marine resources located along the coastline between the Mbhashe and Nkonyane Rivers (the "relevant coastal waters") for a variety of purposes, including cultural, economic and spiritual purposes.

Second, the MLRA has not extinguished their customary law rights to access and use marine resources along the coastline between the Mbhashe and Nkonyane Rivers and, consequently, their conduct was authorised by law. Given that they had authority to fish and

[207] 18 of 1998. Section 43 of the MLRA was repealed by the National Environmental Management: Protected Areas Amendment Act 21 of 2014. This Amendment Act included MPAs in the list of protected areas that the Minister responsible for environmental management could declare (see s 22A of the National Environmental Management: Protected Areas Act 57 of 2003 (NEM: PAA)). Section 48A(1)(a) of the NEM: PAA expressly prohibits fishing or attempting to fish in a MPA that has been declared a no-take zone.

[208] The MPA was declared as "no-take" zone by the Minister of Environmental Affairs on 29 December 2000 under section 43 of the MLRA. A "no-take" MPA is one in which fishing or harvesting of marine resources is prohibited (see GN No. R1429 in *GG* No 21848).

that authority is recognised as a defence excluding unlawfulness, it followed that their conduct was not unlawful in terms of section 43 of the MLRA.

Third, if they were wrong and the MLRA had extinguished their customary law rights, thus rendering their conduct unlawful, then section 43 of the MLRA was inconsistent with the Constitution because it had extinguished their customary law rights in a manner that was contrary to the provisions of section 211(3) of the Constitution, as well as sections 30 and 31 of the Constitution.

Section 211(3) governs the legal status of customary law and provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". Sections 30 and 31 form a part of the Bill of Rights and protect the rights of every person to participate in the cultural life of their community. Section 30 provides that:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights".

And section 31 provides that:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:
> (a) to enjoy their culture, practice their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society".

(b) The judgment

The Supreme Court of Appeal (per Schippers AJA; Maya P, Majiedt, Dambuza, JJA and Plasket AJA concurring) upheld the appeal and set aside the appellants' convictions. The key question the Court had to answer was whether the appellants' customary law rights to access and use marine resources in the relevant coastal waters had been extinguished by the MLRA. Before turning to consider this question, the Court dealt with two preliminary issues, namely the status of customary law and whether the appellants were exercising a valid customary law right at the time the alleged offence was committed.

So far as the first issue was concerned, the Supreme Court of Appeal began by pointing out that customary law is recognised as an independent and original source of law in terms of

section 211(3) of the Constitution[209] and that, for the purposes of this case, three key points may be derived from its provisions. First, that customary law is "protected by and subject to the Constitution in its own right", but may be developed to promote the spirit, purport and objects of the Bill of Rights. Second, that the legislative authority of Parliament to pass laws dealing with customary law has not been abolished, and, third, that the injunction to apply customary law is "not rendered subject to any legislation generally, but only to 'legislation that specifically deals with customary law'".[210]

So far as the second issue was concerned, the Supreme Court of Appeal began by summarising the evidence adduced by the appellants and the state.[211] After having done so, the Court found that the appellants had clearly shown that the Dwesa-Cwebe community was governed by their own customary system and that this system applied to all aspects of life, including access to and use of marine resources.[212] Knowledge of this customary system was transmitted from generation to generation, usually from father to son as regards fishing and from mother to daughter as regards harvesting intertidal resources.[213] Given that none of this evidence was contested by the state, it followed that the appellants had proved that they had a customary law right to fish in the relevant coastal waters.[214]

After finding that the appellants did have a customary law right to fish in the relevant coastal waters, the Supreme Court of Appeal turned to consider whether this right had been extinguished by the MLRA.

In this respect, the Supreme Court of Appeal started by pointing out that, unlike Australia and Canada, the post-constitutional extinguishment of customary law rights had not previously been considered in South Africa.[215] Despite the absence of any relevant jurisprudence in South Africa, however, it was unnecessary to rely on the approaches adopted in Australia and Canada. This is because the validity of customary law rights in South Africa is protected by section 211(3) and is rendered subject only to the Constitution and legislation that specifically deals with that law. It follows, therefore, that a customary law right can be extinguished by legislation only if two requirements are met. First, the legislation must

[209] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 22.
[210] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 23.
[211] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at paras 27-33.
[212] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 37.
[213] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 38.
[214] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 39.
[215] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 41

specifically deal with customary law, and, second, the customary law right must be extinguished by such legislation either expressly or by necessary implication.[216]

The Supreme Court of Appeal put these key findings as follows:

> "Counsel for the appellants submitted that the Canadian test – a clear and plain intention to extinguish a customary right – fits perfectly with the text and purpose of s 211(3) of the Constitution. It seems to me unnecessary to adopt that approach or the Australian one that the regulation of a fishing right through a permit does not sever the connection of Aboriginal peoples with their land, or deny the continued exercise of their rights and interests under Aboriginal law. Ultimately, the validity of customary law, and the rights under it in South Africa, are protected by s 211 of the Constitution and are rendered subject only to the Constitution and legislation that specifically deals with that law. It follows first, that a customary right can only be extinguished by legislation specifically dealing with customary law; and secondly, that such legislation must do so either expressly or by necessary implication".

Although the MLRA did confer a right of access to marine resources on subsistence fishers, the Supreme Court of Appeal held that this right could not be interpreted as recognising a customary right to fish and, consequently, the MLRA could not be classified as legislation that specifically deals with customary law.[217] The right of access conferred on subsistence fishers could not be interpreted in this way, the Court explained, because subsistence fishers were defined as natural persons who regularly caught fish for personal or family consumption and not as natural persons who regularly caught fish for personal or family consumption in terms of customary law. Subsistence fishers, therefore, were not limited to persons who fished in terms of customary law. In addition, the appellants' customary law right to access marine resources also extended beyond consumption and included customary rituals, ancestral ceremonies and adornment.[218]

Given that the MLRA could not be classified as legislation that dealt specifically with customary law, the Supreme Court of Appeal concluded, it followed that the appellants' customary law right to fish had not been extinguished. After arriving at this conclusion, the Court turned to consider whether the appellants' conduct was unlawful in terms of section 43 of the MLRA. The Court held that their conduct was not unlawful because the possession of the necessary authority by an accused person is a defence that excludes unlawfulness and, in the context of this case, the requirement of necessary authority could take the form either of a

[216] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 50.
[217] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 52.
[218] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 53.

permit or licence granted in terms of the MLRA or of a valid customary law right to access and use marine resources. Since the appellants' customary law right to fish in the relevant coastal waters had not been extinguished, it followed that they did have the necessary authority to do so.[219]

(c) Analysis and comment

As Bishop points out in his 2021 article titled "Asserting customary fishing rights in South Africa", the judgment in *Gonqose* has very significant implications for the relationship between customary law and legislation. It confirms that customary law rights are not automatically trumped by any legislation. Instead, customary law rights can be overridden only by legislation that specifically deals with customary law and which expressly or by necessary implication alters those rights.[220]

To determine whether a customary law right has been extinguished by legislation, Bishop argues that a six-step analysis must be applied. This six-step analysis is as follows:

(i) First, a court must ask whether the "access to the resource" being asserted is merely a cultural practice or whether it is, in fact, a customary law right.

(ii) Second, if it is a customary law right, does the legislation "specifically deal" with customary law as required by section 211(3) of the Constitution? If it does not, the legislation cannot override the right, and it will continue to exist.

(iii) Third, if the legislation does "specifically deal" with customary law, does it alter or extinguish the customary law right either expressly or by necessary implication? If the right has not been extinguished, then it can be exercised lawfully. However, the exercise of the right can still be regulated.

(iv) Fourth, if the legislation does regulate a customary law right, does the regulation limit any of the fundamental rights in the Bill of Rights, such as the rights to culture in sections 30 and 31?

(v) Fifth, if the legislation extinguishes, alters or limits a customary law right, does the limitation satisfy the requirements of section 36(1) of the Constitution (the limitation clause)?

[219] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at paras 61-62.
[220] M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291 at 292.

(vi) Sixth, if the limitation does not satisfy the requirements of the limitation clause, how should the customary law right be developed in terms of section 39(2) of the Constitution in a manner that does not distort its character?[221]

Given that there is no reference to customary law in any of the provisions of the NEM: ICMA, it can be said with some confidence that the Act does not specifically deal with customary law at all and, consequently, that it has not extinguished any existing customary law rights of ownership of the coast or any customary law rights to access and use the coast and its many resources.[222] In terms of Bishop's six-step analysis, therefore, a community or person who wished to assert such a right would simply have to prove that the "right" being asserted is, in fact, a customary law right and not a cultural practice.

In this respect, Bishop argues that a cultural practice can be classified as a customary law right if it satisfies three requirements. First, the community must practice and be bound by a general system of customary law.[223] Second, within that general system, the specific right being claimed must be "more than a pastime". Instead, it must be governed by rules dictating when, who, what and how it can be exercised. [224] Third, the person claiming the right must prove that he or she is a member of the community and a bearer of that right.[225]

In those cases in which these requirements have been fulfilled, customary law rights may conflict with the provisions of the NEM: ICMA, especially those relating to the ownership, use, management and administration of coastal public property. Where the Act does not trump customary law rights, the legal rules governing the legal status, use, management and administration of the coast may differ from the provisions of the Act. At the same time, however, it is important to keep in mind that this will not necessarily detract from the aims and objects of the Act. As the Supreme Court of Appeal itself stated in *Gonqose*, customary rights and the conservation and protection of the environment can co-exist:

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[221] M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291 at 296-297.

[222] Bishop argues that legislation specifically deals with customary law if the provisions of the statute itself show, first, that the legislature knew that the law could affect customary rights and, second, the legislature considered how the law should affect customary law. Simply including the phrase "customary law" in a statute is not enough to comply with section 211(3) of the Constitution and the absence of that phrase does not mean that a statute does not comply with section 211(3) (see M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291 at 299-302).

[223] M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291 at 297.

[224] M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291 at 298.

[225] M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291 at 298.

> "Customary rights and conservation can co-exist. And it is important to remember that as regards conservation and long-term sustainable utilisation of marine resources in the MPA, the Dwesa-Cwebe communities have a greater interest in marine resources associated with their traditions and customs, than any other people. These customs recognise the need to sustain the resources that the sea provides".[226]

3.8 CONCLUSION

The composition, classification and legal status of coastal public property were considered in this chapter. In addition, the public's right to access and use this natural resource and the state's power to regulate it were discussed. The coastal institutions and coastal management programmes envisaged by the NEM: ICMA, as well as the regulatory and enforcement mechanisms established by the Act, were also explored. In light of the judgment in *Gonqose v Minister of Agriculture, Forestry and Fisheries*, the relationship between the Act and African customary law was investigated.

In order to achieve its various objects, the NEM: ICMA has replaced the sea and the seashore with an entirely new thing or *res*, namely, coastal public property. In addition, the Act has made significant changes to the classification and legal status of the coast, the public's right to access and use this natural resource and the state's power to regulate it.

Coastal public property consists of several components and embraces a much broader area than the sea and the seashore, especially on its seaward side, which includes, not only South Africa's territorial waters, but also its exclusive economic zone and continental shelf. In addition, coastal public property forms part of a series of adjacent and overlapping zones that, taken together, comprise a larger area known as the coastal zone. The coastal zone sets the limits of the Act's geographical reach and brings almost the entire coastal ecosystem under the Act's jurisdiction.

The fact that the NEM: ICMA applies to almost the entire coastal ecosystem is welcome. This is because it facilitates an integrated approach to the management and administration of the coast. According to the National Coastal Management Programme, the goal of integrated coastal management is to "improve the quality of life of human communities who depend on coastal resources while maintaining the biological diversity and productivity of coastal ecosystems".[227] It may be defined as a process "that unites government and the

[226] *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) at para 56.
[227] Department of Environmental Affairs *South Africa's National Coastal Management Programme* (2014) at 2.

community, science and management, sectoral and public interests in preparing and implementing an integrated plan for the protection and development of coastal ecosystems".[228]

Insofar as the classification and legal status of coastal public property is concerned, section 11(1) of the NEM: ICMA vests ownership of coastal public property in the "citizens of the Republic" rather than in the "State President". This change in ownership has retained the classification of coastal public property as a *res publicae* (public thing) as that concept was defined in Roman law (i.e. as things owned by the people) and not as it was defined in Roman-Dutch law (i.e. as things owned by the prince or the state, but which the people were still entitled to access and use). An important consequence of this nuanced and subtle change is that section 11(1) of the Act has brought to an end the centuries-long process of étatisation of the sea and the seashore.

Apart from strengthening the public nature of coastal public property, scholars such as Freedman, Sowman and Rebelo have argued that the purpose underlying the reclassification of coastal public property is to address the state's failure, during the colonial and apartheid eras, to exercise its ownership to promote access to the opportunities and benefits of coastal public property, irrespective of race, and to conserve and protect the coastal environment for current and future generations, by divesting the state of its ownership of coastal public property and emphasising its duties and responsibilities as the public trustee, rather than its authority as an owner.

Like its predecessor, the NEM: ICMA distinguishes between the ownership of coastal public property and the right to access and use these natural resources and vests them in the citizenry and all "natural persons", respectively. At the same, it expressly imposes limits on the manner in which the right to use and enjoy coastal public property may be exercised. Given that these limits are included in the same provision that established the right itself, they may be regarded as inherent limits and the right as an inherently limited right.

In direct contrast to the Seashore Act, the NEM: ICM expressly prohibits the alienation, sale and acquisition by prescription of coastal public property. This prohibition represents a significant diminution of the authority of the state to alienate, lease and grant other rights in coastal public property and flows from the change in the legal status of coastal public property. It thus strengthens the public nature of coastal public property.

Although scholars have argued that the purpose underlying the reclassification of coastal public property is to address the state's maladministration and mismanagement of the

[228] Department of Environmental Affairs *South Africa's National Coastal Management Programme* (2014) at 2.

coast during the colonial and apartheid eras, by divesting the state of its ownership of coastal public property and emphasising its responsibilities as a trustee, this argument has been made in the absence of any engagement with the body of research produced by Anglo-American-Australasian scholars such as Kevin Grey, Carol Rose, Gregory Alexander and John Page on the concept of public property and the role that it can and should play in democratic societies. This public property research is important because it may assist South African coastal law scholars in identifying a normative justification for the ownership provisions of section 11 of the NEM: ICMA. Given the volume of public property research that has been published in Australia, England and the United States in recent years, it was impossible to do justice to this scholarship in the confined context of this chapter. Instead, it will be investigated in the next chapter of this thesis.

CHAPTER FOUR

THE CLASSIFICATION, NATURE AND JUSTIFICATION OF PUBLIC PROPERTY IN ANGLO-AMERICAN-AUSTRALASIAN JURISDICTIONS

4.1 INTRODUCTION

As we saw in Chapter Three, scholars such as Freedman, Sowman and Rebelo have argued that although the reclassification of coastal public property as a public thing (*res publica*) in the Roman law sense of that concept does not appear to have a practical purpose, it may have a symbolic purpose. This symbolic purpose, they argue further, is to highlight the state's failure during the colonial and apartheid eras to exercise its ownership of the sea and the seashore to promote public access to the opportunities and benefits of the coast, irrespective of race, and to conserve and protect the coastal environment for current and future generations, by divesting the state of its ownership and simultaneously stressing its duties and responsibilities as the public trustee of coastal public property.

While these arguments contain valuable insights, South African coastal public trust scholars have not engaged with the body of research produced by Anglo-American-Australasian scholars such as Kevin Gray, Carol Rose, Gregory Alexander and John Page on the concept of public property and the role that it can and should play in democratic societies. This scholarship is important because it may assist South African coastal law scholars in identifying a normative justification for the ownership provisions of section 11 of the National Environmental Management: Integrated Coastal Management Act (NEM: ICMA).[1] The purpose of this chapter, therefore, is to go beyond the largely doctrinal and positivist approach adopted in Chapter Three and critically analyse the section 11 ownership provisions from a more non-doctrinal and normative perspective.

This chapter is divided into six sections. Apart from the introduction in section 4.1 and a brief justification for considering the public property scholarship that emanates from common law rather than civil jurisdictions in section 4.2, the different property regimes that are featured in Anglo-American-Australasian law (i.e. common property, public property, and private property) and the manner in which they may be distinguished from one another are set out and

[1] 24 of 2008.

considered in section 4.3. Following this discussion, the chapter turns to focus more narrowly on public ownership and examines the various ways in which the scope and content of public ownership may be conceived in section 4.4. A series of normative justifications for public property proposed by Gray, Rose and Alexander are investigated and evaluated in section 4.5. The conclusion is set out in section 4.6.

4.2 CIVIL AND COMMON LAW JURISDICTIONS

Although there is a rich literature on the role of public property in civil law jurisdictions (there are countless publications on the French *dualité domaniale* and the German *öffentliche Sachen*),[2] this chapter focuses largely on common law jurisdictions, in particular, Australia, England and the United States, for the following reasons:

First, apart from *res communes* (common *things*) and *res publicae* (public *things*), which are classified as *res extra commercium* and either cannot be owned at all or are owned by the state for the benefit of the people, all other forms of government *property* in South Africa are classified as *res in commercio* and owned by the state in its private capacity even though this property may serve some public purpose and be open to wide public access, for example, government buildings, public museums, public hospitals and public schools.[3] Accordingly, common *things*, public *things* and government *property* in South Africa (which may be referred

[2] The ownership of public property (*domaine public*) in France is governed by a specific statute, the General Code on Property of Public Bodies of 2006 (*Code Général de la Propriété des Personnes Publiques* 21 May 2006, *Journal Officiel* 460. Article L 2111-1 of the Code provides that public property includes immovables that belong to the state, local authorities or other public bodies and are used directly by the public or assigned to a public service, provided, the immovable is essential for the achievement of that public service (see M Habdas "Who needs a park or city square? The notion of public real estate as *res publicae*" 2011 *TSAR* 626 at 631). Unlike in France, there is no specific statute that governs the ownership of public property in Germany. Instead public property *(öffentliche Sachen*) in Germany consists of those things that have been formally dedicated to public use by statute, administrative decision or custom and both public and private things may be so dedicated. Once a thing has been formally dedicated to public use, it remains the property of its public or private owner, but becomes subject to a public servitude which prohibits uses that are inconsistent with the public use to which it has been dedicated. It follows, therefore, that the owner can still sell or encumber the thing. The German system of public property thus focusses on the public use of public things rather than the ownership of those things (see M Habdas "Who needs a park or city square? The notion of public real estate as *res publicae*" 2011 *TSAR* 626 at 636).

[3] See *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) at paras 40 and 41. Although the state is endowed with legal personality and may acquire private property rights in much the same way as any other private person (see IM Rautenbach *Rautenbach – Malherbe Constitutional Law* 8ed (2023) at 80), when the state exercises its powers as the private owner of government *property* it is not in the same position as all other private landowners "who may freely grant or refuse to grant rights in property". This is because its decisions may be classified as administrative action and can be reviewed and set aside on the grounds set out in section 33 of the Constitution and, more particularly, the grounds listed in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (see *Bullock NO v Provincial Government of North West Province* 2004 (5) SA 262 (SCA) at paras 13 and14). In the context of the United States, Rose refers to *res publicae* and *res communes* as "inherently public property" and government *property* as "government-controlled public property" (see C Rose "The comedy of the commons: Custom, commerce, and inherently public property" (1986) 53 *University of Chicago Law Review* 711 at 720.

to collectively as "public *property*") are all regulated by the same private law system of property law. There is no separate public law system of property law in South Africa.

Second, the single property law regime followed in South Africa is similar to the approach followed in England. Apart from the Crown Estate, all other forms of public property in England are owned by the government in its capacity as a private person and regulated by the same common law principles that regulate private property. There is no separate category of public property law.[4] The Crown Estate is property owned by the King in his official capacity. It thus forms a part of the monarch's public estate and, as such, is neither the King's private property nor government property. It is managed by the Crown Estate Commissioners in terms of the Crown Estate Act.[5]

Third, the single property law regime followed in South Africa is different from the approach followed in civil law countries. In many civil law countries, public property and private property fall into distinct fields of law and are governed by different rules and procedures. Public property is governed by administrative law principles, while private property is governed by property law principles. In addition, disputes concerning public property are dealt with in administrative courts and not in ordinary courts.[6]

These differences may account, at least in part, for why common *things*, public *things* and government *property* have not attracted the same level of scholarly attention in South Africa as they have in civil law countries and, accordingly, why public *property* in South Africa is theoretically underdeveloped in much the same way as it is in Anglo-American-Australasian jurisdictions.

4.3 THE TAXONOMY OF PROPERTY REGIMES

4.3.1 Introduction

Apart from the distinction drawn by Roman law between *res extra commercium* and *res in commercio*, there are several other ways in which property that cannot be privately owned may

[4] J Ball *The Boundaries of Property Rights in English Law* paper presented at the Electronic Journal of Comparative Law: XVIIth International Congress of Comparative Law (July 2006) at 9-10. Although English law does not draw a distinction between public and private property law, public law rules apply to the public bodies that own property. These rules inevitably impose duties on the manner in which public bodies may exercise their right of ownership. For example, they may exercise only those powers that the law confers upon them and so on. See also G Resta "Systems of public property" in M Graziadei and L Smith (eds) *Comparative Property Law: Global Perspectives* (2017) 216 at 232 and A Layard "Privatising land in England" (2019) 11 *Journal of Property, Planning and Environmental Law* 151 at 154.

[5] Crown Estate Act, 1961.

[6] M Habdas "Who needs a park or city square? The notion of public real estate as *res publicae*" 2011 *TSAR* 626 at 631 and G Resta "Systems of public property" in M Graziadei and L Smith (eds) *Comparative Property Law: Global Perspectives* (2017) 216 at 225.

be distinguished from property that can be privately owned. These other methods have been explored by a small but steadily growing group of legal scholars, especially in Anglo-American-Australasian common law jurisdictions.[7] Among these scholars are Clarke and Kohler, Rodgers, and Page. While Clarke, Kohler and Rodgers' research investigates the different types of property regimes that may be found in Anglo-American-Australasian law (i.e. common property, public property and private property) and the ways in which they can be distinguished from one another, Page's research focuses on the distinction that may be drawn between different types of public property, especially different types of public ownership. Each will be discussed in turn.

4.3.2 Alison Clarke and Paul Kohler

In their 2005 monograph titled *Property Law: Commentary and Materials*,[8] Clarke and Kohler begin their analysis by noting that property rights may be held not only by legal persons, but also by communities. Communities, they write, are groups of individuals identified by reference to "a particular locality", or to "their membership of a class, ethnic or tribal group", or to "some other general defining characteristic". Property rights held by legal persons may be classified as private property rights, while those held by communities may be classified as communal property rights. Apart from legal persons and communities, property rights can also be held by the state, and these property rights may be classified as public or state property rights. Property rights, therefore, may be divided into three classes, namely private, communal and state property.[9]

Before discussing these three categories of property rights in more detail, Clarke and Kohler explain, it is important to note that there is another category of property that should be

[7] Unlike civil law jurisdictions, in most Anglo-American-Australasian common law jurisdictions the concept of property that cannot be privately owned has been marginalised over a period of centuries. As Page argues, an important consequence of this process of marginalisation is that non-private property has tended to disappear from view and, as a result, the narrow concept of private property has come to be equated with the broad concept of property itself. All property is seen as private property. Another important result is that the differences between different types of non-private property, such as open access common property, restricted access common property, public property and state property, have become blurred (see J Page *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021) at 1-2).

[8] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005). See also A Clarke "Creating new commons: Recognition of communal land rights within a private property framework" (2006) 59 *Current Legal Problems* 319.

[9] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 35. In his 2009 monograph titled *Property Rights and Natural Resources*, Barnes argues that property is usually divided into three broad types that share familial characteristics, namely private property, common property and collective property. In addition to these traditional categories, he argues further, there is also stewardship, which imposes certain public responsibilities on its holder and which are an inherent part of the property right itself (see R Barnes *Property Rights and Natural Resources* (2009) at 152).

considered first, namely "no-property". No-property refers to those things which everyone is free or at liberty to use, but which no one has a right to do so. The fact that no one has a right to use these things has two important consequences. First, no one has a right "to exclude others" from freely using them, and, second, no one has a right "not to be excluded" from using these things. "We cannot complain", they write, "if careless or profligate use by others spoils or depletes the supply [of the no-property thing]".[10]

Examples of no-property things, Clarke and Kohler explain further, include natural resources which are not scarce either because there is an abundant supply of the natural resource and it is not highly valued, like leaves that fall off trees in autumn, or the natural resource is not depleted by use, like air and sunlight. This category also includes things that have been created for commercial purposes but which have been made freely available to everyone, such as "free newspapers, radio signals from commercial radio stations and access to material downloadable from the internet". Every person is free to use these things, but has no right to object if a third party interferes with that freedom.[11]

Although this category of things appears to resemble open-access communal property, Clarke and Kohler argue that there are important differences between the two categories. The most important of these differences is that while no one has a right not to be excluded from no-property, every member of an open-access community does have the right not to be excluded from communal property. A person who is a member of an open-access community, therefore, not only has a right to access and use the communal property, but also has a right not to be excluded from it. An important consequence of the right not to be excluded is that everyone else has a correlative duty not to interfere with an open-access community member's access to, and use and enjoyment of, the thing.[12]

Communal property, Clarke and Kohler then explain, may be divided into two categories, namely open-access communal property and limited-access communal property. Limited-access communal property is also referred to as restricted-access or closed-access communal property. An open-access community, they explain further, is one in which membership of the community is open to every person in the world, while a limited-access community is one in which membership of the community is limited to "those who share

[10] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 36.
[11] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 36.
[12] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 37.

common characteristics" such as the membership of a cultural or religious community, indigenous community, neighbourhood, village or town.[13]

As explicated above, a distinguishing characteristic of an open-access community is that every person who is a member of the community has a right not to be excluded from the property, and this right imposes a correlative duty on everyone else not to interfere with a community member's access to and use and enjoyment of the property. In a limited-access community, every person who is a member of the community also has a right not to be excluded from the property. Unlike the members of an open-access community, however, the members of a limited-access community also have the right to exclude everyone else, including the public, from their property.[14]

Apart from non-property and communal property, Clarke and Kohler also recognise another category of non-private property, namely state property. State property, they argue, refers to those property interests that are vested in the state rather than individuals or communities. When ownership of a particular thing is vested in the state, they argue further, "individuals may nevertheless be allocated various types of use rights in the property, or even limited management and control rights". However, given that these use or management rights are personal to their holders and cannot be transferred to another person, they cannot be classified as property rights.[15]

State property, Clarke and Kohler explain, may be distinguished from open-access communal property in two ways:

(i) First, while state property is owned by the state, open-access communal property is not or, at least, it is not necessarily owned by the state or any other public body. For example, a public right of way – which they define as open-access communal

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[13] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 37.
[14] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 39
[15] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 40. Like Clarke and Kohler, Viljoen also distinguishes between open-access and limited-access property on the basis of the right to exclude. Open-access property, she writes,

> "represents 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".

Unlike open-access property, Viljoen writes further, limited-access property (which she labels as "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 resource, there are rules and mechanisms in place that allow the group to exclude outsiders from using the resource"

(see G Viljoen *Water as Public Property: A Parallel Evaluation of South African and German Law* (LLD Thesis, University of the North West, 2016) at 69. See also G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities present by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193 at 198).

property – may be established over private land or over the pavement of a road owned by the highways authority.[16]

(ii) Second, if the state can revoke a person's access to one of its facilities simply by means of an administrative decision, then that facility may be classified as state property, for example, a public library. However, if the state can revoke a person's access to one of its facilities only by changing the law, then that facility may be classified as open-access communal property, for example, a public highway.[17]

4.3.3 Christopher Rodgers

While the right to exclude features prominently in Clarke and Kohler's taxonomy of private, communal and public property, it does not in Rodgers' taxonomy. Instead, he bases his taxonomy of private, communal and public property on the identity of the person to whom the law grants access to a property resource and the terms on which that access is given. In his 2019 article titled "Towards a taxonomy for public and common property",[18] Rodgers begins by arguing that it is important to distinguish public property rights from private property and common property rights for at least two reasons. First, because the ability to distinguish accurately between these three categories of rights is necessary for the effective governance of natural resources and, second, because both private and public property rights serve crucial civic needs and, therefore, should be harmonised in a well-balanced society.[19]

Before public property rights can be accurately distinguished from private property rights and common property rights and then arranged into a taxonomy of private, common and public property rights, Rodgers argues further, it is necessary to consider the manner in which the concept of property itself should be conceived.[20] A particularly helpful description of property, he notes, has been developed by Jeremy Waldron. In his seminal article titled "What is private property?", Waldron described property as a system of "rules governing access to and control of material resources", and that such a system may "assign several people rights in the same resources".[21]

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[16] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 37.
[17] A Clarke and P Kohler *Property Law: Commentary and Materials* (2005) at 37.
[18] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124.
[19] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 125.
[20] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 126.
[21] J Waldron "What is private property" (1995) 5 *Oxford Journal of Legal Studies* 313 at 324.

In light of this description, Rodgers argues, it may be said that private property rights are created when access to and control of a property resource is assigned (by the rules of property law) to an individual. That individual – who is usually referred to as the owner – can then determine how those property resources may be used and by whom. Unlike private property rights, he argues further, access to and control of a property resource is not assigned to an individual when it comes to common and public property rights. Instead, access to and control of the property resource is vested in a group or "community" of others, in the case of common property, or, in the public at large, in the case of public property rights.[22]

As these brief explanations illustrate, a taxonomy for distinguishing between private, communal and public property rights may be developed by taking into account the identity of the person to whom the law grants access to a property resource as a whole or access to the different elements of the use to which the resource may be put, as well as the terms on which that access is given. The terms on which access is given include the purpose for which access has been granted and any restrictions imposed on that access.[23] Rodgers puts his proposed taxonomy as follows:

> "To develop a taxonomy differentiating common and public property rights, however, we need to think not only of the role of property rules in allocating resource utility, but also about *to whom* different elements of resource utility are allocated, and the terms on which that access is granted (including any restrictions that may be placed upon it). The taxonomy suggested here would organise different classes of property rights by reference *to whom* access to elements of resource utility is given and *on what terms* – they may enjoy access to a resource subject to restrictions, or only for some and no other purposes, and the type of access may differ from case to case".[24]

After setting out his proposal, Rodgers applies it to private property rights, communal property rights and public property rights in turn.

As far as private property rights are concerned, Rodgers explains, the person to whom the law grants access to a property resource is clearly the owner, who, in turn, may grant access to another person. The key feature of private property rights, therefore, is that access to the property resource is based on the consent of the owner and not the identity of the person who

[22] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 127.
[23] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 130.
[24] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 130.

may actually use the property or an aspect of the property. This feature distinguishes private property rights from communal and public property rights. In the case of communal and public property rights, access to the property may be granted by someone other than the owner, for example, by legislation or by administrative action. Apart from the way in which access to a property resource is granted, communal and public property rights may also be distinguished by their focus on the identity of their recipients and how they are defined.[25]

As far as common property rights are concerned, Rodgers explains, access is not granted to an individual. Instead, access is granted to a defined category of users who then share that right of access. This category may be large or small, but is characterised by the fact that some restrictions are imposed on the identity of the potential users. The property rules defining common property rights, therefore, are both inclusionary and exclusionary. They are inclusionary because they define the category of users to whom a right of access to the property resource will be granted, and they are exclusionary because, by implication, they exclude all other persons. [26] Apart from the fact that access is shared, earlier in his article, Rodgers notes that another important difference between private and common property rights is that while private property rights confer the right to exclude others, common property rights confer the right not to be excluded.[27]

As far as public property rights are concerned, Rodgers explains, they differ from private and communal property rights because access to the property resource is not limited

[25] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 131.

[26] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 131. Apart from the distinctions set out above, Rodgers explains that common property must be distinguished from communal and collective property systems. Property will be communal if there is a social link between the appropriators of the resource and a "community" – in whatever way that community is defined. The presence of a social link, therefore, distinguishes a communal property system from a common property system. If there is a social link between the group of individuals who have been granted access to the property resource then their property right is a communal one. However, if there is no social link between the group of individuals who have been granted access to the property resources then their property right is a common one.

[27] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 132. Barnes also distinguishes between private property and communal property on the basis of the right to exclude. He argues that private property emerges when it is possible to legally, physically or morally exclude others from a resource and the power to do so, together with the power to determine how the resource may be used, is vested exclusively in an individual. Unlike private property, the key characteristic of communal property "is that the owners have no right to exclude others from use of a resource". Common property, therefore, is defined by the right of access rather than the right of exclusion. Common property regimes may be established for a number of different reasons. For example, it may not be physically possible to exclude people form a resource or it may be impractical to do so. Common property regimes may also emerge in the absence of a formal system of property law or common property may be established to control access to a vital resource. As this last example illustrates, common property regimes may resemble private property to the outside world if access is limited to members of a particular group. A distinction, therefore, can be drawn between open-access or common pool regimes and limited-access or common property regimes (see R Barnes *Property Rights and Natural Resources* (2009) at 153).

solely to those permitted by the owner or those who are members of the group. Instead, access to the property resource is granted to members of the public, although there may be restrictions on what members of the public may do on it, or take from it, and there may be restrictions on the quantity of the resource that may be taken. It is important to note, however, that these public property rights do not apply to alienated land held by the state or to public land that has been leased to a private person unless the public has been given direct access to these property resources.[28] Earlier in his article, Rodgers also notes that public property rights are enforceable against the state and everyone else. In addition, they ordinarily take the form of use rights and not ownership. They include public rights of way, public recreation rights and public navigation rights. As these examples illustrate, they can also apply either to state-owned land, to privately owned land or to ownerless things.[29]

4.3.4 John Page

Unlike Clarke and Kohler and Rodgers, Page's taxonomy is not aimed at distinguishing between private, communal and public property. Instead, it is aimed at distinguishing between different types of public property and, therefore, is particularly relevant for the purposes of this thesis.

Page derives his taxonomy from his own self-created definition of public property. However, before setting out this definition, he advises that it is a work in progress and simply serves as a starting point for his much wider discussion of public property. In addition, and perhaps most importantly, he cautions that it does not engage with the "dilemma as to whether *public property* and *public space* are co-constitutive". This definition, he also warns, sidesteps the argument that the distinction between private and public property is not strict, but rather "porous, complex and at times indistinct".[30]

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[28] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 125.

[29] C Rodgers "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124 at 125. Like Clarke and Kohler, Barnes defines public or state property as property that has been vested in a public or state agency which is then responsible for controlling the property. However, he goes a step further and also describes public or state property as a form of collective property. Collective property, he explains, is a system of property in which the "needs of society as a whole take precedence over those of individuals considered on their own". Examples include national parks and military bases. A fishery, Barnes argues, can also be regarded as collective property. This is because access to it is limited and it must be utilised only in a manner that "is most conducive to the collective interests of society". An important consequence of describing public or state property as collective property is that the state must exercise its powers in a manner that protects and serves the public interest (see R Barnes *Property Rights and Natural Resources* (2009) at 154).

[30] J Page *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021) at 10.

After acknowledging these and other limitations, Page defines "public real property" as "those corporeal and incorporeal interests in land; common law or statutory; traditional or *sui generis*, that are used or enjoyed by the public at large, or serve a public purpose".[31] For the purposes of his taxonomy, however, not all of the elements of this definition are relevant. Instead, his taxonomy is based on the argument that public real property may be corporeal or that it may be incorporeal. In an earlier article, Page also argued that it may be customary in nature.[32] Each of these elements will be discussed in turn.

The most easily recognised type of public real property, Page writes, is corporeal public property. He defines this type of public real property broadly as land owned, managed or controlled by the state, and public land leased to long-term private lessees. Land owned, managed or controlled by the state includes highly esteemed public places such as city squares, national monuments and public galleries, as well as less esteemed public spaces such as roads, sewage works and sidewalks. Corporeal public property also includes state-owned hospitals, houses, military bases and schools. In many countries, Page notes, the size of corporeal public property is vast.[33]

Incorporeal public property is less visible than corporeal public property, Page points out, but highlights the diversity of public property rights. This type of public property is comprised of non-possessory interests or rights appurtenant to public or private land that are used and enjoyed by the public or that serve a public purpose. They include covenants, easements, servitudes and *sui generis* statutory rights, such as conservation covenants, public rights of passage and the right to roam. These interests or rights may be held by the state, state agencies, the public itself or even private bodies acting in the public interest.[34]

Although custom is an awkward and anachronistic source of modern property law, especially in settler societies that lack a social history from which customary rules arise, Page notes that sometimes customary norms do generate property rights among specific

[31] In a chapter published in 2013, Page defined "public property in land" somewhat differently as "those interests in which the individual concerned has no greater claim than any other member of the public, collective rights, enjoyed by individuals in common with others, and measured by their public sum" (see J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) 195 at 196).

[32] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) 195 at 200.

[33] J Page *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021) at 10. See also J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) 195 at 197.

[34] J Page *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021) at 10. See also J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) 195 at 198.

communities. In practice, these customary property rights frequently regulate the manner in which public resources may be accessed and governed. This is because they often enjoy greater normative strength than property law rules. The fact that customary norms can and do generate public property rights is clearly illustrated in *State ex rel. Thorton v Hay*.[35] In this case, the Oregon Supreme Court held that members of the public had the right to access, use and enjoy the privately owned dry-sand areas of beaches in the State of Oregon and that this right was based, not on the Public Trust Doctrine, but rather on custom.

An important consequence of this taxonomy, Page concludes, is that it emphasises that there is no bright line between private property, on the one hand, and public property, on the other. Instead, public property can be found across a spectrum, ranging from state-owned public land, which is clearly separate from private land, to customary public rights, which may exist over privately owned land. There are, consequently, different degrees of "public-ness" in land, and it is this feature that may be more important than the formal and technical descriptions of the different types of public property set out above. Even more importantly, he argues further, this wide view of public property

> "contributes to the mosaic [of property rights and uses] by adding different titles, corporeal and incorporeal, to the private monotony. The more we 'see' a variety (and greater quantity) of different property types, the less conditioned we become to a self-imposed straitjacket where property and private property are synonymous. Also, by diluting the dominance of the abstract private right, the propensity for property to become relational to, rather than divorced from, its physical context is enhanced … Optimistically, property plurality has the potential for human landscapes to become less like a universalised 'Blackacre', and more representative of where we live". [36]

4.3.5 Analysis and comment

In light of the literature review set out above, some comments may be made about the taxonomy of property regimes in South Africa in general and coastal public property in particular. Among these are the following:

First, like the Anglo-American-Australasian legal systems, the South African legal system also distinguishes between private property, common property and public property. In light of its civil law roots, however, the notion that certain categories of property are *res extra*

[35] *State ex rel. Thornton v Hay* 254 Or. 584, 462 P.2d 671 (1969).
[36] J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) 195 at 202-203. "Blackacre" is a hypothetical plot of land that is often used in property law classes in the United States to illustrate property law concepts, principles and rules.

commercium and thus excluded from private ownership has never disappeared from view in the same way that they have in Anglo-American-Australasian systems. Instead, the concept of non-private property has always been accepted as a fundamental aspect of South Africa's system of property law.

Second, following the transition to democracy in 1994, the South African government enacted a statutory framework governing natural resources (including some resources that were classified as *res communes* or *res publicae* in terms of the common law) to give effect to the environmental rights guaranteed in section 24 of the Constitution. Although these statutes have been the subject of a great deal of scholarly work, especially from an environmental law perspective, with some exceptions, their implications for the classification of things, the specific concepts of *res communes* and *res publicae* and the relationship between public and private ownership have not been fully investigated.[37]

Third, when compared to the Anglo-American-Australasian common property and public property regimes discussed by Clarke, Kohler and Rodgers above, South African property law has tended to adopt a narrow focus. Insofar as the common property regime is concerned, the focus in South Africa has fallen largely on *res communes* and not on other forms of open-access common property or limited-access common property, such as communal property in traditional areas. Insofar as the public property regime is concerned, a similar point may be made. The focus in South Africa has fallen largely on *res publicae* and not on property owned by the state in its capacity as a private person (i.e. government *property*). Remarkably little in the way of scholarly comment has been written on government *property*.

Last, when it comes to *res communes* and *res publicae* themselves, South African property law has also adopted a narrow focus. In this respect, case law and academic scholarship have focused largely on the classification and legal status of these things rather than the rights to access, use and enjoy them. In addition, until recently, almost no attention has been paid to the state's duty to promote the public's access to the opportunities and benefits of these things and its responsibility to conserve and protect them for present and future generations. The same point may be made with respect to the policy goals and normative justifications underlying them. Following the introduction of the public trust concept in South

[37] A notable exception is the body of work produced by Viljoen (see G Viljoen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176; G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" 2019 *VRU-WCL* 172; and G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities present by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193).

Africa, however, this has started to change, at least with respect to running water, public rivers, public parks and the sea and the seashore (all of these things were classified either as *res communes* or *res publicae* in terms of the common law, but are now subject to the public trust provisions of the relevant public trust Act).

4.4 THE SCOPE AND CONTENT OF PUBLIC OWNERSHIP

4.4.1 Introduction

Apart from developing a taxonomy of public real property, Page has also explored the scope and content of public ownership itself. In Chapter Three of his monograph, Page divides this exploration into three parts. In the first part, he adopts a typically private law approach to defining ownership and canvasses the incidents of public ownership. In the second part, he investigates the spectrum of possible public owners. These range from the "singular state" to the "unorganized public at large". In the third and final part of his exploration, Page questions the emphasis placed on ownership itself. In this respect, he shifts the focus from the identity of the owner to the purpose of the owner and argues that the question of who owns public real property is less important than how and why it is owned. Each part will be discussed in turn.[38]

4.4.2 The incidents of public ownership

One of the ways in which the scope and concept of private ownership have typically been defined, especially in the Anglo-American-Australasian common law world, is by identifying and describing the key sticks that make up the bundle of rights that are commonly described as ownership.[39] Given this metaphor's widespread acceptance among property law scholars, Page asks whether the same approach can be used to define the scope and content of public ownership. Although some scholars have suggested that it can,[40] the answer that Page arrives

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[38] J Page *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021) at 36.

[39] The bundle of sticks is a metaphor that is used in United States property to law to described the wide range of different rights or incidents that are encompassed by the right of ownership. Each of these sticks may be held by the owner or by another person. The idea of the bundle of sticks may be traced back to ancient Rome when the *fasces* as a bundle of sticks were carried in front of the Roman emperor to indicate a bundle of rights and thus the limitations imposed on the emperor's position by the law (see J Ball *The Boundaries of Property Rights in English Law* paper presented at the Electronic Journal of Comparative Law: XVIIth International Congress of Comparative Law (July 2006) at 4).

[40] For example, Macpherson argues that

> "[t]he rights which the state holds and exercises in respect of [state property] … are akin to private property rights, for they consist of the right to the use and benefit, and the right to exclude others from the use and benefit of something. In effect, the state itself is taking and exercising the powers of a corporation: it is acting as an artificial person"

(see CB Macpherson *Property: Mainstream and Critical Positions* (1978) at 5). Somewhat similarly, Barnes asserts that when it comes to what he terms "collective property", the public authority in which ownership has been vested will typically

at is a resounding no. While this approach may work in the private realm, he argues, it is difficult to translate it into the language of the public realm. This is because it is unclear which sticks are part of the right of public ownership.[41]

This difficulty, Page asserts, is clearly illustrated by the right to "exclude". While some commentators argue that this stick lies at the very heart of private ownership, it is the antithesis of public ownership. Instead, its opposite, namely, the right to be included, is more appropriate. In practice, however, there are many publicly owned spaces from which the public is excluded, such as corporate buildings owned and used by government departments. There are also public spaces that may be accessed, but only upon payment of a fee, such as city parks, municipal art galleries and public swimming pools. Furthermore, the primary purpose underlying some public property is not to facilitate public inclusion but rather to achieve other goals, such as the conservation of nature or the preservation of heritage.[42]

Apart from the right to exclude, another key stick in the bundle of ownership rights is the right to "possess". Despite the fact that some commentators see the right to possess as the origin of all property rights, Page points out that, like the right to exclude, the right to possess is also the antithesis of public ownership. Instead, its opposite, namely, the right to share, is a more appropriate stick in the bundle of rights that make up the right of public ownership. Unfortunately, the right to share suffers from the same practical problems as those experienced by the right to inclusion set out above. In addition, Page points out further, although the notion of shared possession is not unknown in modern property law systems, it is usually regarded as exceptional and may give rise to theoretical and practical difficulties.[43]

> "enjoy rights of possession, use, management, income and capital. For example, the public authority determines who can use the library and how; it may levy charges on users or sell the library or its books on the open market".

Given that public property is structured in the same way as private property, Barnes contends, the difference between these two categories does not lie in the content of the right of ownership, but rather in the purpose underlying each category. While the purpose of private property is to serve the interests of the individual owner, the purpose of public property is to serve the interests of society. The manner in which a public authority exercises its right of ownership in collective property, therefore, must promote social objectives (see R Barnes *Property Rights and Natural Resources* (2009) at 155).

[41] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 37. While Page is opposed to this approach, other scholars have embraced it. Macpherson, for example, argues that the

> "rights which the state holds and exercises in respect of [state property] … are akin to private property rights, for they consist of the right to use and benefit, and the right to exclude others from the use and benefit, of something. In effect, the state is taking and exercising the powers of a corporation: it is acting as an artificial person"

(see CB MacPherson *Property: Mainstream and Critical Positions* (1978) at 5).

[42] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 38.

[43] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 38.

Finally, Page states, there is the right to "use", which Honoré lists as one of the eleven "standard incidents of ownership".[44] Given its open-ended nature and potential to embrace a wide variety of acts of use and enjoyment, this right holds great potential for public ownership. Its open-ended nature is illustrated by the fact that even when restrictions are imposed on the right to use by agreement, or statute, or common law, these restrictions are generally defined precisely, leaving the remaining uses unaffected. Take these restrictions away, and there are "still an unlimited number of other things that [an owner] may do". A paradoxical consequence of the open-ended nature of the right, however, is that it is best understood by the restrictions imposed on it rather than its undefined content. Unfortunately, this leaves the right to use as a somewhat empty right.[45]

If the rights to inclusion, shared possession and use are unsuitable or empty, Page asks, what other sticks could potentially be included in the public ownership bundle of rights? While it may be possible to create new sticks, he concedes, this is unlikely to be successful for two reasons. First, creating new sticks would infringe the *numerus clausus* principle; and, second, any new sticks would inevitably replicate the existing right to use, or at least they would replicate an aspect of the existing right to use. The ultimate problem with this right-based approach, he concludes, is that it attempts to force public ownership into a private ownership mould, or, as he puts it, the "problem with this rights-based narrative is that it situates the public estate in an alien paradigm, stranded in a mindset where public entitlements are forced to mimic private rights to confirm to the propertied discourse".[46]

4.4.3 The spectrum of public ownership

Another method in terms of which the scope and content of public ownership may be investigated, Page argues, is to picture its different forms along a spectrum. Like the rights-based approach set out above, this is also a typically private law approach to defining ownership in the Anglo-American-Australasian common law world. It draws on "traditions of law, equity and trusts to allocate ownerships based on separable legal and beneficial titles". This spectrum begins at one end, with the state as the sole legal owner of public real property. It then shifts toward the middle of the spectrum, where legal title and beneficial title are vested in separate entities or persons. It stops at the other end of the spectrum with an equitable and not legal

[44] AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence* (1961) 107.
[45] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 38-39.
[46] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 40.

version of public ownership. One in which no trustee is required to act on behalf of an owner.[47] Each of these forms of public ownership will be discussed in turn.[48]

The notion that the state is the sole legal owner of public real property is one that combines the legal and beneficial titles into one estate and then vests it exclusively in the state or, to put it another way, the beneficial interest in the land is simply absorbed into the legal title. This approach, Page asserts, is similar to Macpherson's definition of state property as those "rights which the state has not only created but kept for itself or has taken over from private individuals or corporations".[49] As an owner, Macpherson argues, "the state … is taking and exercising the powers of a corporation: it is acting as an artificial person".[50] State property, he argues further, may be defined as "corporate property, which is exclusive property, and not as common property, which is non-exclusive property. State property is the exclusive right of an artificial person".[51] As Macpherson's arguments indicate, in terms of this form of public ownership, the state holds all of the sticks in the ownership bundle of rights, including the right to exclude.[52]

The problem with this absolute and atomistic notion of public ownership, Page declares, is that it creates "a barren terrain for public property and public ownership".[53] This is because it defines public ownership in terms of private law concepts and values, such as individualism, exclusion, and commodification, and thus precludes public ownership from generating its own normative meanings. Apart from precluding public ownership from generating its own normative meanings, this notion of public ownership emphasises the state's right to use the land rather than the public's right to benefit from it. More importantly, it disguises the unique nature of public ownership and consequently diminishes this form of ownership in the eyes of the public at large, despite the fact that the public estate's holdings in most societies are vast.

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[47] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 41.
[48] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 41.
[49] CB MacPherson *Property: Mainstream and Critical Positions* (1978) at 5.
[50] CB MacPherson *Property: Mainstream and Critical Positions* (1978) at 5.
[51] CB MacPherson *Property: Mainstream and Critical Positions* (1978) at 6.
[52] Although this form of public ownership does not apply to those things that are classified as *res extra commercium* in South African property law, it does seem to apply to most other forms of public property. In *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) at para 41, for example, the Constitutional Court confirmed this point when it held that there is "no reason why the government as the owner of property should not under our law have the same rights as any other owner".
[53] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 43 and J Page and A Brower "The four dimensions of public property" in H Conway and R Hickey (eds) *Modern Studies in Property Law Volume 9* (2017) 544 at 298.

"Where there is no apparent differentiation between what is public and private", Page explains, "the former is marginalised to the point of near invisibility".[54]

While legal title and beneficial title are combined and vested in the state as the sole legal owner at the beginning of the spectrum, the opposite approach applies at the middle of the spectrum. At this spot, legal title and beneficial title are separated and vested in different persons or entities. In terms of this approach, ownership of public real property is divided between the state and the public. The state holds legal title to the property, but in trust for the public, who are the beneficial title holders. A prominent example of this bifurcated model of public ownership may be found in the United States (US) Public Trust Doctrine.[55] The US Public Trust Doctrine is discussed extensively in the next chapter of this thesis. For the purposes of this chapter, therefore, only selected aspects of the doctrine will be highlighted.

Most American commentators and courts accept that the roots of the US Public Trust Doctrine may be traced back to Roman law and especially to the concept of *res communes* as set out in the *Institutes of Justinian*. They also accept that it migrated from Roman law to English common law, most probably following the rediscovery of the *Corpus Juris Civilis* in the 11th century and the emergence of the University of Bologna as the premier centre for the study of the law in Christian Europe. After being received into English common law, it travelled across the Atlantic Ocean to North America together with the early settlers and was subsequently transformed by American jurists into a uniquely American doctrine.[56]

Initially, the US Public Trust Doctrine was aimed at protecting the public's right to access and use tidal and navigable waters for navigation and fishing. Following the publication of Sax's landmark 1970 article in the *Michigan Law Review*,[57] however, the doctrine underwent a process of judicial development, and today, it embraces not only commercial uses but also recreational and environmental uses such as boating, sunbathing and swimming. Apart from embracing new uses, since the 1970s, the doctrine has also expanded to include other natural resources such as dry beach areas, parks, wildlife, and, more recently, the atmosphere. In some states, for example, Hawaii, Florida and Pennsylvania, the Public Trust Doctrine has also been

[54] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 43 and J Page and A Brower "The four dimensions of public property" in H Conway and R Hickey (eds) *Modern Studies in Property Law Volume 9* (2017) 544 at 300.
[55] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 43 and J Page and A Brower "The four dimensions of public property" in H Conway and R Hickey (eds) *Modern Studies in Property Law Volume 9* (2017) 544 at 301.
[56] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 43.
[57] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471.

elevated from a common law doctrine to a constitutional right. These state constitutions expressly provide that the state holds natural resources in trust for the "benefit of the people".[58]

The legal nature of the US Public Trust Doctrine has been considered by United States courts on countless occasions. One of the leading accounts of the legal nature of the doctrine, however, was provided by the US Supreme Court in its seminal judgment in *Illinois Central Railroad Co v Illinois*.[59] In this case, the Illinois State Legislature passed legislation repealing an earlier statute (the Lake Front Act of 1869) that transferred ownership of a portion of the bed of Lake Michigan located adjacent to the City of Chicago's commercial waterfront to the Illinois Central Rail Company. Illinois Central argued that the repealing legislation was unconstitutional and invalid because it infringed the "Contracts Clause" in Article 1, Section 10 of the United States (US) Constitution.[60] The US Supreme Court dismissed this argument on the grounds that the initial transfer of ownership violated the Public Trust Doctrine and, accordingly, that the Lake Front Act could validly be revoked by the Illinois State Legislature.

In arriving at this decision, the Supreme Court held, *inter alia*, that while the state owns land submerged by navigable waters, this ownership is different from private ownership because it is held in trust for the people. The Supreme Court put this principle as follows:

> "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits in the same manner that the state holds title to soils under tidewater by the common law we have already shown, and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties".[61]

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[58] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 43. Article XI Section 1 of the Constitution of the State of Hawaii (1978) declares that "[a]ll public natural resources are held in trust by the State for the benefit of the people. Article X Section 11 of the Constitution of the State of Florida (1968) provides that "[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the State, by virtue of its sovereignty, in trust for all the people" and Article I Section 27 of the Constitution of the Commonwealth of Pennsylvania (1968) states that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people".

[59] 146 US 387 (1892). This judgment is discussed in detail in Chapter 4.

[60] Article 1, Section 10 of the US Constitution provides, *inter alia*¸ that "[n]o State shall pass any Law impairing the Obligation of Contracts". As its terms indicate, the Contracts Clause prohibits the States from passing legislation that relieves parties of their valid contractual obligations.

[61] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452.

While the bifurcated model of public ownership better reflects the manner in which the public at large views public ownership, especially of things such as national parks, national monuments and national museums, than the state as sole legal owner model, it is still located within a private law framework in terms of which different and discrete owners hold different sticks in the ownership bundle of rights.[62]

The final spot on the spectrum, Page notes, is occupied by public property that is not owned or held in trust by the state or an organ of state. Instead, this property is used and enjoyed by the public, who hold nothing more than a beneficial title to the thing. Once again, an example of this approach may be found in the US Public Trust Doctrine. As explained above, while the right of ownership in a public trust resource is vested in the state, the right to access and use the public trust resource is not. Instead, the right to access and use the resource is vested in the public, despite the fact that it is unorganised. It follows, therefore, that the "unorganised public at large" holds a property-like right in the resource, which may be enforced even against the state.[63]

Even though the unorganised public is an indefinite and informal body or group of persons, Rose argues that this does not mean that it is unable to manage itself and act generally.[64] The common law doctrine of custom provides a means by which an "unorganised public can order its affairs authoritatively", including its right to use and enjoy the public property to which it holds beneficial title.[65] An important consequence of these customary norms is that they protect public property from being depleted or wasted by imposing limits on the manner in which the unorganised public's rights to use and enjoy that public property may be exercised.[66]

Investigating the character of public real property through the lens of a spectrum of public ownership, Page concludes, has several advantages. Perhaps the most important of these is that it "demonstrates the great diversity of public owning, and highlights that when it comes to the crude question of public ownership, one size does not fit all".[67]

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[62] J Page and A Brower "The four dimensions of public property" in H Conway and R Hickey (eds) *Modern Studies in Property Law Volume 9* (2017) 544 at 302-303.
[63] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 43 and J Page and A Brower "The four dimensions of public property" in H Conway and R Hickey (eds) *Modern Studies in Property Law Volume 9* (2017) 544 at 300.
[64] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53 *Chicago University Law Review* 711 at 743
[65] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53 *Chicago University Law Review* 711 at 744.
[66] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53 *Chicago University Law Review* 711 at 744.
[67] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 46.

4.4.4 Rethinking ownership

After studying the "incidents of public ownership" in the first part of his exploration of the scope and content of public ownership and investigating the "spectrum of possible public owners" in the second part, Page turns to focus on the "purpose of public ownership" in the third part. In this respect, he begins by explaining that he wants to rethink public property by reviewing some of the theories of public property that have recently emerged in the fields of political science and critical geography and law that focus not so much on the identity of the owner of public property, but rather on the purpose of public property. The first and perhaps most pertinent theory Page reviews is the one proposed by Nili, a political scientist, in his 2019 article titled "The idea of public property".[68]

In this article, Nili argues that political theory lacks a compelling account of public property and that the purpose of his article is to address this gap. He wants to address this gap, Nili explains, to make sense of popular complaints made against political leaders that deserve moral attention. More specifically, he wants to make sense of the complaint that political leaders are "stealing what belongs to the people", irrespective of whether this theft takes the form of corruption, nepotism, theft and so on.[69] However, he argues further, it is important to note that a theory of public property will be compelling only if it satisfies four requirements:

(i) First, a compelling account of public property must be able to capture the moral complaint against political leaders stealing from the people.[70]

(ii) Second, a compelling account of public property must uphold the status of public property as a system that cannot change "simply due to the uncoordinated activities of isolated individuals".[71]

(iii) Third, a compelling account of public property must make room for the concept of public property without excluding private property. A plausible theory of public property must recognise that private property can and does serve vital moral functions.[72]

(iv) Fourth, a compelling account of public property must address political issues that extend beyond property itself. It must "fit with, and inform, broader moral intuitions concerning public affairs".[73]

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[68] S Nili "The idea of public property" (2019) 129 *Ethics* 344.
[69] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 346.
[70] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 348.
[71] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 349.
[72] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 349.
[73] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 349.

After setting out these requirements, Nili turns to construct his model of public property, which he refers to as "deep public ownership". This model, he explains, is based on the notion that "all the resources within a jurisdiction" are owned by the sovereign members of a political community from which the state and its laws draw their ultimate authority. He refers to this political community as the "body politic", the "people" or the "sovereign people". In terms of this model, Nili explains further, private property rights are carved out of the sovereign people's deep ownership and then allocated to specific individuals who hold those private property rights as trustees in the Rousseauian sense of things owned by the body politic. The property rights of the sovereign people thus *precede* rather than *stem from* specific laws.[74]

The moral power of the sovereign people to create private property rights over certain things, Nili writes, implicitly includes a claim to be the ultimate owner of those things. This is because when the sovereign people create private property rights and thus determine the manner in which individuals may control, use and enjoy specific things, the people are, in fact, claiming the moral power to decide what can be done with those things. Because this moral power lies at the very heart of private property rights, the sovereign people enjoy a more fundamental form of control over private property rights than any other person. This fundamental control includes a claim of fundamental ownership of a thing. It follows, therefore, that the sovereign people are the ultimate owners of all of the things located within their jurisdiction.[75]

After constructing his model, Nili turns to consider whether it satisfies the requirements for a compelling account of public property and argues that it does. This is because it provides that public property vests in the sovereign people and not in the state or the political leadership of a state, and, consequently, acts of corruption, nepotism or theft by political leaders can accurately be described as "stealing what belongs to the people". In addition, this model coheres with the commonly held view that private property is derived from public property rather than the other way around. It deepens our understanding of existing practices relating to public property and helps us to see the collective claims embodied in such property. In terms of the deep ownership model, for example, the authority to expropriate private property is not defined as a power in terms of which the sovereign people take pre-political property for a

[74] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 353 and 355.
[75] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 354.

public use, but rather as one in which the sovereign people reclaim the property they have assigned to certain individuals.[76]

As Page observes, a significant aspect of this theoretical account is that it emphasises the purpose of property rather than the identity of the owner. This is because Nili's concept of deep public ownership "makes the *owner* question subsidiary to, and dependent on, the *purpose* question".[77] Nili himself argues that his model is a plausible account of public property because it satisfies the four purposive requirements discussed above.

4.4.5 Analysis and comment

In light of the literature review set out above, a number of comments may be made about the scope and content of public ownership in the South African context. Among these are the following:

First, the argument that the concept of public property in South Africa has been marginalised and thus suffers from a lack of theoretical development is clearly illustrated when the ownership of public things is considered in light of Page's discussion of the incidents of public ownership. Taking coastal public property as an example, very little, if any, consideration has been given to the incidents of the citizenry's right of ownership even though 16 years have passed since the NEM: ICMA was passed by Parliament. The only points that can be tentatively made at this stage in the development of our coastal property jurisprudence are the following: first, in terms of section 11(2) of the NEM: ICMA, the entitlement to alienate coastal public property has been excluded from the citizenry's ownership; second, in terms of section 12, the entitlement to manage and administer coastal public property has been separated from the citizenry's ownership and vested in the state; and, third, in terms of section 13, the entitlement to access and use coastal public property has been separated from the citizenry's ownership and vested in all natural persons.

Second, although it is difficult to define the incidents of ownership when it comes to public *things*, this is not the case when it comes to government *property* in South Africa. Insofar as government *property* is concerned, it is relatively easy to identify the incidents of ownership. As explained above, South African property law simply provides that government *property* is classified as *res in commercio* and is owned by the state in its capacity as a private person. It follows, therefore, that the state has the same entitlements in this property as any other private

[76] S Nili "The idea of public property" (2019) 129 *Ethics* 344 at 355.
[77] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 53.

owner would. This point was confirmed by the Constitutional Court in *Minister of Public Works v Kyalami Ridge Environmental Association*, where the Court held that as the owner of the property in question, the government had "all the rights that a private owner would have, including the right to erect buildings on its property" and that there is "no reason why the government as the owner of property should not under our law have the same rights as any other owner. If it asserts those rights within the framework of the Constitution and the restrictions of any relevant legislation, it acts lawfully".[78] Whether the state's ownership of government *property* should, in fact, be regarded as private ownership is open to question, especially in those cases in which the government *property* may be accessed by the public or is used to provide a public service. However, this question falls outside the scope of this thesis.

Third, while some of these forms of public ownership and their incidents can be plotted on Page's spectrum of public ownership precisely, others cannot. As we have already seen, this spectrum begins at the one end, with the state as the sole legal owner of public real property. Excluding *res communes* and *res publicae*, the state's private ownership of government *property* may be located at this point on the spectrum. The spectrum then shifts toward the middle, where legal title and beneficial title are vested in separate entities. Legal title is vested in the state, but the state holds this title in trust for the public who are the beneficial title holders. Although the NEM: ICMA does vest legal title and beneficial title in separate entities, this form of public ownership does not precisely depict the middle point on the spectrum. This is because section 11(1) of the Act does not vest legal title in the state but rather in the "citizens of the Republic", and the citizenry does not hold this title in trust for the public. Instead, it holds this title for itself. Before it was repealed, the Seashore Act[79] more precisely mirrored this middle point. Section 2(1) of the Seashore Act thus vested ownership in the State President on behalf of the public, while section 13(c) preserved the public's common law rights to access and use the sea and the seashore. Finally, the spectrum stops at the other end with an equitable and not legal version of public ownership. One in which public real property is not owned by the state or anyone else. Instead, it is used and enjoyed by the public, who hold nothing more than a beneficial title. Once again, section 11(1) of the NEM: ICMA does not precisely depict the endpoint of the spectrum. Even though the "citizens of the Republic" are equivalent to Rose's

[78] 2001 (3) SA 1151 (CC) at para 41. It is important to note that the private ownership held by the state differs from the private ownership held by all other juristic and natural persons in at least one important respect. When the state exercises its powers as the private owner of government *property*, its decisions may be classified as administrative action and can be reviewed and set aside on grounds listed in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000. This is not the case with all other private owners (see *Bullock NO v Provincial Government of North West Province* 2004 (5) SA 262 (SCA) at paras 13 and14).
[79] 21 of 1935.

unorganised public, section 11(1) vests legal and not simply beneficial title in the citizenry. While section 11(1) does not precisely depict the endpoint, it may be argued that section 13 does. Unlike section 11(1), section 13 bestows beneficial title in the form of the right to access and use coastal public property on all "natural persons" who are another manifestation of Rose's unorganised public.

Fourth, the fact that it is difficult to locate the ownership provisions of section 11(1) of the NEM: ICMA precisely on Page's spectrum highlights important features of section 11(1), all of which talk to its purpose. Before turning to consider these features, however, it is necessary to make the following three preliminary observations. First, the practice of separating beneficial title from legal title and then vesting each form of title in a different entity is not unique to civil law or mixed jurisdictions like South Africa. Instead, it features in common law jurisdictions as well, especially those that have adopted the public trust doctrine, such as the United States. Second, while it is not unusual to vest beneficial title in the public, the same cannot be said about legal title. Instead of vesting legal title in the public, it is typically vested in the state or in an organ of state. One possible reason for this can be found in the fact that the state enjoys legal personality and may be the bearer of rights, while the public does not. Third, given its status as a juristic person, the state has the capacity to enter into juristic acts and thus exercise the rights and entitlements that flow from the legal title vested in it. In these circumstances, it is unlikely that the legal title vested in the state will be merely symbolic. Instead, it is much more likely to confer legally enforceable entitlements on the state, in which case it will be important to identify those entitlements. In light of these preliminary observations, the following comments may be made: (i) Given that section 11(1) of the NEM: ICMA vests legal title in the unorganised public in the form of the "citizens of the Republic" and not in the organised public in the form of the state, it is not surprising that it is difficult to precisely locate the ownership provisions of section 11(1) on Page's spectrum. (ii) Given further that the "citizens of the Republic" do not enjoy legal personality, it follows that they do not have the capacity to exercise or enforce any rights or entitlements that might flow from their ownership. The ownership conferred on the citizenry, therefore, is more likely to be a bare or nude ownership. (iii) Simply because it is a bare or nude ownership and cannot serve an instrumental or practical purpose, it does not follow that the ownership provisions of section 11(1) do not serve any purpose at all. Instead, they may still serve a normative or symbolic purpose and rather than engaging in a futile search for such a purpose, it would be more productive to search for a normative purpose.

4.5 THE NORMATIVE JUSTIFICATION OF PUBLIC PROPERTY

4.5.1 Kevin Gray's pedestrian democracy

(a) Introduction

Public property is a socially significant institution. This is because it serves a number of substantive and symbolic public goals. Some of these goals were identified by Gray in his 2010 article titled "Pedestrian democracy and the geography of hope", published shortly before the Marine and Coastal Access Act of 2009 was passed by the British Parliament.[80] As its long title states, the purpose of this Act is, *inter alia*, to improve public access to and enjoyment of the English coast by establishing a virtually continuous walking trail along the entire 4000 km coastline of the country and by conferring a public right of recreational access to land near the coast on the inhabitants of England.

To achieve these goals, the Marine and Coastal Access Act imposes a duty on Natural England[81] and the Secretary of State for the Environment to achieve two complementary goals.[82] The first goal is to secure a long-distance route for the whole of the English coast, along which members of the public are entitled to journey by foot or by ferry for recreational purposes.[83] This route is referred to as the "coastal route".[84] The second goal is to establish an associated margin of land along the length of the English coast that is accessible to members of the public and which they may use together with the coastal route.[85] This margin of land is referred to as the "coastal margin".

Insofar as the coastal route is concerned, the Marine and Coastal Access Act provides that it is restricted to land that is "accessible to the public".[86] Land that is accessible to the public is defined in the Act as land that has been made available to the public for the purpose of open-air recreation in terms of the Countryside and Rights of Way Act of 2000 (CROW Act).[87] In other words, the Marine and Coastal Access Act itself does not confer a right on the

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[80] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45.

[81] Natural England is a non-departmental public body and is sponsored by the United Kingdom's Department for Environment, Food and Rural Affairs (Defra). It was established in terms of the Natural Environment and Rural Communities Act of 2006. Section 2(1) of this Act provides that its general purpose is to "ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contribution to sustainable development". Available at https://www.gov.uk/government/organisations/natural-england. Accessed on 14 January 2023.

[82] Marine and Coastal Access Act: s 296(1). This duty is referred to in the Marine and Coastal Access Act as the "coastal access duty" (s 296(4)).

[83] Marine and Coastal Access Act: s 296(2). This route is referred to as the "coastal route".

[84] The coastal route is not a physical path, but rather a mapped line.

[85] Marine and Coastal Access Act: s 296(3). This margin of land is referred to as the "coastal margin".

[86] Marine and Coastal Access Act: s 296(1).

[87] Marine and Coastal Access Act: s 296(5). Section 29(1) of the CROW Act grants every member of the public a right "to enter and remain … for the purposes of open-air recreation" on any "access land" situated in England

public to access and use the coastal route and the coastal margin for recreational purposes. Instead, it extends the right of recreational access created in terms of the CROW Act to the coastal route and coastal margin.

The coastal access rights created by the Marine and Coastal Access Act represented what – at the time – was a novel and potentially far-reaching development in the law of property, namely "the increasing recognition of public entitlements to access wild or scenic natural landscapes".[88] These public entitlements, Gray explains in his article, are examples of what some commentators have referred to as "pedestrian democracy". Given its novel nature and far-reaching implications, he explained further, the purpose of his article was to investigate why a public right to journey across someone else's privately owned land for recreational purposes was necessary and important in the 21st century.[89] As a part of this investigation, Gray identified four principles that justify not only a "right of foot traverse", but public property more generally. These four principles are "citizenship, distributive equity and social inclusion";[90] "personal well-being and psycho-social connection";[91] public health concerns";[92] and "ecological consciousness and ecological conscience".[93] Each principle will be discussed in turn.

(b) Citizenship, distributive equity and social inclusion

Insofar as the principles of citizenship, distributive equity and social inclusion are concerned, Gray begins his analysis by observing that the principle of equity demands that access to wild and scenic natural landscapes, and the "non-commodity values" they represent should not be reserved exclusively for the privileged few. Instead, they should be available for the reasonable enjoyment of all people because they are held by their owners in trust, or they are held by their

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and Wales. This right is sometimes referred to as a "right to roam". Subject to certain exceptions, "access land" is defined in section 1 of the CROW Act, read together with section 16, as land located more than 600 metres above sea level, together with other mapped areas of "open country", registered common land, and land that has been irrevocably dedicated by the owner to public access. The public's right to access these areas is limited to access on foot and must be exercised in a reasonable and responsible manner (s 2(1)(b) read together with Schedule 2).

[88] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 45.

[89] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 45.

[90] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 53.

[91] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 55.

[92] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 60.

[93] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 60.

owners as stewards or because the public has an interest in them.[94] In addition, a shared right of access to wild and scenic natural landscapes "engenders a heightened sense both of civic responsibility and of participation in an integrative society of equals".[95] The egalitarian nature of a public right to access the open country, Gray points out, was highlighted by Justice William O'Douglas when he wrote about the "citizenship of the mountains" where "[p]overty, wealth, accidents of birth, social standing, race [are] immaterial".[96] The value of egalitarianism also featured strongly in the justifications provided by the British government for the CROW Act. In the consultation paper that preceded the adoption of the Act, the government argued that as a matter of "social equity", all of Britain's citizens should be entitled to walk in some of the country's "finest countryside", that access to the countryside was a part of the British people's "common heritage" and that it should be "enjoyed by the many, not the few".[97]

(c) Personal well-being and psycho-social connection

Insofar as the principles of personal well-being and psycho-social connection are concerned, Gray starts his analysis by pointing out that the personal, psychological and social benefits of being exposed to and communing with nature are widely recognised. While there is clear evidence that contact with nature has regenerative and therapeutic benefits, very few people would disagree with the statement that engaging with the natural landscape goes much further than simply restoring a person's psychological well-being. In addition, it also has a wide range of other benefits, including physical, social and spiritual benefits. Most people, Gray argues, are willing to go even further and accept that wild and open spaces promote good morals. They make us better people. As Gray puts it himself, "[a]bstracted from the cloying complexities of busy urban life, it is difficult on the mountain top or in the deserted country lane not to sense the possibility of a life of greater virtue, purity and simplicity".[98] Apart from promoting good morals, the "wholesome impact" of connecting with the natural environment also manifests itself in two other forms. For some people, it provides an opportunity to think or meditate,

[94] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 53.
[95] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 54.
[96] W O'Douglas *Of Men and Mountains* (1951) at 211. O'Douglas was an associate justice of the United States Supreme Court from 1939 to 1975. He was a committed environmentalist and sought to conserve and protect the environment, both on and off the bench.
[97] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 54.
[98] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 55.

especially while walking. For others, it creates a space to travel inwards and search for meaning and significance or to locate oneself in time and space. Walking in nature, Gray writes, "is a journey into the solitude of the soul".[99] Finally, for many people, experiencing nature can also be a spiritual event, and the wonders of the natural world may deepen a belief in the glory of God.[100]

(d) Public health concerns

As its title suggests, the principle of public health draws a strong connection between an ageing and physically inactive population and the provision of opportunities in the open countryside for citizens to engage in physical activities. Providing opportunities for citizens to engage in physical activities will not only improve their health and extend their lifespans but will also reduce the cost to the nation of the public health service. The health benefits associated with walking in nature, Gray notes, was one of the grounds on which the enactment of both the CROW Act and the Marine and Coastal Act were justified.[101]

(e) Ecological consciousness and ecological conscience

Insofar as the principles of ecological consciousness and ecological conscience are concerned, Gray notes that one of the most insightful discoveries over the last 50 years is that the entire planet is a single interconnected biophysical community and that human beings cannot exist separately from this community. Instead, human beings are simply a part of what Aldo Leopold described as a "larger biotic community of ecological equals".[102] An important consequence of this discovery is that it has revealed the biosocial origins of the manner in which humans respond to the environment as a habitat. Deep within the unconscious biological memory of every individual is the knowledge that land is a source of food and shelter. "To go for a walk or to climb a rock face", Gray notes further, "may not be simply an act of recreational exercise in the open air. It is to participate in some long-forgotten, biosocially dictated search for food.

[99] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 56.
[100] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 57-58.
[101] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 60.
[102] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 60. See A Leopold "Some fundamentals of conservation in the Southwest" in SL Flader and JB Callicott (eds*) The River of the Mother of God (and Other Essays by Aldo Leopold)* (1925) at 95.

It is a function of survival".[103] Walking across a landscape, he writes, is an exercise in pursuing food and escaping danger. The ability to successfully traverse the landscape, therefore, is a crucial part of "securing mastery over the environment", which, in turn, is "a necessary component of an ancient inherited strategy for survival".[104] Accordingly, it may be argued that the pleasure many people find in observing and exploring wild and open spaces is derived from our ancient instinct to survive.[105] An appreciation of the deep connection that exists between humans and the environment may also encourage people to become more involved in its protection. "This link between ecological consciousness and ecological conscience", Gray writes further, "is ultimately the most important rationale for the statutory recognition of 'pedestrian democracy'".[106]

4.5.2 Carol Rose's property and sociability

Apart from the four principles discussed above, a number of other justifications for public property have been identified by property law scholars. One of these is the notion of sociability, and another is the notion of propriety. Although they differ from one another in important respects, they are also connected. As Page points out, both justifications contribute to the goal of a well-lived life and the role that public property can play in achieving that goal.[107] The argument that public property can be justified on the ground that it promotes sociability may be traced back to Rose's article, "The comedy of the commons: Commerce, custom and inherently public property", aspects of which were discussed above.[108]

In this article, Rose argues that apart from purely private property, there have always been two categories of public property in Anglo-American law. The first category is public property that is owned and actively managed by the government. She refers to this as "government-controlled public property". The second category is public property that is not owned by the government. Instead, it is "collectively 'owned' and 'managed' by society at

[103] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 61.
[104] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 61.
[105] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 61.
[106] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45 at 62.
[107] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 62.
[108] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 774. Rose also draws a link between certain kinds of public property and sociability in a 2006 article titled "Property and language, or, the ghost of the Fifth Panel". In this article, she bases the link on narrative theory rather than the comedy of the commons (see CM Rose "Property and language, or, the ghost of the Fifth Panel" (2006) 18 *Yale Journal of Law and the Humanities* 1).

large". Rose refers to this category as "inherently public property".[109] Property rights to inherently public property are typically vested in the "unorganized public at large" rather than in a governmental body (the "governmentally organized public").[110]

Inherently public property, Rose argues further, often takes the form of travel lanes such as roads, waterways and the seashore. These travel lanes, she explains further, have traditionally been classified as inherently public property because they facilitate commerce.[111] If they were not classified as inherently public property, but rather as private property, the classic economic problem of a "holdout" could arise. A holdout arises when privately owned property is required to achieve a public goal, and no alternative is available. The private owner is then in a position to "hold out" for an excessively high price and block the entire project. In other words, the private owner enjoys a monopoly and can use that power to extract a monopoly price or "rent".[112]

Apart from overcoming the danger of a holdout, Rose explains, Anglo-American law has also classified certain kinds of property as inherently public because the benefit of doing so outweighs the benefit of classifying it as private property. This will be the case when the value of property is enhanced rather than reduced by open-ended public use.[113] A unique feature of roads, waterways and the seashore is that they become more valuable the more people use them. Or, to put it another way, increased use enhances the value of the property rather than diminishes it, and, consequently, there is a "return to scale". Rose describes this characteristic as the "comedy of the commons" and labels it as a "felicitous merry-go-round", where "the more is the merrier" and the "better for all".[114]

As she has already intimated, Rose notes, the initial reason why travel routes were classified as inherently public property was to promote commerce. Commerce, she notes further, is an "interactive practice whose exponential returns to increasing participation run on without limit".[115] The more people engage in trade, the more opportunities there are for

[109] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 720.
[110] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 721.
[111] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 723.
[112] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 749.
[113] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 766.
[114] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 768.
[115] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 769.

valuable exchanges; and the more valuable exchanges there are, the more there will be an increase in wealth.[116] Given that commerce is interactive, it requires travel routes. In addition, these travel routes should be public to avoid the danger of holdouts and thus to prevent private owners from taking excessive rents that have been created and enhanced by the publicness of commerce itself. The benefit of classifying travel routes that facilitate commerce as public property thus outweighs the benefits of classifying them as private property.[117]

Besides creating wealth, Rose states, there are other reasons for regarding commerce as an interactive practice. One of these is that it promotes sociability. In fact, she states further, commerce is a quintessential mode of sociability. "Despite its appeal to self-interest, it also inculcates rules, understandings and standards of behavior enforced by the reciprocity of advantage".[118] To do business, a person "must learn the ways and practices of other businesspeople; and, arguably, doing business can make even the hard-bargaining trader more accustomed to dealing with strangers and more ready to sympathize with them and feel responsible for their needs".[119] If this is correct – if commerce promotes, not only the creation of wealth, but also sociability – it follows that a central purpose of inherently public property is to promote, not only commerce, but other socialising activities as well and, if this is correct, then other socialising activities may also justify the classification of property as inherently public.[120]

An activity that has more recently been recognised as a socialising one and that may justify the classification of property as inherently public, Rose writes, is recreation. In the 19th century, the American landscape architect Frederick Law Olmsted (1822-1903) argued that recreation can exert an educative and socialising influence on people that helps promote democratic values. Besides improving the mental health of city dwellers by allowing them to escape from the antisocial features of city life, he argued that public parks provide a physical space in which different social classes can mix and learn to regard each other as neighbours.[121]

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[116] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 769.
[117] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 770.
[118] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 776.
[119] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 776.
[120] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 777.
[121] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 779. Together with his partner Calvert Vaux , Olmstead is best-known for designing many of America's most famous public parks, including New York City's Central Park.

When it does exert an educative and socialising influence, Rose writes further, recreation "acts as a 'social glue' for everyone, not only those immediately engaged; and of course, the more people involved in any socializing activity, the better".[122] As with commerce, therefore, recreation has social and political overtones. It had the potential to elevate our minds above the workaday world and coach us in democratic give and take. For these reasons, "recreation should be open to all at minimal cost, or at costs to be borne by the public, since all of us benefit from the greater sociability of our fellow citizens".[123] If these arguments are correct, Rose concludes, then unique recreational spaces – such as the dry sand beach – should not be classified as private property. Their greatest value lies in civilizing and socialising all members of the public, and this value should not be "held up" by private owners.[124]

4.5.3 Gregory Alexander's property as human flourishing

The concept of property as propriety was promoted by property law scholars such as Carol Rose and Gregory Alexander in the 1990s as a response to what was then the prevailing idea of property, namely property as a commodity. In terms of this understanding, the idea of property was viewed simply as a means to satisfy individual preferences, pursue private agendas and maximise wealth. Although he accepted that this was one way in which property could be viewed, in his 1998 article titled "Property as propriety", Alexander argued that this picture was incomplete and that there was another side to property, viz property as propriety. The propriety concept of property rejects the notion that property is intended to exclusively serve private goals. Instead, the propriety concept argues that property also forms the material basis for creating and maintaining a "proper social order" and, consequently, that the system of property should be organised in a manner that promotes a just and fair society. It follows, therefore, that private property is burdened with a public function or, to put it another way, that private property is imbued with a social obligation.

A related and more modern version of the property as propriety concept is the relatively recent theory of progressive property, which argues that private property includes a social obligation norm that is aimed at promoting the goal of human flourishing. One of the most prominent of these theorists is Alexander himself. In his 2009 article titled "The social

[122] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 779-780.
[123] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 780.
[124] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53(3) *Chicago University Law Review* 711 at 780.

obligation norm in American property law",[125] Alexander argues that contrary to popular belief, the core function of private property is not simply to protect individuals from the "demands of society". Instead, as an inherently relational concept, private property imposes responsibilities on property owners in terms of which they are placed under an obligation to others. As society has developed over time and become increasingly complex, so have these responsibilities. It may be said, therefore, that American property law encompasses a social obligation norm.[126]

This social obligation norm, Alexander argues further, is inherent in the concept of ownership itself. An important consequence of its inherent nature is that when restrictions are imposed on the rights and interests of an owner, those restrictions – at least to the extent that they are consistent with the social obligation norm – should not be regarded as externally imposed and abnormal limitations on an inherently unrestricted right. Rather, they should be understood as normal and natural limitations on a fundamentally restricted right.[127] The theoretical basis of the social obligation norm is the concept of human flourishing, which may be traced back to Aristotle, who defined it as a state of being in which a person is able to live a life that is as fulfilling as possible for him or her.[128]

For his purposes, Alexander argues, the concept of human flourishing has two key characteristics:

(i) The first characteristic is that it is "morally pluralistic". Or, to put it another way, it rejects the idea that there is one fundamental moral value to which all other moral values may be reduced. Instead, it accepts that human flourishing encompasses a wide range of moral values, including "individual autonomy, personal security/privacy, personhood, self-determination, community and equality".[129]

(ii) The second characteristic is that the concept of human flourishing is objective. It is not based on a person's possessions or subjective preferences, but rather on his or her

[125] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451.
[126] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 at 747 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 452-453.
[127] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 at 749 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 453.
[128] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 at 760 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 453.
[129] G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 453-454.

> capabilities to choose among "alternative life horizons". Or, to put it slightly differently, it is not based on whether a person is able to fulfil his or her personal desires or maximise his or her personal preferences, but rather on what he or she is able to do with his or her life. [130]

When it comes to a person's capabilities, however, Alexander argues further, it is important to note that "no one can develop these capabilities by himself [or herself]". A person can do so only in community with others. It follows, therefore, that communities, including the state, are "the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities".[131]

The fact that we are dependent on our communities to develop the capabilities that make human flourishing possible, Alexander explains, imposes an obligation on us to support the social networks that make up those communities. Given that these social networks require resources, it follows that the obligation to support them includes an obligation to share our resources, or at least our surplus resources, when this is necessary to foster the capabilities required for human flourishing, namely security, practical rationality, sociability and so on.[132] In other words, Alexander writes in a subsequent article,

> "[p]roperty owners are obligated to provide from their surplus, and in ways that are appropriate to them as property owners, to the communities to which they belong – upon which they are dependent – those benefits that the community reasonably regards as necessary for the development of the capabilities essential to human flourishing".[133]

Although both property as propriety and property as human flourishing focus on private rather than public property, Page argues that they do implicate the public realm indirectly in the following three ways:

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[130] G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 454.
[131] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 at 760 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 456-457.
[132] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 at 761 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 457.
[133] G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451 at 459-459.

(i) First, they recognise that property is inherently social and that it is not possible for a person to flourish without others. In order to achieve the goal of human flourishing, therefore, a person has to move out of the private space and into the public.

(ii) Second, they recognise that human flourishing encompasses a wide range of moral values, some of which are consistent with the values that underlie public property, such as community and equality.

(iii) Third, they recognise that private property relies on communal or public infrastructure such as roads, sidewalks, parks and so on.[134]

4.5.4 Analysis and comment

Insofar as a normative justification for public property and especially coastal public property is concerned, the following comments may be made:

First, as we have already seen, Freedman, Sowman and Rebelo have suggested that the purpose underlying the reclassification of coastal public property from a *res publicae* in the Roman-Dutch law sense to a *res publicae* in the Roman law sense is to remedy the state's failure during the colonial and apartheid eras to exercise its right of ownership to promote public access to the opportunities and benefits of coastal public property, irrespective of race, and to conserve and protect the coastal environment for current and future generations, by divesting the state of its ownership of coastal public property and emphasising its duties and responsibilities as a trustee, rather than its rights and entitlements as an owner.

Second, although this suggestion contains valuable insights, it may be criticised on the grounds that it places the state at the centre of a normative justification for the reclassification of coastal public property and thus perpetuates the state-centred perspective that characterised the process of étatisation and ultimately resulted in section 2(1) of the Seashore Act. In light of this criticism, it is submitted that a more appropriate approach would be to de-centre the role of the state and seek a normative justification for the reclassification of coastal public property in the contribution it can make to improving the lives of individual human beings and addressing the harm caused to black South Africans by beach apartheid.

Third, when it comes to a human-centred normative justification for the reclassification of coastal public property, it is submitted that Rose's theory of inherent public property as sociability is well-placed to serve this purpose. This is because it argues that inherently public

[134] J Page *Public Property, Law and Society: Owning, belonging, connecting in the public realm* (2021) at 67-68.

recreational spaces exert an educative and socialising influence on people, and this influence fosters interpersonal relationships that strengthen the sense of belonging to a democratic political community. Apart from its inherently public and recreational nature, coastal public property is particularly well-suited to exert a socialising influence on people because it facilitates social swimming. As Archer and Bouillon argue, during the apartheid era, social swimming was segregated more rigidly than any other leisure activity. "[U]nlike tennis or golf", they argue further, "swimmers are in direct physical contact with each other, through the medium of water; far from separating swimmers from different races (or sex), water dissolves the physical barriers between them".[135] Coastal public property as sociability thus stands in direct contrast to colonialism and apartheid, which claimed the beach for white settlers and reimagined it initially as a white British and subsequently as a white Californian space in which black beachgoers were positioned as the "other".[136]

Fourth, apart from fostering interpersonal relationships and strengthening the sense of belonging to a democratic political community, Rose's theory of inherent public property as sociability also gives effect to the right to "an environment that is not harmful to their health or well-being" guaranteed in section 24(a) of the Constitution.[137] A careful reading of the provisions of this section reveals that it encompasses two rights. First, a right to an environment that is not harmful to "health", and, second, a right to an environment not harmful to "well-being".

While the right to an environment that is not harmful to health is aimed at protecting a person's physical health, mental integrity and quality of life (insofar as a person's quality of life relates to good health) from environmental harm,[138] the right to an environment that is not harmful to well-being goes further and protects a person's activities, choices, interests and values that are not directly related to his or her physical and mental health from environmental harms.[139]

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[135] R Archer and A Bouillon *The South African Game: Sports and Racism* (1982) at 105.

[136] A Deumert "Racism and the politics of the beach" *Diggit Magazine* (28 November 2019). Available at: https://www.diggitmagazine.com/column/politics-beach-racism. Accessed, 06 January 2024.

[137] Constitution of the Republic of South Africa, 1996. Section 24 reads as follows:

> "(a) Everyone has a right to an environment that is not harmful to their health or well-being; and (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that: (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

[138] M Kidd "Environment" in I Currie and J de Waal *Bill of Rights Handbook* 6ed (2013) 516 at 519 and A du Plessis "South Africa's constitutional environment right (generously) interpreted: What is in it for poverty?" (2011) 27 *SAJHR* 279 at 293.

[139] A du Plessis "South Africa's constitutional environment right (generously) interpreted: What is in it for poverty?" (2011) 27 *SAJHR* 279 at 295.

Although the courts have not yet confirmed this, most South African environmental law scholars agree that the types of interests that are protected by the concept of well-being are very broad and include a person's aesthetic, psychological and spiritual well-being and, in turn, that a person's aesthetic, psychological and spiritual well-being includes, *inter alia*, the notion of a "sense of place".[140]

The concept of a "sense of place" refers to the attachment, emotional bonds or feeling of belonging that people develop or experience with respect to a place because of its distinct or unique characteristics. These distinct and unique features can take a variety of different forms, including the aesthetic value of a place; its physical and natural features; its historical, cultural, and religious significance; the social and recreational opportunities it provides, and so on. A sense of place plays an important role in a person's well-being and highlights the often subjective nature of a person's interaction with the environment.[141]

The link between the concept of a sense of place and Rose's theory of inherently public property as sociability is illustrated by the beach closure incident recounted in the first chapter of this thesis. Apart from the fact that the closure was reminiscent of beach apartheid, the public outcry and strong emotions expressed in response to this incident may be traced back to the fact that South African beaches, in general, and Clifton Fourth Beach, in particular, evoke a strong sense of place for many South Africans. This is because of their aesthetic beauty, location and history. Perhaps more importantly, it is also because they are one of the few recreational spaces in the country that are open at minimal cost to everyone and, consequently, are well-positioned to foster interpersonal relationships, strengthen our sense of community and promote an inclusive democracy.

In an opinion piece published in the *Daily Maverick*, Marianne Thamm made a similar point when she argued that instead of opposing the ceremony aimed at cleansing Fourth Beach of the "demon of racism" under the banner of #ReclaimClifton, during which a sheep was brought onto the beach and slaughtered, white South Africans should have participated in the ceremony as a contribution to nation building. This is because the protest was aimed at reclaiming an important public and social space from which black South Africans had been excluded during the apartheid era and from which lower-middle and working-class South

[140] M Kidd "Environment" in I Currie and J de Waal *Bill of Rights Handbook* 6ed (2013) 516 at 522 and A du Plessis "South Africa's constitutional environment right (generously) interpreted: What is in it for poverty?" (2011) 27 *SAJHR* 279 at 295.
[141] M Donald "Unlocking the potential of well-being in the environmental right: A teleological interpretation" (2020) 31 *Stellenbosch Law Review* 55 at 67 and 68.

Africans were excluded by the rich in the post-apartheid era. Thamm summed up her argument as follows:

> "The Clifton beach protests were vital in pushing back against the erosion of public freedoms. In Cape Town, the lower-middle and working classes have already been squeezed to the periphery of the city by Monopoly Money property prices. The intention of the #ReclaimClifton and the slaughtering of the sheep was 'to exorcise the demon of racism' and to take back a public space for all Capetonians. Imagine how different the event could have been had white South Africans requested to be part of it, had we handled it with tenderness and an understanding of the history and pain of this country? Imagine how the moribund narrative could have been disrupted? There are still many demons that haunt us and we could do with a little collective ritual exorcising of ghosts on a lovely hot, summer's afternoon. We could do also with a little communing with all the ancestors – first peoples, African, slave, white, Indian – all the souls who have shaped us".[142]

Apart from Rose's theory of inherently public places as sociability, the concept of a sense of place is also closely linked to Gray's normative principles, especially his principle of personal well-being and psycho-social connection. Anyone who has walked on the beach, swum in the waves or observed others doing the same, will readily accept that these activities not only promote good morals and make us better people, but also provide us with an opportunity to think and meditate, to travel inwards and search for meaning, to locate ourselves in time and space, or to deepen our belief in the glory of God. Unlike Rose's theory, however, Gray approaches the concept of a sense of place and the principle of environmental well-being from a more individualist perspective and, consequently, does not speak as strongly to the goal of redressing the adverse effects of South Africa's history of racial discrimination.

4.6 CONCLUSION

The different property regimes that feature in Anglo-American-Australasian jurisdictions, namely common property, public property and private property, and the manner in which they may be distinguished from one another, were considered in this chapter. In addition, the diverse ways in which the scope and content of public ownership may be conceptualised, as well as a series of normative justifications for the notion of public property, were investigated.

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[142] M Thamm "Clifton 4th beach: Of slaughtered sheep, drowned slaves and collective rituals" *Daily Maverick* 28 December 2018. Available at https://www.dailymaverick.co.za/opinionista/2018-12-30-clifton-4th-beach-of-slaughtered-sheep-drowned-slaves-and-collective-rituals/ (accessed 15 January 2024).

Like the Anglo-American-Australasian legal systems, the South African legal system also distinguishes between private property, common property and public property. In light of its civil law roots, however, the notion that certain categories of property are *res extra commercium* and thus excluded from private ownership has never disappeared from view. Instead, the concept of non-private property has always been accepted as a fundamental aspect of South Africa's system of property law.

Although the notion that certain categories of property are *res extra commercium* has never disappeared from view in South Africa, the South African system of property law has adopted a narrow approach to the concepts of common property and public property. Insofar as common property is concerned, the focus in South Africa has fallen largely on *res communes* and not on other forms of open-access or limited-access common property. Insofar as public property is concerned, the focus has fallen largely on *res publicae* and not on property owned by the state in its capacity as a juristic person (i.e. government *property*).

Insofar as *res publicae* are concerned, legislation, case law and academic scholarship have tended to focus on the classification and legal status of these public things, rather than the nature of the right of ownership in them, the public's right to access and use them, and the state's duty to conserve, protect, manage and administer them for present and future generations. In addition, very little attention has been paid to the normative justifications underlying *res publicae*.

As Page has demonstrated, there are various ways in which the nature of public ownership may be seen and understood. One of these is by identifying and describing the entitlements that public ownership confers on its holder. Another is by asking who owns public property and locating the different iterations of public ownership along a spectrum. This spectrum begins at the one end, with the state as the sole legal owner. It then shifts to the middle of the spectrum, where legal and beneficial title are separated and vested in different entities. The spectrum ends with a beneficial-only version of ownership. One in which there is no legal title. Instead, the right to access and use the property is held by the "unorganised public".

Regrettably, it has proved difficult to locate the ownership provisions of section 11(1) of the NEM: ICMA on Page's spectrum. Although section 11(1) does separate legal title (i.e. ownership of coastal public property) from beneficial title (i.e. the right to access and use coastal public property), it does not vest legal title in the state but rather in the "citizens of the Republic" who are an exemplar of Rose's notion of the unorganised public. Given that the citizenry does not enjoy legal personality and thus does not have the capacity to engage in

juristic acts, it is unlikely that the ownership vested in the citizenry confers any entitlements or powers on them. Instead, it is, in all likelihood, a bare or nude ownership.

Simply because the ownership vested in the citizenry is a bare or nude ownership and cannot serve an instrumental or practical purpose, it does not follow that the ownership provisions of section 11(1) of the NEM: ICMA do not serve any purpose at all. Instead, it was argued in this Chapter that they may still serve a symbolic or normative purpose and rather than engaging in a futile search for an instrumental or practical purpose, it would be more productive to search for a normative one.

After setting out and discussing the normative arguments in favour of public property made by Gray, Rose and Alexander, it was argued that Rose's inherently public property as socialisation provided a particularly strong justification in favour of vesting ownership of coastal public property in the citizens of the Republic. This is because it argues that inherently public property, like coastal public property, exerts a socialising influence on people, which fosters interpersonal relationships and a sense of belonging to a democratic community, both of which are sorely needed in South Africa. In addition, it also gives effect to the constitutional right to "an environment that is not harmful to well-being", which encompasses the concept of a "sense of place". This concept undoubtedly encompasses South Africa's public beaches.

While the scope and content of the ownership provisions of section 11 of the NEM: ICMA have been investigated in this chapter and the previous two chapters, the public trust provisions of section 11 and section 12 of the Act have not, or at least not in as much detail. These provisions are investigated in Chapter Six. This investigation is situated within the context of a discussion of the public trust provisions in section 3 of the National Water Act (NWA) and the water resources public trust case law and scholarship.

Before embarking on an investigation of the public trust provisions in sections 11 and 12 of the NEM: ICMA, however, it will be helpful to review the US Public Trust Doctrine. Although almost all the South African water resource public trust scholars agree that the US Public Trust Doctrine has not been incorporated into South African law as a whole, they accept that it may be taken into consideration as a persuasive source of law, given its long history, rich jurisprudence and various concepts, principles and rules. Relying on this approach, South African water resources public trust scholars have frequently referred to, and relied heavily on, the US Public Trust Doctrine. This Doctrine is examined in the next chapter.

CHAPTER FIVE

THE UNITED STATES PUBLIC TRUST DOCTRINE

5.1 INTRODUCTION

As we saw in Chapter One, the provisions of section 11 of the National Environmental Management: Integrated Coastal Management Act[1] (NEM: ICMA) may be divided into two categories. First, those provisions that vest ownership of coastal public property in the citizens of the Republic (the "ownership provisions"); and, second, those provisions that designate the state as the public trustee of coastal public property and confer on it the authority to manage and administer coastal public property (the "public trust provisions").

The ownership provisions were investigated in Chapter Two, Chapter Three and Chapter Four of this thesis mainly through an examination of the classification and legal status of coastal public property; the public's right to access, use and enjoy coastal public property; and the components and boundaries of coastal public property. Special attention was also paid to the purpose and normative justification underlying the decision to vest ownership of coastal public property in the "citizens of the Republic".

While the ownership provisions of section 11 of the NEM: ICMA have been explored in some depth, the same cannot be said about the public trust provisions. These provisions will be investigated in Chapter Six. As stated in the previous chapter, this investigation will be based on and engage with the approach adopted by South African water resource public trust scholars to the public trust provisions in section 3 of the National Water Act (NWA).[2] However, before embarking on this investigation, it will be helpful to review the United States (US) Public Trust Doctrine in some detail.

Although almost all the South African water resource public trust scholars agree that the US Public Trust Doctrine has not been incorporated into South African law as a whole, they accept that it may nevertheless be taken into consideration as a persuasive source of law, given its long history, rich jurisprudence and wide variety of concepts and principles. Relying on this approach, South African water resources public trust scholars have frequently referred to and relied heavily on the US Public Trust Doctrine. The purpose of this chapter, therefore, is to set out and discuss the key concepts, principles and rules of the US Public Trust Doctrine.

[1] 24 of 2008.
[2] 36 of 1998.

Chapter Five is divided into eight sections. Besides the introduction in section 5.1, the historical origins of the US Public Trust Doctrine and the traditional approach to the Doctrine are discussed in sections 5.2 and 5.3, respectively. A summary of Joseph Sax's groundbreaking 1970 article follows in section 5.4. Key aspects of the modern version of the Doctrine are compared and contrasted with the traditional version in section 5.5. An examination of the continuous supervisory duty may be found in section 5.6 and an alternative approach to the Doctrine in section 5.7. The conclusion is set out in section 5.8.

5.2 THE HISTORICAL ORIGINS OF THE PUBLIC TRUST DOCTRINE

The historical origin of the Public Trust Doctrine is usually traced back to the *Institutes of Justinian* and, particularly, to the classification of the air (*aer*), running water (*aquae profluens*), the sea (*mare*) and the seashore (*mare litus*) as common things (*res communes*) which cannot be owned, but which members of the public are entitled to access and use.[3] For example, in *PPL Montana, LLC v Montana*,[4] the US Supreme Court itself noted that "[t]he public trust doctrine is of ancient origin. Its roots trace to Roman civil law, and its principles can be found in the English common law on public navigation and fishing rights over tidal land and in the States of this country".

As this passage indicates, American courts and public trust scholars also contend that the concept of *res communes* migrated from Roman law to English law. This migration took place largely as a result of the rediscovery of the *Corpus Juris Civilis* in the 11th century and the emergence of the University of Bologna as the premier centre for the study of the law in Christian Europe. Students from all over the continent, including England, flocked to the University to study under its renowned scholars, whose practice of making interlinear or marginal annotations on the texts resulted in them being referred to as "glossators". After completing their studies, these students took their newfound knowledge of Roman law back to their home countries, where they often attained high office in the church and the state.[5]

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[3] *Institutes of Justinian*, translated by JB Moyle (1913) 2.1.1; *Digest of Justinian*, T Mommsen and P Krueger (eds) translated by A Watson (1985) 1.8.2.1; *D* 43.8.3.1; and *D* 47.10.13.7.

[4] 565 US 576 (2012) at 603. See also GJ MacGrady "The navigability concept in the civil and common law: Historical development, current importance, and some doctrines that don't hold water" (1975) 3 *Florida State University Law Review* 511; P Deveney "Title, *ius publicum* and the public trust: A historical analysis" (1976) 1 *Sea Grant LJ* 13; BW Frier "The Roman origins of the public trust doctrine" (2019) 32 *Journal of Roman Archaeology* 641; and JB Ruhl and Thomas AJ McGinn "The Roman public trust doctrine: What was it and does it support an atmospheric trust?' (2020) 47 *Ecology Law Quarterly* 117, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440244, accessed 8 June 2020.

[5] P Stein *Roman Law in European History* (1999) at 52; HJ Berman *Law and Revolution: The formation of the Western Legal Tradition* (1983) at 120; and H Coing "The Roman law as *Ius Commune* on the Continent" (1973) *Law Quarterly Review* 505 at 506. Thomas Becket (1118-1170), for example, studied law at the

The first references to public trust principles in English law appeared in the following century when the *Magna Carta* (Great Charter) was accepted by King John (1166-1216) in 1215 to avoid a civil war with a group of rebel barons.[6] Apart from addressing specific grievances relating to ecclesiastical freedoms, feudal taxes, and the justice system, the *Magna Carta* conferred certain due process rights on all free men, especially the right to a fair trial, speedy justice, and against unusual punishments. In addition, it also contained several eclectic clauses, one of which (clause 33) provided that all fish weirs were to be removed "from the Thames, the Medway, and throughout the whole of England, except on the sea coast". Given that fish weirs not only threatened fish stocks, but also obstructed shipping and boating, this clause protected both the public's right to fish in all rivers and the right to navigate on them without obstruction (a right of passage).[7] The *Magna Carta* thus proclaimed that navigable waters were a public commons.

The rights conferred by clause 33 of the *Magna Carta* on the public to freely access and use navigable rivers for purposes of fishing and navigation were extended to other natural resources two years later when the *Carta de Foresta* (Charter of the Forest) was accepted by King John's successor, King Henry III (1207-1272), in 1217.[8] This Charter addressed specific grievances related to restrictions imposed by William the Conqueror (1028-1087) on traditional

University of Bologna. He later became the Archbishop of Canterbury and, after being assassinated by knights of King Henry II, was venerated as a martyr and a saint by the Roman Catholic and Anglican Churches (see TJ McSweeney and MK Spike "The significance of the *Corpus Juris Civilis:* Matilda of Canossa and the revival of Roman law" (2015) *William and Mary Law School Faculty Publications* at 22. Available at: https://scholarship.law.wm.edu/facpubs/1736/, accessed 10 January 2021)).

[6] The *Magna Carta* was engrossed, sealed and issued by King John on 15 June 1215 at Runnymead, near Windsor, after five days of negotiations. It was initially drafted by Cardinal Stephan Langton, the Archbishop of Canterbury, and consisted of 63 clauses. Amended and shorter versions of the Charter were issued in 1216, 1217 and 1225. As these various amendments indicate, the *Magna Carta* was not particularly successful at first. However, its authority and legitimacy grew with the passage of time and eventually it exerted an enormous influence on the development of the English constitutional system and became a symbol of freedom against oppression. Today it is regarded as an important source of Western democracy (see DM Stenton "Magna Carta" in the *Encyclopedia Britannica*, Available at: https://www.britannica.com/topic/Magna-Carta#ref326680, accessed 10 January 2021).

[7] See clause 33 of the *Magna Carta* of 1215. An English translation of the *Magna Carta* may be found on the British Library's website. This translation is available at: https://www.bl.uk/magna-carta/articles/magna-carta-english-translation, accessed 10 January 2021. Fish weirs were wooden V-shaped structures into which fish could swim but not escape. Given that they slowed down the flow of water, these weirs led to silting and eventually to the closure of rivers and other waterways. In this way they prevented the free navigation of rivers.

[8] The Charter of the Forests was issued at the same time as the third version of the *Magna Carta*. An English translation of the Charter may be found on the British National Archives website. It is available at: https://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/, accessed 10 January 2021. The Charter consisted of 16 clauses. Two of these were taken from the 1215 *Magna Carta* (clause 44 and clause 47) and the remainder were new. It is not known who drafted the Forest Charter (see D Magraw and N Thomure "*Carte de Foresta*: The Charter of the Forest turns 800" (2017) 47 *Environmental Law Reporter* 10934 at 10935. See also J Langton "The Charter of the Forest of King Henry III" in *Forests and Chases of England and Wales c. 1000 to c 1850*. Available at http://info.sjc.ox.ac.uk/forests/Carta.htm, accessed 10 January 2022).

access to forests, the maladministration of justice regarding forests, and the imposition of harsh penalties for violating forest laws.[9] The Charter disafforested (reduced) the amount of land classified as royal forests and expanded the public's right to access and use royal forests for foraging, grazing, planting crops and gathering wood. In addition, it also subjected forest courts to procedural safeguards and abolished capital punishment and maiming for violations of forest law.[10]

Almost 600 years later, Lord Chief Justice Matthew Hale (1609-1676) argued in his treatise – *De Jure Maris*[11] – that the public rights to access and use navigable rivers and public forests included in the *Magna Carta* and the *Carta de Foresta* confirmed that English common law distinguished between the ownership of navigable waters and the land beneath them, including shore lands and tidal lands (which was vested in the King or those to whom he had granted such land), on the one hand; and the right to access and use these natural resources (which was vested in the public), on the other hand.[12]

Hale labelled the right of ownership vested in the King and his grantees as the *jus privatum* (private rights). This label was based on the theory that following the invasion of William the Conqueror, the ownership of all land in England vested in the King in his personal capacity and, consequently, that he was entitled to alienate it to whomever he chose. It followed, therefore, that the idea that certain lands were held by the King in trust for the public and, therefore, were inalienable did not exist in English common law.[13]

While Hale labelled the right of ownership vested in the King and his grantees as the *jus privatum*, he labelled the right to access and use navigable waters vested in the public as

[9] As Magraw and Thomure point out, forests were particularly important in the 13th century for both the King and his subjects. This is because they encompassed almost one-third of England and included farmland, open grassland, waterways and even parts of towns. They were also an important source of income for the King. Unsurprisingly, English Kings going all the way back to William the Conqueror (1028-1087) habitually expanded the land classified as royal forests much to the detriment of common people, who needed access to these areas for building materials, food, fuel, grazing and water (see D Magraw and N Thomure "*Carte de Foresta*: The Charter of the Forest turns 800" (2017) 47 *Environmental Law Reporter* 10934 at 10936).

[10] D Magraw and N Thomure "*Carte de Foresta*: The Charter of the Forest turns 800" (2017) 47 *Environmental Law Reporter* 10934 at 10936-7. See also S Nield "The New Forest: Ancient forest and modern playground" in E Cooke (ed) *Modern Studies in Property Law 2* (2003) 287. Although the Charter abolished capital punishment and maiming, it retained other harsh punishments for killing deer, including being exiled from England. Clause 10 of the Charter thus provided that "[n]o man from henceforth shall lose either life or member for the killing of our deer; but if any man be taken and convited for the taking of our venison, he shall make a grievous fie, if he has anything whereof; and if he has nothing to lose, he shall be imprisoned a year and a day; and after the year and day expired, if he can find sufficient sureties, he shall be delivered; and if not, he shall abjure the realm of England".

[11] Although this treatise was first published in 1786, it was written much earlier, around 1660.

[12] P Deveney "Title, *ius publicum* and the public trust: A historical analysis" (1976) 1 *Sea Grant LJ* 13 at 40.

[13] P Deveney "Title, *ius publicum* and the public trust: A historical analysis" (1976) 1 *Sea Grant LJ* 13 at 45.

the *jus publicum* (public rights).[14] An important consequence of this right, he argued, was that "the *jus privatum* of the owner or proprietor is charged with and subject to that of the *jus publicum*".[15] The owner or proprietor, therefore, was not entitled to make or continue a nuisance, for example, by obstructing a navigable river. The King was responsible for vindicating the public's rights and was himself prohibited from making or continuing such a nuisance.[16]

5.3 THE TRADITIONAL PUBLIC TRUST DOCTRINE

5.3.1 Introduction

In light of its historical origins, it is not surprising that the Public Trust Doctrine initially focused intensely on State ownership of tidal and navigable rivers, lakes and other waterways, including the land beneath them (up to the mean high-water mark), as well as the general public's right to access and use these waters for commercial, fishing and navigation purposes. This narrow focus – commonly referred to as the "traditional approach" – persisted until the 1970s when Joseph Sax published his groundbreaking article titled "The public trust doctrine in natural resources law: Effective judicial intervention" in the *Michigan Law Review*.[17]

Following the publication of Sax's article, the resource base and public values protected by the Public Trust Doctrine gradually evolved to include a broader variety of natural resources and a wider range of public values, including ecological, recreational and scenic values. The role of the state as the public trustee also underwent a process of transformation. As a result of this process, the state's role shifted from one in which its "authority" over public trust resources was asserted to one in which its responsibility to protect them for present and future generations was acknowledged and affirmed.[18]

The traditional approach to the Public Trust Doctrine is usually traced back to the decision of the New Jersey Supreme Court in *Arnold v Mundy*,[19] which was decided in the

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[14] P Deveney "Title, *ius publicum* and the public trust: A historical analysis" (1976) 1 *Sea Grant LJ* 13 at 46.
[15] M Hale *De Jure Maris* in S Moore *A History of the Foreshore and the Law Relating Thereto* 3ed (1888) at 336.
[16] M Hale *De Jure Maris* in S Moore *A History of the Foreshore and the Law Relating Thereto* 3ed (1888) at 355. See also GJ MacGrady "The navigability concept in the civil and common law: Historical development, current importance, and some doctrines that don't hold water" (1975) 3 *Florida State University Law Review* 425.
[17] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 474
[18] E Ryan "A short history of the public trust doctrine and its intersection with private water law" (2020) 38 *Virginia Environmental Law Journal* 135 at 138
[19] 6 NJL 1 (1821). Ruhl and McGinn trace the public trust doctrine in the United States back to an even earlier judgment, namely *Harrison v Starrett* 4 H&McH 540 (1774). In this case, a provincial court in Maryland found that a riparian owner's decision to fill a large portion of a navigable river adjacent to his

early nineteenth century. This judgment was confirmed by the US Supreme Court two decades later in *Martin v Waddell's Lessee*[20] and then again in the seminal judgments in *Illinois Central Railroad Co v Illinois*[21] and *Shively v Bowlby*,[22] towards the end of the same century. As a result of these judgments, the Doctrine became firmly established in American common law. Each judgment will be discussed in turn.

5.3.2 Arnold v Mundy 6 NJL 1 (1821)

The facts of this case were as follows. The appellant, Arnold, owned land adjacent to the Raritan River in New Jersey. He had planted oysters on beds below the mean low-water mark and staked them off. The respondent, Mundy, led a group of boats up the river to the oyster beds and harvested them without permission. Arnold then brought an action for trespass against Mundy in the Circuit Court. In support of his action, Arnold argued, *inter alia*, that his predecessors-in-title had been awarded exclusive title to the land, together with the neighbouring portion of the river, by the 24 proprietors of East New Jersey, who in turn had been granted title to the land by the Duke of York. The Duke himself had been granted title to the entire territory in 1664 and 1667 by his brother, King Charles II, to establish a new colony.[23] In response to this argument, Mundy argued that Arnold's exclusive title extended only to the mean high-water mark and that members of the public had a common right to harvest oysters from the navigable waters of New Jersey. The Circuit Court found in favour of Mundy and dismissed the action for trespass. Arnold then appealed to the New Jersey Supreme Court.

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property with sand and stone was a public nuisance because it interfered with the public's right to sail along the river. In arriving at this decision, the court held, after referring English common law, that

> "air and light are common to all; so is the sea, rivers and their banks … Nothing is to be thrown therein to the prejudice of navigation"

(see JB Ruhl and Thomas AJ McGinn "The Roman public trust doctrine: What was it and does it support an atmospheric trust?' (2020) 47(1) *Ecology Law Quarterly* 117 at 134). As Blumm and Schwartz point out, however, it was the judgment in *Arnold v Mundy* that was first endorsed by the US Supreme Court (see MC Blumm and ZA Schwartz "The Public Trust Doctrine Fifty Years after Sax and Some Thoughts on its Future" (2021) 44 *Public Land and Resources Law Review* 1 at 9, footnote 46).

[20] 41 US (16 Pet) 367 (1842).

[21] 146 US 387 (1892).

[22] 152 US 1 (1894).

[23] The royal charter in terms of which King Charles II granted the entire territory to the Duke of York expressly stated that the grant included

> "all the land, islands, soils, rivers, harbours, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawking, huntings and fowlings, and all other royalties, profits, commodities and hereditaments to said islands, lands and premises". The letters patent in terms of which the Duke granted Eastern New Jersey to the 24 proprietors expressly provided that it included "every part and parcel thereof, together with all islands, bays, rivers, waters, forts, mines, minerals, quarries, royalties, franchises whatsoever".

The New Jersey Supreme Court also found in favour of Mundy and dismissed the appeal. In arriving at this decision, the Court began by observing that the key issue it had to decide was whether Arnold and his predecessors-in-title had, in fact, been granted an exclusive right to the neighbouring portion of the river below the mean low-water mark. While it was true that the Duke of York had purported to award Arnold's predecessors-in-title exclusive title to the river, this grant was subject to the laws of England, which had been brought to the United States together with the British colonists. It was, therefore, necessary to investigate these laws. Relying heavily on Hale's treatise as an authoritative source, the Court found, first, that in English law, title to navigable rivers (all of which are tidal in England) and the land beneath them was held by the Crown in trust for the use of the people;[24] second, that in terms of this trust, the people were entitled to use navigable rivers as a "common piscary";[25] and third, that any grant by the Crown purporting to divest the people of their "common piscary" was void.[26] It followed, therefore, that the Duke's purported grant of exclusive title to the river below the mean low-water mark was invalid. The New Jersey Supreme Court summed up these principles in the following sweeping terms:

> "Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of the opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment".[27]

5.3.3 Martin v Waddell's Lessee 41 US (16 Pet) 367 (1842)

The principles laid down in *Arnold v Mundy* were embraced by the US Supreme Court slightly more than two decades later in *Martin v Waddell's Lessee*. The facts of this case were almost the same as those in *Arnold*. Waddell owned land adjacent to Raritan River, not far from

[24] *Arnold v Mundy* 6 NJL 1 (1821) at 71.
[25] *Arnold v Mundy* 6 NJL 1 (1821) at 74.
[26] *Arnold v Mundy* 6 NJL 1 (1821) at 78.
[27] *Arnold v Mundy* 6 NJL 1 (1821) at 78.

Arnold's land, and had planted oysters in beds located below the mean low-water mark. After Martin harvested these oysters without permission, Waddell's lessee brought an action of ejectment against him in the Federal Circuit Court of New Jersey. Like Arnold, he based his action on the ground that Waddell's predecessors-in-title had been awarded title to the land, together with the neighbouring portion of the river, by the 24 proprietors of East New Jersey who, in turn, had been granted title to the land by the Duke of York, including "every part and parcel thereof, together with all islands, bays, rivers, waters" and so on. In response, Martin relied on the judgment of *Arnold*. The Federal Circuit Court, however, found in favour of Waddell's lessee, and Martin appealed to the US Supreme Court.

A majority of the US Supreme Court disagreed with the Federal Circuit Court and upheld the appeal. In arriving at this decision, the Supreme Court held that the key issue it had to decide was whether the navigable rivers in the colony and the land beneath them had been granted to the Duke of York as "a trust for the common use of the new community" or as

> "private property to be parcelled out and sold to individuals for [their] own benefit". In order to answer this question, it was necessary to take into account, not only the words of the charter in terms of which the grant had been made, but also the "laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it for the century and more which had [elapsed since the colony was established]".[28]

Insofar as the laws and institutions of England were concerned, the Supreme Court also relied heavily on Hale as an authoritative source. According to Hale, the Court explained, ownership of the "sea or creeks or arms thereof" was vested in the King and, consequently, he had the primary right to fish in it. Despite the King's ownership, however, the common people of England had "a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary" and could not be prevented from exercising this liberty unless the King had granted a person a right to fish "exclusive of that liberty". The King's right to grant such exclusive rights, the Court held, was severely restricted following the adoption of the *Magna Carta* in 1215, and there was nothing in the charter granted to the Duke of York to suggest that the same legal principles should not be applied in the colony. It followed, therefore, that the navigable rivers had been granted to the Duke as a trust and not as private property.[29]

[28] *Martin v Waddell's Lessee* 41 US (16 Pet) 367 (1842) at 411.
[29] *Martin v Waddell's Lessee* 41 US (16 Pet) 367 (1842) at 412.

In addition, the Supreme Court held further, the charter expressly imposed an obligation on the Duke of York to establish a government in the colony based on the laws and statutes of England, and it would have been impossible for him to do so if this trust was separated from his royal authority. There was nothing in the charter or the purpose for which it was granted that would justify an interpretation that converted the "shores and rivers and bays and arms of the sea and the land beneath them" into private property that could be parcelled out and sold by the Duke for his personal benefit. Instead, they were to be "held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish".[30]

5.3.4 Illinois Central Railroad Co v Illinois 146 US 387 (1892)

The principles set out in *Martin v Waddell's Lessee* were confirmed half a century later in *Illinois Central Railroad Co v Illinois.* Apart from merely confirming that the ownership of navigable waterways is vested in the State as a public trustee and not as a private owner, however, the Supreme Court went a step further. It emphasised the duty that the Public Trust Doctrine imposes on the State to protect the public interest in the trust resource from being substantially impaired. For this reason, it is referred to as the "lodestar" judgment by Sax and is accepted as the seminal public trust judgment by most American public trust scholars.

The facts of this case were as follows. In 1850, the US Congress granted the State of Illinois approximately 2.5 million acres of federal land, as well as a two-hundred-foot-wide right of way, to establish a railroad stretching across the state. The grant provided that the railroad would start in the town of Cairo in the south and then run north to Centralia, where it would split into two branches. One branch would head northwest to Galena and the other northeast to Chicago. Following this grant, the State Legislature established the Illinois Central Railroad and transferred the land and a right of way to it. The legislation establishing the Illinois Central gave each municipality the right to determine the railroad's location within its boundaries. Acting in terms of this power, the Chicago City Council granted Illinois Central permission to enter the city from the south and then proceed north, partly along the shore of Lake Michigan, and partly in the lake itself, until it reached its depot just south of the Chicago River. In return, Illinois Central agreed, *inter alia*, to build a breakwater on the eastern edge of its railway tracks to prevent erosion of the lakefront.

[30] *Martin v Waddell's Lessee* 41 US (16 Pet) 367 (1842) at 413.

Over the next twenty years, the city grew, and the Chicago River became increasingly congested with water-borne traffic. To address this problem, a Bill was introduced in the Illinois State Legislature aimed at establishing a private company to construct a new outer harbour for the city. The Bill provided that this outer harbour would be constructed east of Illinois Central's breakwater and that the new company would be given the power to connect the outer harbour to the city by roadways across the railroad tracks. Although the Bill failed to pass, Illinois Central was alarmed by this development. It feared that its railroad tracks and its right to use the lake would be threatened if this part of the lake was granted to another entity. To counter this threat, Illinois Central began lobbying state legislators to pass a bill securing its rights. These lobbying efforts were successful, and in 1869, the Lake Front Act was passed. Among other provisions, this Act granted "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater" to Illinois Central for a distance of one mile. This area encompassed more than 1000 acres of submerged land and included a significant part of the city's commercial waterfront.

Unfortunately for Illinois Central, its legislative victory was short-lived. Following its adoption, the Lake Front Act was roundly condemned by the Chicago City Council as well as many of Chicago's citizens and newspapers, several of which labelled it as the "lakefront steal" and accused Illinois Central of corruption. Opposition to the Act became even more intense when – as a result of an economic crisis in the Midwest in the 1870s – Illinois Central put its plans to construct a new outer harbour on hold for an indefinite period. The growing opposition to the Lake Shore Act bore fruit in 1873 when a Bill repealing the Lake Front Act was adopted by a newly elected Illinois State Legislature with a large majority in both Houses.[31] Despite the purported revocation of its rights to the outer harbour area, Illinois Central did not take any legal steps to protect these rights. This is because it believed that the rights and interests granted to it in the Lake Front Act were vested rights and, consequently, that they could not lawfully be revoked by the State Legislature.

When the economy began to recover a number of years later, it was no longer necessary for Illinois Central to build an outer harbour. In the intervening years, the Army had built a new breakwater outside the one built by Illinois Central in the 1850s, and this relieved the

[31] The Illinois State Legislature is referred to as the Illinois General Assembly and it was established in 1818 when the first Constitution of the State of Illinois was adopted. The Illinois General Assembly consists of two chambers, namely the Illinois House of Representatives and the Illinois Senate (see Constitution of the State of Illinois, 1818 Article 2, Section 1).

congestion on the Chicago River. The economic recovery, however, did lead to an increase in demand for rail services, and Illinois Central's single railway line became very congested. In order to address this problem, the company began building a parallel railway line in the outer harbour area. In response, the Attorney-General of Illinois applied for an injunction. He based his application on the grounds that the outer harbour area belonged to the State of Illinois and that the grant to Illinois Central in 1869 had been validly repealed in 1873. In response, Illinois Central argued that the Lake Front Act had transferred the State's property rights in the outer harbour area to it and that, under the vested rights doctrine, the grant could not be lawfully revoked. The Federal Circuit Court found in favour of the State and granted the injunction. Illinois Central then appealed to the Supreme Court.

A majority of the Supreme Court dismissed the appeal. In arriving at this decision, the Court began by finding that the land under the Great Lakes was indistinguishable from land under tidal waters and, consequently, that it belonged to the States themselves and not to the riparian owners. It followed, therefore, that the State of Illinois exercised sovereignty over, and ownership of, the land under Lake Michigan and had done so since it was admitted to the Union in 1818.[32] Although the State held title to the land under the waters of Lake Michigan, the Court held that the nature of this title was different from that which the State held in land intended for sale. This is because it was a "title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties".[33]

The fact that the title to the land under the waters of Lake Michigan was held by the State in trust for the people, the Supreme Court held further, did not impose an absolute bar on the State's power to dispose of such land. This is because the State was entitled to grant parcels of submerged land where "[t]he interests of the people in the navigation of the waters and in commerce over them may be improved … by the erection of wharves, docks and piers therein"; and, provided a grant was made for such a purpose, no valid objection could be made to it. In addition, the State was also entitled to dispose of submerged land where the parcels being granted did not substantially impair the public interest in the remaining land and water.[34]

Although the State was entitled to grant parcels of submerged land to improve the public interest in navigation and commerce, the Supreme Court went on to hold, it was not entitled to abdicate its general control "over lands under the navigable waters of an entire

[32] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 434-437.
[33] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452.
[34] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452.

harbor or bay, or of a sea or lake".[35] This kind of abdication was inconsistent with the exercise of the public trust, which required a State to preserve navigable waters for the use of the public. It followed, therefore, that the State could not relinquish its public trust obligations by simply transferring the land. The only circumstances in which a State could relinquish its obligations were, first, when the grant of a parcel promoted the interest of the public; or, second, when a parcel could be disposed of without substantially impairing the public interest in the remaining land and water.[36]

A large grant of all of the lands under the navigable waters of State, the Supreme Court concluded, did not fall into the legislative powers of a State and

> "any attempted grant of this kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace".[37]

After setting out these principles, the Supreme Court turned to apply them to the facts. It found that the grant of the outer harbour area to Illinois Central was so large that it fell into the prohibited category of disposals and thus violated the public trust, the exercise of which could be resumed by the State at any time. It was, therefore, revocable and, consequently, the decision to repeal the Lake Front Act in 1873 did not infringe the "Contracts Clause" of the US Constitution and was valid.[38]

5.3.5 Shively v Bowlby 152 US 1 (1894)

A mere two years after *Illinois Central Railroad Co v Illinois*, the Supreme Court returned to the Public Trust Doctrine in *Shively v Bowlby*.[39] This judgment is significant for two reasons.

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[35] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452.
[36] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452.
[37] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 453.
[38] The "Contracts Clause" may be found in Article 1, Section 10 of the US Constitution. It provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts". As its terms indicate, the Contracts Clause prohibits the States (although not the Federal Government) from passing legislation that interferes with the obligation to perform in terms of a valid and existing contract. For a more detailed discussion of the Contracts Clause see E Chemerinsky *Constitutional Law: Principles and Policies* 4ed (2011) at 645.
[39] In *Phillips Petroleum Company v Mississippi* 484 US 469 (1988) at 473, the US Supreme Court described *Shively v Bowlby* rather than *Illinois Central Railroad Co* as the "seminal case in American public trust jurisprudence".

First, because it accepts the notion that the *jus privatum* can be granted to private parties, while the State retains the *jus publicum*. Second, it contains a comprehensive summary of the legal principles governing the traditional Public Trust Doctrine.

In this case, Shively registered a claim to land along the bank of the Columbia River near its delta in terms of a federal statute that applied to Oregon while it was still a federal territory. The claim included the adjacent tidelands and a portion of the bed of the Columbia River. After Oregon was granted statehood, the State transferred the same tidelands to Bowlby, and he constructed a wharf on this land. Bowlby then applied for an order declaring that his title was valid. In response, Shively argued that the State could not convey title to the tidelands to Bowlby because they belonged to him. This argument was rejected by the Oregon Supreme Court, and Shively appealed to the US Supreme Court.

The US Supreme Court also rejected Shively's argument and dismissed the appeal. In arriving at this decision, the Court held that when the State of Oregon was admitted to the Union, the equal footing doctrine provided that these lands were governed by the same legal principles that applied to the 13 original States.[40] In terms of these legal principles, tidelands were the property of the State of Oregon in its sovereign capacity, and the State was entitled to dispose of them in any way it deemed proper, subject only to the paramount right of commerce and navigation. It followed, therefore, that the State could decide either to preserve existing rights of ownership in tidelands or grant them to someone else. In the case at hand, the State had decided not to recognise Shively's existing right of ownership, but rather to grant it to Bowlby.

As pointed out above, in its judgment, the Supreme Court accepted the notion that the State of Oregon could grant the right of ownership in the tidelands (the *jus privatum*) to Bowlby, while retaining the public's public trust right to use these lands for commerce, fishing and navigation (the *jus publicum*). Apart from accepting this notion, the Court also concluded its judgment by summing up the principles governing the Public Trust Doctrine. This summary confirmed that tidal and navigable waters and the land beneath them were held by the sovereign in trust for the benefit of the people. Although it is lengthy, this summary is generally regarded as a definitive statement of the traditional Public Trust Doctrine and is worth setting out in full.

[40] The equal footing doctrine provides that all states in the union, irrespective of when and how it joined the union, enjoy the same sovereign rights and responsibilities as the original 13 states, including those related to tidal and navigable waters and the land beneath them. The Supreme Court traced the development of these legal principles from English common law to the original 13 states and then to those states that were admitted afterwards.

"[1.] Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above the high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people.

[2.] At common law, the title and the dominion in lands that flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.

[3.] Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory.

The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below the high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

[4.] The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below the high-water mark of tidewaters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states, respectively, when organized and admitted into the union.

Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters convey, of their own force no title or right below high water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States.".[41]

Like the judgment in *Illinois Central*, the principles set out above confirmed "that the public trust doctrine functions not only as a grant of affirmative state authority over [tidal and navigable waters and the land beneath them], but also as a limit on state authority with regard

[41] *Shively v Bowlby* 152 US 1 (1894) at 57-58.

to the management of those lands. This is because the State is required to manage them as trustee for the public benefit".[42]

5.3.6 Analysis and comment

In light of the judgments set out above, the key principles that make up the traditional Public Trust Doctrine may be described as follows:

(i) First, the Public Trust Doctrine does not only protect the public nature of tidal and navigable waterways and the land beneath them, it also confers the authority on the State, as the trustee, to manage and administer those resources. At the same time, however, the Doctrine limits the State's authority to manage and administer public trust resources by imposing a fiduciary duty on the State to do so in the best interests of the public, who are the beneficial owners.

(ii) Second, although the limits imposed by the Public Trust Doctrine on the State's authority to manage and administer public trust resources can take different forms, one of these is that the State may not abdicate its powers and responsibilities as the trustee by granting title in public trust resources to private parties. Or, to put it another way, the State may not abdicate its public trust powers and responsibility by alienating public trust resources.[43]

(iii) Third, there are two exceptions to this non-alienation rule. First, the State may alienate public trust resources where this will improve the public's interest in commerce, navigation and fishing. Second, even when it would not improve the public's interest, the State may alienate public trust resources if it would not "substantially impair the public interest in the remaining land and waters of a particular waterway".[44]

(iv) Fourth, if the State has abdicated its public trust responsibilities by alienating public trust resources to a private party, that abdication is unlawful and may validly be revoked, without having to pay compensation for the property itself. However, the State may have to pay compensation for any improvements made to the public trust property.

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[42] E Ryan "The public trust doctrine, property, and society" in N Graham, M Davies and L Godden (eds) *The Routledge Handbook of Property, Law and Society* (2023) at 240.

[43] According to Sax, the obligations or responsibilities imposed on the state by the Public Trust Doctrine could be divided into three categories. First, not only must public trust property be used for a public purpose, it must also be available for use by the public. Second, public trust property may not be alienated, even for a fair price. Third, public trust property must be maintained for specific types of uses, such as commerce, navigation and fishing (see J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 477).

[44] *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452.

(v) Fifth, as the beneficiaries of the trust, members of the public can hold the State accountable for failing to manage public trust resources in accordance with its fiduciary duties and responsibilities. Individual members of the general public, therefore, are entitled to enforce their public trust rights in court.

5.3.7 Tidal and navigable waters

Given that there are no navigable rivers in England beyond the ebb and flow of the tide and, consequently, that navigable waters and tide waters were synonymous in English common law, it is not surprising that the public trust principles adopted in the founding public trust cases such as *Arnold v Mundy* and *Martin v Waddell's Lessee* applied only to tidal waters in the United States and not to inland navigable waters. However, this narrow approach to navigability did not last long, and less than ten years later, it was extended to include waterways that are "navigable-in-fact". The extension occurred, first, in *The Genesee Chief v Fitzhugh,*[45] *in relation to federal admiralty jurisdiction, and then in Barney v Keokuk,*[46] *in relation to public ownership of waterways and the Public Trust Doctrine.*[47]

In *The Genesee Chief,* the Supreme Court overruled previous judgments in which it had limited the application of admiralty jurisdiction to tidal waters. In arriving at this decision, the Court began by criticising the "ebb and flow of the tide" test for admiralty jurisdiction – which it inherited from England – on the ground that the United States, unlike England, has "thousands of miles of public navigable water, including lakes and rivers in which there is no tide". Given these topographical differences, the Court held that the application of admiralty jurisdiction should depend, not on the ebb and flow of the tide, but rather on whether a waterway was navigable-in-fact.[48] Approximately 25 years later, in *Barney v Keokuk,* the Supreme Court extended the application of the navigable-in-fact test to include, not only admiralty jurisdiction, but also the public ownership of waterways and the Public Trust Doctrine, largely on the ground that this was consistent with the Court's decision to extend admiralty jurisdiction in *The Genesee Chief*.[49]

When it comes to determining the content of the navigable-in-fact test, each State has the authority to adopt its own definition of the test. This is because the Supreme Court has

[45] *The Genesee Chief* 53 US 12 How 443 (1851).
[46] *Barney v Keokuk* 94 US 324 (1876).
[47] In *Phillips Petroleum Company v Mississippi* 484 US 469 (1988) at 475, the Supreme Court held that the extension of navigable waters to include waterways that are navigable-in-fact did not change the principle that all tidal waters are automatically classified as navigable.
[48] *The Genesee Chief* 53 US 12 How 443 (1851) at 457.
[49] *Barney v Keokuk* 94 US 324 (1876) at 338.

repeatedly held that the scope of the Public Trust Doctrine is a matter of State law.[50] As Craig points out, however, many States have adopted the definition used to determine whether rivers and streams are public or private.[51] The basic formulation of this definition was adopted by the Supreme Court in *The Daniel Ball*,[52] where it held that rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water".[53]

A slightly more elaborate version was adopted by the Supreme Court in *United States v Holt State Bank*,[54] where it held that rivers will be classified as navigable-in-fact if "they are used, or are susceptible to being used, in their ordinary and natural condition, as a highway for commerce over which trade and travel is or may be conducted in the customary modes of trade or travel on water". In addition, the Court held further, navigability does not depend on the particular method that is used to trade or travel on the water. It can include "steamboats, sailing vessels and flatboats". It also does not depend on the absence of occasional obstacles to navigation. Provided the river or lake in its natural condition provides a channel for useful commerce, it will be classified as navigable-in-fact" and thus subject to the Public Trust Doctrine.[55]

5.4 THE SAXIAN VISION

As stated above, before 1970, the Public Trust Doctrine was defined narrowly as a rule of the common law in terms of which the State owned tidal and navigable waters and the land beneath them (up to the median high-water mark) in trust so that people could use them for commerce, navigation and fishing and that the State could not alienate these lands except in narrowly defined circumstances.[56] This narrow approach began to change in 1970 when Professor

[50] See for example *Appleby v City of New York* 271 US 364 (1926) at 395; *Idaho v Coeur d'Alene Tribe of Idaho* 521 US 261 (1997) at 285; and *PPL Montana, LLC v Montana* 565 US 576 (2012) at 603.
[51] See RK Craig "Navigability and Its consequences: State title, mineral rights and the public trust doctrine" in Proceedings of the 60th Annual Rocky Mountain Mineral Law Foundation Summer Institute (2015). Available at: https://ssrn.com/abstract=2449374, accessed 1 April 2022.
[52] *The Daniel Ball* 77 US 10 Wall. 557 (1870).
[53] *The Daniel Ball* 77 US 10 Wall. 557 (1870) at 563.
[54] *United States v Holt State Bank* 270 US 49 (1926).
[55] *United States v Holt State Bank* 270 US 49 (1926) at 56.
[56] JB Ruhl and Thomas AJ McGinn "The Roman public trust doctrine: What was it and does it support an atmospheric trust?' (2020) 47(1) *Ecology Law Quarterly* 117 at 136.

Joseph Sax published his landmark article titled "The public trust doctrine in natural resources law: Effective judicial intervention" in the *Michigan Law Review*.[57]

In this article, Sax argued that the principles and rules developed by the courts in public trust cases were not limited to property law or to tidal and navigable waters. Given its "breadth and substantive content", the Public Trust Doctrine was a useful "tool of general application" that could be applied to the conservation and protection of a wide range of natural resources, including the atmosphere, wetlands and private property.[58] He thus "unhooked [the doctrine] from its traditional moorings on and around water bodies".[59] Sax himself put this argument as follows:

> "If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required".[60]

Apart from unhooking the Public Trust Doctrine from its traditional mooring, Sax made several other important arguments in his article. Among these were the following:

First, he pointed out that while there is no one overarching theory that explains why a State's authority over public trust property is inherently limited, a number of justifications may be identified. One of these is that public trust resources are "so inherently important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs" and, therefore, no small group of individuals should be allowed to control these resources. Another is that public trust resources "are so particularly the gifts of nature's bounty that they

[57] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471.
[58] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 474.
[59] CM Rose "Joseph Sax and the idea of the public trust" (1998) 25 *Ecology Law Quarterly* 351 at 352.
[60] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 556-557.

must be reserved for the whole of the populace". Yet another is that "certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate".[61]

Second, Sax noted that decisions affecting public trust resources are commonly made, not by legislatures, but rather by administrative officials, and these administrative decisions are more likely to threaten public trust interests than legislative decisions. This is because administrative officials are frequently subject to intense lobbying by private parties seeking official concessions to promote their commercial endeavours. The concessions sought by these private parties are often of limited visibility to the public, and public sentiment is not aroused. In these circumstances, administrative officials usually attach more weight to the interests of the private parties lobbying them than to the interests of the public as a whole.[62] They thus allow "self-interested and powerful minorities" to have an undue influence on the public resource decisions of administrative agencies and cause them "to ignore broadly based public interests".[63] This phenomenon is sometimes referred to as "agency capture".

Third, Sax found that the courts have sought to address the problems associated with agency capture by special interest groups by adopting a "hard-look" approach to administrative decisions. In terms of this hard-look approach, the courts have, for example, required administrative agencies to obtain explicit legislative authorisation for decisions that adversely affect public trust resources, provide additional justifications for their decisions, or show that every important interest has been adequately considered. When the public benefits of a project are unclear, the courts have also held that the project's proponents have the onus of justifying the project and may not simply rely on "the traditional presumptions of legislative propriety and administrative discretion".[64] Sax labelled this approach the "phenomenon of indirect intervention" and explained that it was indirect because, instead of addressing the merits of an administrative decision that adversely affected public trust resources, the courts sought to protect the public interest by imposing strict procedural requirements on the decision-making process of the relevant administrative agency.[65] It followed, therefore, that the Public Trust Doctrine was not necessarily "a set of standards for dealing with the public domain", but rather

[61] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 484-485.
[62] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 495.
[63] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 495.
[64] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 560.
[65] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 558-559.

"a technique by which courts may mend perceived imperfections in the legislative and administrative process".[66]

As Rose has eloquently explained, the arguments set out above arose out of the fact that at the time that Sax wrote his article, he was concerned about the "fragility of majority governance" and the need to "bolster majority rule to solve environmental problems". More specifically, he was concerned about the fact that "sharply focused minority interests often could get their way in legislatures at the expense of diffuse majorities" and especially about the fact that in the administrative arena, special interest groups could capture the administrative agency that was supposed to be regulating them. The most serious problem in environmental law at the time, therefore, was not domineering majoritarianism, but rather "the weakness and incompetence of majority rule" when compared to well-organised minority interests. To address this threat, Rose explained further, Sax sought to generalise the concept of the public trust by treating it as a

> "common law version of the then-novel 'hard look' doctrine for environmental impacts: on his presentation, the public trust doctrine required the collection of adequate information, public participation in decisions, informed and accountable choices, and a close scrutiny of private giveaways of environmental resources".[67]

5.5 THE MODERN PUBLIC TRUST DOCTRINE

5.5.1 Introduction

In the slightly more than five decades that have passed since Sax published his landmark article, the Public Trust Doctrine has undergone a gradual process of transformation. In terms of this process, the scope of the Doctrine has evolved to include a broader variety of natural resources; the public trust values protected by the Doctrine have expanded to address modern concerns; and the duties and responsibilities of the State as the public trustee have been elevated above its powers and rights. An important consequence of these changes is that the role of the State has shifted from one in which its "authority" over public trust resources was asserted to one in which its responsibility to protect them for present and future generations has been acknowledged and affirmed. Each aspect will be discussed in turn.

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[66] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 509.
[67] C Rose "Joseph Sax and the idea of the public trust" (1998) 25 *Ecology Law Quarterly* 351 at 355.

5.5.2 The natural resources included in the Public Trust Doctrine

As we have already seen, the scope of the traditional Public Trust Doctrine was confined to tidal and navigable waterways and the land beneath them. Since the 1970s, however, the scope of the Doctrine has expanded, and today the modern Public Trust Doctrine includes non-navigable waters and, in some States, other water-related resources. For example, in *Just v Marinette County*,[68] the Wisconsin Supreme Court held that the doctrine includes wetlands, and in *National Audubon Society v Superior Court, Alpine County*,[69] the California Supreme Court held that it includes non-navigable tributaries that affect navigable waters. In *Montana Coalition for Stream Access Inc v Curran*,[70] the Montana Supreme Court extended the doctrine to include all waters capable of recreational use and in *In re Water Use Permit Applications (Waiahole Ditch)*,[71] the Hawaii Supreme Court went even further and held that the doctrine encompasses groundwater.[72]

Apart from water-related natural resources, the Public Trust Doctrine has been extended in some States to include non-water-related natural resources such as beach access, parklands and wildlife. The first of these extensions occurred a mere two years after Sax published his article, when the New Jersey Supreme Court held, in *Borough of Neptune v Borough of Avon-By-the Sea*,[73] that the Doctrine applies to dry sand beaches owned by the State and, consequently, that members of the public were entitled to cross these beaches to gain access to the foreshore and the sea and use them for recreational purposes "such as bathing, swimming and other shore activities".[74] Just over a decade later, the same Court extended the geographic scope of the Doctrine even further when it held, in *Matthews v Bay Head Improvement Association*,[75] that the Doctrine applies, not only to public dry sand beaches, but also to privately owned dry sand beaches in certain circumstances.[76]

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[68] *Just v Marinette County* 201 N.W. 2d 761 (Wisconsin 1972).
[69] *National Audubon Society v Superior Court, Alpine County* 658 P.2d 709 (California 1983).
[70] *Montana Coalition for Stream Access Inc v Curran* 682 P.2d 163 (Montana 1984).
[71] *In re Water Use Permit Applications (Waiahole Ditch)* 9 P.3d 409 (Hawaii 2000).
[72] Hawaii has the most expansive public trust doctrine in the United States. Apart from all surface and ground water, Article XI of the Constitution of the State of Hawai'i provides that "all public natural resources are held in trust by the State for the benefit of the people".
[73] *Borough of Neptune v Borough of Avon-by-the-Sea* 294 A.2d 47 (New Jersey 1972).
[74] *Borough of Neptune v Borough of Avon-by-the-Sea* 294 A.2d 47 (New Jersey 1972) at 54-55.
[75] *Matthews v Bay Head Improvement Association* 471 A.2d 355 (New Jersey 1984).
[76] When it comes to determining which privately owned beaches are subject to the Public Trust Doctrine, the New Jersey Supreme Court held that the following factors must be taken into account and weighed together: the "location of the dry sand area in relation to the foreshore"; the "extent and availability of publicly owned beaches"; the "nature and extent of public demand"; and the "usage of the dry sand area by the owner" (at 365). Apart from tidal and navigable waters, the land beneath them and the dry-sand beaches, the New Jersey Public Trust Doctrine also applies to all other water resources in the State, including drinking surface water and ground water (see New Jersey Statutes Ann. § 58:11A-3(g) and *Mayor of Clifton v. Passaic Valley Water Commission* 557 A.2d 299 (New Jersey 1989)).

Besides public and privately-owned dry sand beaches, other non-water-related natural resources have also been recognised as public trust property. For example, in *Parsons v Walker*,[77] the Illinois Court of Appeals held that the Public Trust Doctrine applies to public parklands, and in *Complaint of Steuart Transportation Company*[78] the Federal District Court for the Eastern District of Virginia held that the Doctrine also applies to natural wildlife resources. Somewhat similarly, the Pennsylvania State Constitution provides that all public natural resources, including forests and parklands, are "the common property of all the people, including generations yet to come" and that the State must "conserve and maintain them for the benefit of all the people".[79] More recently, in *Juliana et al v United States*,[80] the Federal District Court for the District of Oregon suggested – without deciding – that the atmosphere may be classified as a public trust resource. In an important footnote, the Court said the following:

> "To be clear, today's opinion should not be taken to suggest that the atmosphere is not a public trust asset. The Institutes of Justinian included the air in the list of assets 'by natural law common to all.' J. Inst. 2.1.l (J.B. Moyle trans.). The New Jersey Supreme Court in *Arnold* similarly included air in its list of 'common property.' 6 N.J.L. at 71. Even Supreme Court case law suggests the atmosphere may properly be deemed part of the public trust *res. See United States v. Causby,* 328 U.S. 256, 261 (1946) (holding that private rights to airspace have 'no place in the modern world' because recognition of such claims would 'transfer into private ownership that to which only the public has a just claim.') … Even if the atmosphere was not always considered a public trust asset, some courts have concluded the doctrine should 'be moulded and extended to meet changing conditions and needs of the public it was created to benefit.'' *Matthews v. Bay Head Improvement Ass'n,* 471 A.2d 355, 365 (N.J. 1984) (citation and quotation marks omitted). Just last year, Judge Hollis Hill reasoned that it "misses the point" to mechanically rely on what has been identified as a public trust asset in the past because '[t]he navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that [greenhouse gas] emissions do not affect navigable waters is nonsensical.' *Foster v. Wash. Dep 't of Ecology*, No. 14-2-25295-1, slip op. at 8 (Wash. King Cnty. Super. Ct. Nov. 19, 2015). …".[81]

5.5.3 The public values protected by the Public Trust Doctrine

The public values protected by the traditional Public Trust Doctrine were confined to commercial activities such as fishing, hunting and navigation. Over the past five decades, however, the purpose of the Doctrine has evolved, and today the modern Doctrine

[77] *Parsons v Walker* 328 N.E.2d 920 (Ill. App. Ct. 1975).
[78] *Complaint of Steuart Transportation Company* 495 F.Supp 3d (1980).
[79] See Article 1, section 27 of the Constitution of the Commonwealth of Pennsylvania.
[80] *Juliana et al v United States* 217 F. Supp. 3d 1224 (District of Oregon 2016).
[81] *Juliana et al v United States* 217 F. Supp. 3d 1224 (District of Oregon 2016) at footnote 10.

encompasses other public trust values, such as recreation and environmental conservation and protection.

As we have already seen, in *Borough of Neptune City v Borough of Avon-by-the-Sea*[82] the New Jersey Supreme Court held that the Public Trust Doctrine includes the right to cross the dry sand beach in order to gain access to the foreshore and the sea and to use the dry sand beach for recreational purposes "such as bathing, swimming and other shore activities". In *Matthews v Bay Head Improvement Association,*[83] the Court held that if members of the public did not have a right to reasonable enjoyment of the dry sand area, they would not be able to exercise their right to swim in the sea:

> "The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. … The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean. This was a principal reason why in *Avon* and [*Van Ness*] we held that municipally-owned dry sand beaches "must be open to all on equal terms...." *Avon,* 61 N.J. at 308. We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner".[84]

The right to use public trust property for recreational purposes was also considered in *Glass v Goecke,*[85] where the Supreme Court of Michigan held that the Public Trust Doctrine confers a right on members of the public to walk along the shores of the Great Lakes below the high-water mark even when that part of the shore is privately owned. This is because the public's traditional public trust rights to use tidal and navigable water for fishing, hunting or navigation could be protected only if activities inherent in the exercise of those rights, such as walking along the shore to reach the water, were also protected.

Apart from expanding the Public Trust Doctrine to protect recreational values, the courts have also expanded the Doctrine to protect the environmental integrity of public trust resources. For example, in *Marks v Whitney,*[86] the California Supreme Court held that one of

[82] *Borough of Neptune City v Borough of Avon-by-the-Sea* 294 A.2d 47 (New Jersey 1972).
[83] *Matthews v Bay Head Improvement Association* 471 A.2d 355 (New Jersey 1984).
[84] *Matthews v Bay Head Improvement Association* 471 A.2d 355 (New Jersey 1984) at 325.
[85] *Glass v Goecke* 703 N.W. 2d 58 (Michigan 2005).
[86] *Marks v Whitney* 491 P.3d 374 (California 1971).

the most important goals of the Doctrine is to preserve public trust assets in their natural state, "so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area".[87] The same goal was referred to by the Supreme Court of Hawai'i in *In re Water Use Permit Applications (Waiahole Ditch)*[88] when it held that "the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust".[89] And in *Mineral County v Department of Conservation and Natural Resources*,[90] the Nevada Supreme Court held that the original objectives of the public trust have been expanded to include recreational and ecological values.

5.5.4 The duties and responsibilities of the state as the public trustee

Given that the public values protected by the Public Trust Doctrine have changed since the 1970s, it is not surprising that the duties and responsibilities imposed on a State by the Doctrine have also changed. Apart from protecting and preserving the public's right to access and use public trust assets for fishing, hunting and navigation, the modern version of the Doctrine also imposes a duty on some States to protect and preserve the environmental integrity of these assets. For example, in *Just v Marinette County*,[91] the Wisconsin Supreme Court held that the Doctrine requires that wetland areas be limited to uses consistent with "natural conditions", and in *Vander Bloemen v State Department of Natural Resources*,[92] the Wisconsin Court of Appeals held that the Doctrine includes the protection of lakeside ecology. In *Selkirk-Priest Basin Association v State*,[93] the Idaho Supreme Court also held that the Doctrine confers standing on an environmental group to challenge timber sales on the ground that sedimentation could injure fish spawning grounds.

Wood helpfully points out that the fiduciary duties and responsibilities imposed on the state as public trustee may be divided into two categories, namely those fiduciary duties that are procedural in nature and those that are substantive in nature. Those fiduciary duties that are procedural in nature include avoiding conflicts of interest, behaving impartially towards all beneficiaries, exercising good faith and reasonable skill when managing public trust resources, following a cautious approach before making management decisions, and properly supervising

[87] *Marks v Whitney* 491 P.3d 374 (California 1971) at 380.
[88] *In re Water Use Permit Applications (Waiahole Ditch)* 899 P.3d 409 (Hawaii 2000).
[89] *In re Water Use Permit Applications (Waiahole Ditch)* 899 P.3d 409 (Hawaii 2000) at 448.
[90] *Mineral County v Department of Conservation and Natural Resources* 20 P.3d 800 (Nevada 2001).
[91] *Just v Marinette County* 201 NW 2d 761 (Wis. 1972).
[92] *Vander Bloemen v State Department of Natural Resources* 551 N.W.3d 869 (Wis. Ct. App. 1996).
[93] *Selkirk-Priest Basin Association v State* 899 P.2d 949 (Idaho 1995).

agents to whom public trust powers have been delegated. Those fiduciary duties that are substantive in nature include conserving public trust resources for present and future generations, protecting public trust resources from substantial impairment, refraining from alienating public trust resources, restoring public trust resources where they have been damaged, and taking positive steps to claim damages from those who have destroyed or harmed public trust resources.[94]

5.6 THE CONTINUOUS SUPERVISORY DUTY

5.6.1 Introduction

Apart from simply conferring rights on members of the public to access and use public trust resources, in most States, the courts have held that these rights are perpetual in nature and may be claimed by present and future generations. In *National Audubon Society v Superior Court of Alpine County*[95] – which has been described as "the leading example of modern public trust litigation in the United States[96] – the Supreme Court of California held that an important consequence of the perpetual nature of public trust rights is that they impose "a continuous supervisory duty on the State to protect and preserve public trust assets". Given its status as the "leading example of public trust litigation in the United States" and the wide-ranging implications of its findings, it will be helpful to discuss this judgment in detail.

5.6.2 National Audubon Society v Superior Court of Alpine County

(a) The facts

In this case, the National Audubon Society – a non-profit organisation devoted to the conservation and protection of birds and their habitats – applied for an order prohibiting the Department of Water and Power (DWP) of the City of Los Angeles from diverting water from the Mono Lake basin on the grounds that water and the bed of the Lake were protected by the Public Trust Doctrine. The Lake is located almost due east of San Francisco and near the border with Nevada. Because it is hypersaline, the Lake contains no fish. However, it does support a large population of small brine shrimp, which are endemic to the Lake and an important source of food for millions of migratory birds following the Pacific Flyway. The

[94] M Wood and G Levitt "The public trust in environmental decision making" in L Paddock, RL Glicksman and NS Bryner (eds) *Decision Making in Environmental Law* (2016) 73 at 78.
[95] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983). This judgment is usually referred to as the "*Mono Lake"* decision.
[96] See E Ryan "From *Mono Lake* to the atmospheric trust: Navigating the public and private interests in public trust resource commons" (2019) 10 *George Washington Journal of Energy and Environmental Law* 39 at 41.

Lake receives most of its water from snow melting in the surrounding Sierra Nevada mountains. The snowmelt is carried to the western shore of the Lake by five mountain streams, namely the Mill, Lee Vining, Walker, Parker and Rush Creeks.

As a result of its burgeoning population and dry climate, the City of Los Angeles' groundwater supplies began to dry up early in the 20th century. In response to this problem, the DWP embarked on a programme of sourcing water for the City from other, wetter regions of California. In 1913, the DWP acquired the right to all of the water in the Owens River, 233 miles to the north of Los Angeles and constructed an aqueduct to convey the water to the City. Unfortunately, the demand for water in the City soon outstripped this new supply, and the DWP embarked on a process of identifying new sources of water, one of which was the Mono Basin. After doing so, the DWP acquired the rights to the water in the Lake and four of its tributaries and, in 1940, applied to the California Water Resources Board for a permit to appropriate almost the entire flow from these tributaries. After this permit was granted, the DWP extended its aqueduct system from the Owens River to the Mono Basin and diverted half of the flow allocated to it. Approximately 30 years later, in 1970, the DWP extended its aqueduct system again and began diverting the remaining half of its allocated flow.

As a result of these diversions, the amount of water in the Lake began to steadily decline. Although this decline was initially slow, it sped up markedly after the DWP began diverting the remaining half of its allocation. Ten years later, when the litigation began, the Lake had shrunk from a pre-diversion area of 85 square miles to an area of 60.3 square miles and had lost half of its entire water volume. One of the adverse consequences of the decline in the volume of water was that the Lake became much more saline. The increased salinity slowed down the reproductive rate of the brine shrimp, and their numbers started to decrease. This, in turn, threatened the millions of local and migratory birds that relied on the Lake for nourishment during their long journeys. In addition, the exposed bed of the Lake was made up of toxic alkali salts, which became airborne when the wind blew, and this contributed to increased levels of air pollution in the region, which frequently violated the Federal Clean Air Act of 1963. The Lake's recession also diminished its value from an economic, recreational and scenic perspective.

In response to these adverse environmental, economic and health consequences, the National Audubon Society, together with other interested parties, applied to the Alpine County Superior Court for an order prohibiting the DWP from diverting water from Mono Lake on the grounds that the Lake was protected by the California Public Trust Doctrine. The application was dismissed, and the National Audubon Society then appealed to the California

Supreme Court. The Court upheld the appeal primarily on the basis that the Lake was protected by the California Public Trust Doctrine and the California Water Resources Board should have taken the Doctrine into account before it decided to grant the DWP a permit to divert water from the mountain streams. Unfortunately, the Board had not done so, and, accordingly, its decision was unlawful.

(b) The judgment

In arriving at this decision, the California Supreme Court held that it had to consider three aspects of the public trust doctrine: first, the purpose of the doctrine; second, the scope of the doctrine; and, third, the powers and duties of the State as trustee of the public water.

As far as the purpose of the public trust doctrine was concerned, the California Supreme Court began by affirming that the goals of the doctrine were not fixed. Instead, they have evolved over time to give effect to changes in the public's perception of the value and uses of waterways. Although the public interest in tidal and navigable waters was traditionally limited to commerce, navigation and fishing, the Court held that this was no longer the case. In recent years, the public had come to accept that the preservation of these waterways in their natural state was one of the most important public uses to which they could be put so that they "could serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area". It followed, therefore, that the protection of Mono Lake's ecosystem fell within the purpose of the Doctrine.[97]

As far as the scope of the public trust doctrine was concerned, the California Supreme Court started by noting that it was long-established in both United States federal and Californian state law that the doctrine applied, not only to tidal waters, but also to navigable lakes and rivers. Although Mono Lake itself was navigable, the Court noted further, the four tributaries from which water was diverted by the DWP were not navigable. The key question that had to be answered, therefore, was whether the Doctrine applied to conduct that affected the non-navigable tributaries of a navigable lake or river. After carefully examining two California judgments, the Court found that the Doctrine did apply to such conduct, but only when that conduct impairs the public trust in the downstream navigable lake or river, for example, when diverting water from a non-navigable tributary causes damage to the

[97] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983) at 719.

ecological integrity of the downstream navigable lake or river.[98]

Insofar as the powers and duties of the State were concerned, the California Supreme Court began by pointing out that one of the obligations that the public trust doctrine imposes on the State is "the duty to exercise continued supervision over the trust".[99] A number of principles, the Court held, may be derived from this continuous supervisory duty. Among these are the following:

First, although the State does have the authority to grant private parties the right to take water from navigable lakes and rivers and use that water elsewhere – even where this will cause some harm to the trust resource – the State does not have the authority to make such a grant where this will cause substantial harm to the public interest in those waters. Prior to making such a grant, therefore, the State must balance the values and uses protected by the Public Trust Doctrine against the harm that will be caused by the grant. The State must also consider less harmful alternatives.[100]

Second, even though the State does have the authority to grant private parties the right to take water from navigable lakes and rivers and use that water elsewhere, it does not have the authority to abdicate its duty to protect the public interest in the water. Any such grant, therefore, must take place subject to the Public Trust Doctrine, except where the grant will improve the public interest or where the grant will not substantially impair the public interest in the remaining waters.[101]

Third, besides conferring the power on the State to grant private parties the right to take water from navigable lakes and rivers, the Public Trust Doctrine also confers a continuing power on the State as the manager and administrator of the trust, and this continuing power includes the authority to revoke previously granted rights or to enforce the trust "against lands long thought free of the trust". The State, therefore, is not bound by past allocations

> "… which may be incorrect in the light of current knowledge or inconsistent with current needs. The State accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses."[102]

[98] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983) at 720-721.
[99] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983) at 721-723.
[100] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983) at 728.
[101] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983) at 727.
[102] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983) at 728.

(c) Analysis and comment

In light of the fact that the State has the continuing power to revoke previously granted rights that adversely affect the public trust, Blumm and Schwartz argue that these rights cannot be classified as vested property rights. Instead, they should be classified as contingent or non-vested property interests. An important consequence of this classification is that when the State does revoke such a right, the rights-holder does not have a claim for compensation under the "Takings Clause" of the Constitution.[103] This is because contingent or non-vested interests are not protected by the Fifth Amendment's just compensation clause.[104]

Apart from imposing a continuous supervisory duty on the State to protect and preserve public trust resources, the judgment in *National Audubon Society v Superior Court of Alpine County* is also authority for a number of other important public trust principles, at least in California. One of these is that it extended the geographic scope of the Public Trust Doctrine to the non-navigable tributaries on which a navigable lake or other water resource relies. Another is that it extended the purpose of the Public Trust Doctrine to protect, not only commercial, fishing and navigation values, but also environmental and recreational values.

5.7 ANOTHER PERSPECTIVE

5.7.1 Introduction

In a very helpful article titled "Public property and the democratization of Western water law", Blumm argues that the best way to understand the modern Public Trust Doctrine is not by examining the resources to which it applies, or the uses which it protects, or the duties and responsibilities it imposes on a State. Instead, the best way to understand the modern Public Trust Doctrine is by focusing on the remedies it prescribes. An analysis of recent case law, he argues further, reveals that there are at least four different types of public trust remedies:

> "(1) a public easement guaranteeing access to trust resources; (2) a restrictive servitude insulating public regulations of private activities against constitutional takings claims; (3) a rule of statutory and constitutional construction disfavoring termination of the trust; and (4) a requirement of reasoned administrative decision making".[105]

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[103] The "Takings Clause" may be found in the Fifth Amendment to the US Constitution. It provides that private property may not "be taken for public use, without just compensation".

[104] MC Blumm and T Schwartz "Mono Lake and the evolving public trust in Western water" (1995) 37 *Arizona Law Review* 701 at 709.

[105] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 578.

Although these remedies vary widely, Blumm asserts that they possess a unifying theme of promoting public access "both to the resources impressed with the public trust as well as to decision-makers with the power to allocate these resources among competing users".[106] By facilitating increased public access to legislative and administrative decision-making processes, the public trust also serves as a democratising force.[107] Given that the first two remedies have been discussed or at least referred to above, this section will focus on the last two. Each will be discussed in turn.

5.7.2 The Public Trust Doctrine as a principle of interpretation

Insofar as this remedy is concerned, Blumm argues that one of the ways in which the modern Public Trust Doctrine's presumption in favour of public ownership and control of trust resources manifests itself is as a rule of constitutional and statutory interpretation. This rule of interpretation provides that constitutional and statutory provisions that abolish public trust restrictions must be interpreted narrowly.[108]

This narrow approach, Blumm argues further, provides that the transfer of ownership of trust resources may take place only in terms of plain and clear statutory provisions and not by implication. Even where statutory provisions are clear and plain, they must be interpreted strictly to preserve as much of the public trust as possible. The courts must also closely examine the veracity of legislative declarations that a statute is intended to serve the public trust.[109]

Underlying this narrow approach is the assumption that the legislature intends to preserve the public trust rather than relinquish it and that any attempt to free public trust resources from trust restrictions must be regarded as exceptional and treated as such.[110]

5.7.3 The Public Trust Doctrine as a standard of administrative review

Insofar as this remedy is concerned, Blumm argues that given the modern Public Trust

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[106] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 578.
[107] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 578.
[108] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 587.
[109] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 588.
[110] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 589.

Doctrine's broad application and vague substantive content, it is not surprising that the courts have turned to administrative law principles to protect the public trust and remedy public trust violations.[111] Instead of reviewing decisions that affect the public trust for rationality – which is the lowest level of scrutiny in United States administrative law, the courts have held that the Doctrine requires them to take a "hard look" at these kinds of administrative decisions.

In terms of the "hard look doctrine", the courts impose an obligation on decision-makers to:

(a) "provide detailed explanations for their decisions";
(b) "justify departures from previous decisions";
(c) "promote effective public participation in the decision-making process"; and
(d) "consider alternatives to the proposed action".[112]

Hard look review, Blumm explains, has also required decision-makers to adopt inclusive procedures encompassing a diverse range of ideas and people and prepare written records explaining why the agency's decision is reasonable in light of the relevant facts, policies and public comments. The outcome has been a judicial emphasis on fair procedures and "reasoned decision-making from administrators, rather than particular substantive results".[113]

Although hard look review may result in the courts avoiding the substantive content of public trust decisions made by administrators, it has the benefit of upholding the separation of powers between the executive and the judiciary. It also has the benefit of providing administrators with robust and strict standards that they can utilise to protect public trust resources outside of the judicial process.[114]

5.7.4 The Public Trust Doctrine as a democratising force

As stated above, Blumm asserts that these remedies facilitate increased public access to legislative and administrative decision-makers who have the power to allocate these

[111] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 590.
[112] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 589.
[113] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 590.
[114] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 592-593.

resources among competing users.[115] By doing so, he asserts further, the modern Public Trust Doctrine serves as "a democratizing influence, fostering pluralistic administrative processes and demanding legislative clarity". As the types of natural resources and the geographic scope of the Doctrine expand and disputes over the manner in which trust resources should be used, Blumm argues, the hard look standard of review will play a particularly important role in democratising public access to decision-makers.[116] It may be impossible, he writes,

> "to arrive at a substantive definition of how to resolve conflicts between trust uses, but the 'hard look' doctrine offers a procedural remedy. By insisting that administrators involve the public in their decision-making and justify in contemporaneous written records their decisions in terms of their trust responsibilities, the courts help to democratize the administrative process. The public trust doctrine, in short, encourages state courts to enter into a partnership with administrators …. The chief product of this relationship between these two undemocratic institutions is … to enhance prospects for democratic decision making".[117]

5.8 CONCLUSION

The Roman and English law origins of the US Public Trust Doctrine were discussed in this chapter. Following this discussion, the traditional approach to the Doctrine was investigated through a detailed exploration of the judgments in *Arnold v Mundy*, *Martin v Waddell's Lessee*, *Illinois Central Railroad Co v Illinois* and *Shively v Bowly*. Joseph Sax's arguments in favour of a broader and environmentally focused doctrine were then reviewed, and this review was followed by a discussion of the manner in which the Doctrine has gradually evolved and expanded over the past five decades, particularly with respect to the natural resources included in the doctrine, the public trust values protected by the Doctrine and the fiduciary duties and responsibilities imposed on the State by the Doctrine.

Although the US Public Trust Doctrine has undergone significant changes since the 1970s, the classification and legal status of public trust resources have remained constant. Ownership of public trust resources is vested in the State as the public trustee, while the right to access, use and enjoy those resources is vested in the general public as the beneficiaries. The Doctrine has thus retained a bifurcated concept of public ownership. While legal title is vested in the State, beneficial title is vested in the general public.

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[115] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 578.
[116] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 595.
[117] MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 596.

Unlike the classification and legal status of public trust resources, the natural resources included in, and the values protected by, the US Public Trust Doctrine have undergone a process of transformation over the past five decades. The scope has evolved to include, not only tidal and navigable waters and the land beneath them, but also non-navigable waters and other non-water related resources, for example, dry sand beaches, parklands and wildlife. At the same time, values protected by the Doctrine have expanded to include ecological, recreational and scenic values.

The significant changes in the resource base and values protected by the US Public Trust Doctrine have been accompanied by an equally significant change in the role of the State as the public trustee over the same period of time. Instead of concentrating on the State's discretionary authority over public trust resources, the modern Doctrine emphasises the State's duties and responsibilities. Although these duties and responsibilities encompass a wide range of fiduciary obligations, among the most important of which is to preserve the public resource so that it can sustain both present and future generations of beneficiaries.

As Sax himself argued, in order to address the danger of special interest groups capturing environmental and other administrative agencies that were supposed to be regulating them, the Public Trust Doctrine should also be conceptualised as a standard of administrative review, ideally along the lines of "hard look" review. In terms of this standard of review, administrative decision-makers are required to provide detailed explanations for their decisions, justify departures from previous decisions, promote effective public participation in the decision-making process"; and consider alternatives to the proposed action.

The public trust provisions of sections 11 and 12 of the NEM: ICMA (the "coastal public trust concept") will be explored in the next chapter. This exploration will be situated within the context of a discussion of the manner in which public trust provisions of section 3 of the National Water Act[118] (the "water resources public trust concept") have been interpreted and applied by the courts and water resources public trust scholars.

[118] 36 of 1998.

CHAPTER SIX

THE SOUTH AFRICAN COASTAL PUBLIC TRUST CONCEPT

6.1 INTRODUCTION

The purpose of this chapter is to critically analyse the public trust provisions of sections 11 and 12 of the National Environmental Management: Integrated Coastal Management Act (NEM: ICMA).[1] This analysis is based on and engages with the approach adopted by South African water resources public trust scholars to the public trust provisions in section 3 of the National Water Act (NWA).[2] Relying on the United States (US) Public Trust Doctrine as a persuasive source of law, public trust scholars have analysed various aspects of the water resources public trust concept, including the classification and legal status of water resources, the identity and nature of the public trustee, the identity and nature of the trust beneficiaries, and the fiduciary obligations the water resources public trust imposes on the state as the trustee. Focusing only on the first and last aspects (i.e. the classification and legal status of water resources and the fiduciary obligations imposed on the state as the public trustee of water resources), this chapter responds to the approach adopted by the water resource public trust scholars towards each aspect and proposes alternative ways of analysing them. These alternative ways are then applied to the coastal public trust concept.

This Chapter is divided into five sections. Apart from the introduction in section 6.1, an overview of the water resources public trust scholarship is set out in section 6.2. This overview is followed by a discussion of the classification and legal status of water resources in South Africa in section 6.3. The classification and legal status of coastal public property is analysed in light of the findings in this section. This analysis of the water resources public trust is followed by a discussion of the duties and responsibilities that the water resources public trust imposes on the state as the public trustee in section 6.4. The duties and responsibilities that the coastal public trust imposes on the state as the public trustee are analysed in light of the findings in this section. The conclusions that may be drawn from

[1] 24 of 2008.
[2] 36 of 1998.

these critical analyses are set out in section 6.5.

6.2 BACKGROUND

As the public trust provisions set out in the NWA, National Environmental Management Act (NEMA),[3] National Environmental Management: Protected Areas Act (NEM: PAA),[4] National Environmental Management: Biodiversity Act (NEM: BA),[5] NEM: ICMA and the National Forests Act (NFA)[6] reveal, Parliament has enthusiastically embraced the public trust concept when it comes to the conservation, protection, management and use of certain natural resources. Unfortunately, the enthusiasm that Parliament has shown towards the public trust concept has not been matched by litigants or the courts. As Van der Schyff notes:

> "Also, whilst South African courts have referred to 'the state fulfilling its role as custodian holding the environment in public trust for the people', there has been no attempt in reported cases to give a thorough exposition of the notion".[7]

Somewhat similarly, Viljoen points out that:

> "Although South African courts have briefly referred to 'the State fulfilling its role as custodian holding the environment in public trust for the people' … there has been no attempt in reported case law to provide a thorough exposition of the meaning and impact of the concept of public trusteeship that may guide the property lawyers towards certainty".[8]

And, most recently, Harding has observed that:

> "in South Africa, the public trust is now an explicit, legislatively expressed and indeed emancipatory foundation of the NWA – but has yet, despite these strong credentials, to receive any measure of juridical interpretation and development".[9]

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[3] 107 of 1998. See section 2(4)(o).
[4] 57 of 2003. See section 3.
[5] 10 of 2004. See section 3.
[6] 84 of 1998. See section 2A.
[7] E van der Schyff "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 13 *PER/PELJ* 122 at 124.
[8] G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities presented by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193 at 195.
[9] WR Harding *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022) at 152. In his doctoral thesis, Blackmore states that

> "the [PTD] has been explicitly included in South Africa's Constitution and environmental legislation. Despite its existence there for over 20 years, it has enjoyed little prominence in academic discourses and judgments taken by the judiciary. The rapid loss of biodiversity at a species and habitat level,

Although Van der Schyff, Viljoen and Harding are correct when they state that the water resources and other public trust concepts have been disregarded by litigants and the courts, the same accusation cannot be levelled against the academy. On the contrary, the public trust concept has been the focus of a number of scholarly studies. Some of these have taken the form of book chapters and journal articles, while others have taken the form of doctoral and master's theses. This scholarship has focused mostly on water resources, but more recently has expanded to include biodiversity.

Among the water resources public trust scholars are Elmarie van der Schyff, Cheri-Leigh Young, Germarié Viljoen, and William Harding. As pointed out above, these scholars have explored various aspects of the water resources public trust, including the classification and legal status of water resources, the identity and nature of the public trustee, the identity and nature of the trust beneficiaries, and the fiduciary obligations the water resources public trust imposes on the state as the trustee. For the purposes of this chapter, however, we are going to focus only on the first and last aspects, starting with the first.

Before turning to consider the scholarship on the classification and legal status of water resources, it will be helpful to set out and briefly compare the provisions of section 3(1) of the NWA and sections 11 and 12 of the NEM: ICMA.

Section 3(1) of the NWA declares that:

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

Section 11 of the NEM: ICMA provides that:

> "(1) The ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the state on behalf of the citizens of the Republic.
> (2) Coastal public property is inalienable and cannot be sold, attached or acquired by prescription and rights over it cannot be acquired by prescription".

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highlights the need to rediscover the doctrine as a means of enabling both the government and the public to bring added protection to the country's natural heritage"
(see AC Blackmore *The Rediscovery of the Trusteeship Doctrine in South African Environmental Law and its Significance in Conserving Biodiversity in South Africa*. (PhD Thesis, University of Tilburg, 2018) at 283).

And, section 12 of the NEM: ICMA states that:

"The state, in its capacity as the public trustee of all coastal public property, must:

(a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and

(b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations".

Although the provisions of section 3(1) of the NWA overlap with those of sections 11 and 12 of the NEM: ICMA in certain important respects, they differ in others. For the purposes of this chapter, the most notable difference is that section 3(1) of the NWA does not explicitly regulate the classification and legal status of water resources. Instead, it simply regulates the power to manage and administer, as well as to conserve, protect and enhance water resources.

Unlike sections 11 and 12 of the NEM: ICMA, therefore, an explicit distinction cannot be drawn between the ownership and public trust provisions of section 3(1). Unfortunately, the failure to explicitly regulate the ownership of water resources has introduced an element of uncertainty into the water resources public trust and engendered a great deal of discussion and debate among water resources public trust scholars, as the discussion set out below illustrates.

Apart from the failure to explicitly regulate the ownership of water resources, other notable differences include the fact that section 3(1) of the NWA refers to the "national government" and "water resources", while sections 11 and 12 of the NEM: ICMA refer to the "state" and "coastal public property".

When it comes to overlaps, the most significant of these is that section 3 of the NWA and section 12 of the NEM: ICMA describe the national government/state's public trust obligations in almost identical terms, namely to ensure that water/coastal public property is protected, used, managed and conserved for the "benefit of all people" (s 3(1)) or in the "interests of the whole community" (s 12(a)).

6.3 THE CLASSIFICATION AND LEGAL STATUS OF WATER RESOURCES

6.3.1 Introduction

Given that it applies to all water resources, it is clear that the NWA has abolished the distinction between private water and public water that characterised its predecessor, the Water Act.[10]

[10] 54 of 1956. The distinction between private and public water is usually traced back to the Irrigation and Water Conservation Act 8 of 1912 and was retained in the Water Act. Private was defined in section 1(xiii) of the Act as "water which rises or falls naturally on any land or naturally drains or is lead onto one or more pieces of land

Although the preamble to the NWA states that "water is a natural resource that belongs to all people", none of the other provisions of the Act deal explicitly with the classification and legal status of water resources. Given this fact, it is not surprising that water resource public trust scholars have devoted a considerable amount of attention to this issue. Elmarie van der Schyff, Germarié Viljoen and William Harding all argued that the public trust provisions of the NWA have created a new statutory concept of public ownership in water.

6.3.2 Elmarie van der Schyff

Insofar as the ownership or legal title in water resources is concerned,[11] Van der Schyff's position has changed over time. In a 2007 co-authored article titled "The reform of water rights in South Africa", she and Pienaar argued that in order to achieve the objects of the NWA, Parliament has abolished the distinction drawn between private water and public water by the previous dispensation and replaced it with a regime that classifies water as a natural resource that belongs to all the people of the country. Authority for this regime change, they argued further, can be found in the preamble to the NWA, which expressly stated that "water is a natural resource that belongs to all people", and in section 3 of the NWA. The public trust provisions in section 3 serve as authority for this argument, they asserted, because section 3 incorporated the US Public Trust Doctrine into South African law and, in terms of the US Public Trust Doctrine, ownership of public trust resources is vested in the state as the public trustee.[12]

In another co-authored article published the following year, Van der Schyff and Viljoen retreated from Van der Schyff and Pienaar's previous position and argued that section 3 of the NWA has not simply incorporated the US Public Trust Doctrine into South African law.[13]

…". Public water was defined in section 1(xv) as "any water flowing or found in or derived from the bed of a public stream, whether visible or not".

[11] Given the very close link that exists between the term "ownership" and the concept of private ownership in South African property law, Van der Schyff and Viljoen argue that the use of the term "ownership" should be avoided when dealing with property falling under the public trust doctrine. Instead of "ownership", it would be wiser to use the term "legal title" (see E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern* Africa 339 at 343).

[12] CJ Pienaar and E van der Schyff "The reform of water rights in South Africa" (2007) 3 *Law and Environment and Development Journal* 181 at 183. Apart from Van der Schyff and Pienaar, other scholars have also argued that section 3 of the NWA has incorporated the US Public Trust Doctrine into South African water law (see J Glazewski *Environmental Law in South Africa* 2ed (2005) at 17; D Takacs "The public trust doctrine, environmental human rights, and the future of private property" (2008) 15 *New York University Environmental Law Journal* 711; and MC Blumm and R Guthrie "Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision" (2012) 44 *University of California Davis Law Review* 791).

[13] In an article published in 2010, Van der Schyff argues, correctly, that it would be "much too simplistic" to equate [the water resources public trusteeship] as it is found in South African legislation with the embodiment of either a philosophical idea or a complicated foreign legal doctrine", like the US Public Trust Doctrine (see E van

Instead, it has introduced a novel, albeit "foreign", statutory concept into South African water law, which is similar to the existing US Public Trust Doctrine but not exactly the same and which will develop its own unique characteristics over the course of time.[14] One of the key features that public trust provisions in section 3 of the NWA share with the US Public Trust Doctrine, they argued further, is that it separates the *dominium* in water resources from the use and enjoyment of those resources and vests legal title in all water resources as a form of public property in the state.[15] An important consequence of this development is that water resources have been "removed from the sphere of private property and deposited squarely into the realm of public property".[16]

It is important to note, however, Van der Schyff and Viljoen asserted, that this legal title is not the same as private ownership. Instead, the state holds this title in a "purely fiduciary capacity".[17] The legal title that has been vested in the state as the public trustee, therefore, is limited and burdened with the duties and responsibilities imposed by the NWA itself, especially by its objects and purpose. Accordingly, any state conduct that conflicts with the objects and purpose of the NWA will be *ultra vires*.[18] At the same time, the right to use and enjoy water resources has been vested in the public as a collective entity. Like the legal title vested in the state, the public's right to use and enjoy water resources is also limited and burdened with the duties and responsibilities imposed by the NWA.[19]

Following the judgment of the Supreme Court of Appeal in *Minister of Minerals and Energy v Agri South Africa*,[20] however, Van der Schyff appears to have adopted a more

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der Schyff "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 13 *PER/*PELJ 122 at 124).

[14] E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern Africa* 339 at 342.

[15] E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern Africa* 339 at 344.

[16] E van der Schyff "South African natural Resources, Property Rights, and Public Trusteeship – Transformation in Progress" in D Grinlinton and P Taylor (eds) *Property Rights and Sustainability* (2011) 323 at 331.

[17] E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern Africa* 339 at 344.

[18] E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern Africa* 339 at 345. See also E van der Schyff "South African natural resources, property rights, and public trusteeship – Transformation in progress" in D Grinlinton and P Taylor (eds) *Property Rights and Sustainability* (2011) 323 at 331.

[19] E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern Africa* 339 at 347.

[20] 2012 (5) SA 1 (SCA). Like the NWA, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) declares in its preamble that South Africa's mineral and petroleum resources belong to the nation and provides in the preamble and section 3(1) that the state is the custodian of these resources for the benefit of all South Africans. Despite the express inclusion of these statements in the MPRDA, the Supreme Court of Appeal held that it was unnecessary to determine whether elements of the US Public Trust Doctrine had been incorporated in the MPRDA. This is because the statement that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian of these resources simply confirmed in non-technical

cautious and nuanced approach to the ownership of, or legal title in, water and other public trust resources such as mineral resources, protected areas, biodiversity and coastal public property. Instead of arguing that legal title in these other public trust resources vests in the state as public trustee, in a 2013 article titled "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?",[21] she argued that the property rights consequences for each of these other public trust resources depend largely on the provisions of the specific statute that governs the resource in question. For example, it might be found that the common law principles have been retained, or that they have been codified or reaffirmed in the statute, or that they have been developed and extended by the statute, or that a novel statutory form of public property has been created or that there has been an institutional regime change in terms of which the resource is governed, not by private law, but rather by public law.[22]

A number of key points emerge from Van der Schyff's scholarship. Among these are the following:

(i) First, section 3 of the NWA has introduced a new concept into South African water law, namely the water resources public trust.

(ii) Second, although this new concept has not simply incorporated the US Public Trust Doctrine into South African water law, it shares many features with that Doctrine.

(iii) Third, given that they share many features, the US Public Trust Doctrine serves as a persuasive source of law for the water resources public trust. It can "assist in defining the concept of public trusteeship".[23]

(iv) Fourth, an important feature that the water resources public trust shares with the US Public Trust Doctrine is that the use and enjoyment of water resources is separated from the legal title, which is vested in the state.

(v) Fifth, the legal title that is vested in the state is not the same as the common law concept of public ownership with respect to public things (*res publicae*). Instead, it is a statutory concept of public ownership that is fiduciary in nature.[24] This statutory form of public

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language that the right to mine vests in the state. There was also nothing, the Court held further, to be gained from analysing and classifying these statements in terms of the common law concept of ownership (at para 86).

[21] E van der Schyff "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" (2013) 130 *SALJ* 369.

[22] E van der Schyff "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" (2013) 130 *SALJ* 369 at 387.

[23] E van der Schyff "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" (2013) 130 *SALJ* 369 at 375.

[24] E van der Schyff "South African natural resources, property rights, and public trusteeship – Transformation in progress" in D Grinlinton and P Taylor (eds) *Property Rights and Sustainability* (2011) 323 at 326, footnote 24.

ownership does not necessarily apply to other public trust resources. The property law regime that applies to other public trust resources depends on the provisions of the specific statute that applies to each public trust resource.

6.3.3 Germarié Viljoen and William Harding

(a) Introduction

Unlike Van der Schyff, Viljoen and Harding are more sceptical about the role that the US Public Trust Doctrine should play in South African water law and especially the role that it should play in defining the scope and content of the water resources public trust. While they both accept that the water resources public trust concept does share some features with the US Public Trust Doctrine, they reject the argument made by some scholars that the US Public Trust Doctrine has simply been incorporated into the water resources public trust by section 3 of the NWA. In addition, they attach less weight to the US Public Trust Doctrine as a persuasive source of the water resources public trust than Van der Schyff does. In her scholarly work, Viljoen has identified the German property law concept of *öffentlichte Sache* as an alternative and potentially more helpful persuasive source of South African water law, while Harding has traced the origin of the water resources public trust to the *Report of the Presidential Commission of Enquiry into South African Water Matters* (1970).

(b) Germarié Viljoen

In a 2017 article titled "South Africa's water crisis: The idea of property as both a cause and solution",[25] Viljoen argued that while valuable lessons may be learned from the US Public Trust Doctrine, it is very unlikely that this Doctrine has simply been incorporated into South African water law by section 3 of the NWA. The assumption made by some scholars[26] that this is what happened when the NWA was passed may be criticised on two grounds. First, unlike Roman-Dutch law, United States law is not recognised as an authoritative source of South African law. Classifying the US Public Trust Doctrine as the source of the water resources public trust, therefore, conflicts with the basic principles of South African law. Second, it is difficult to say what exactly the US Public Trust Doctrine means and, accordingly, which

[25] G Viloen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176.

[26] See J Glazewski *Environmental Law in South Africa* 2ed (2005) at 17; D Takacs "The public trust doctrine, environmental human rights, and the future of private property" (2008) 15 *New York University Environmental Law Journal* 711; and MC Blumm and R Guthrie "Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision" (2012) 44 *University of California Davis Law Review* 791.

public trust principles should be applied in South Africa. This is because there is not a single US Public Trust Doctrine that spans the entire nation. Instead, each individual State has its own public trust doctrine, with its own unique characteristics.[27]

In light of these points, Viljoen argued further that it would be wrong to accept that the South African concept of public trusteeship is simply a "copy" or "replica" of the US Public Trust Doctrine. Instead, the South African concept is a "domestic product of statutory origin, resulting from South Africa's own legal development". Section 3 of the NWA, therefore, has not simply incorporated the US Public Trust Doctrine into South African water law and neither has it "reaffirmed" the Roman-Dutch legal principles governing common things (*res communes*) and public things (*res publicae*). As the *White Paper on a National Policy for South Africa* (1997) makes clear, section 3 of the NWA was "intended to create a doctrine of public trust that is designed to fit the specific circumstances of South Africa".[28]

Although she rejects the US Public Trust Doctrine as an authoritative source of the South African water resources public trust, Viljoen was willing to recognise it as a persuasive source.[29] Accordingly, it is not surprising that she accepted that section 3 of the NWA vests legal title in South Africa's water resources in the national government as the public trustee. An important consequence of this development, she argued, is that the legal framework regulating water has changed. Instead of linking access to water to land ownership and distinguishing between private and public water – as was the case during the apartheid era – the NWA applies to "all water" in South Africa and classifies it as "water that belongs to the people", or, to put it another way, as public property.[30]

Even though section 3 of the NWA has reclassified all water in South Africa as public property, Viljoen argued further, it is important to note that this classification is not the same as the common law concept of *res publicae*. Instead, it is a novel statutory concept of public

[27] G Viljoen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 190-191; G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" 2019 *VRU-WCL* 172 at 175; and G Viljoen "Critical perspectives on South Africa's groundwater law: Established practice and the novel concept of public trusteeship" (2020) 38 *Journal of Energy and Natural Resources Law* 391 at 403.
[28] G Viljoen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 191.
[29] G Viljoen "Critical perspectives on South Africa's groundwater law: Established practice and the novel concept of public trusteeship" (2020) 38 *Journal of Energy and Natural Resources Law* 391 at 402 and G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" 2019 *VRU-WCL* 172 at 175.
[30] G Viljoen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 195-196. See also G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities presented by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193 at 197 and 204.

property that differs from the common law concept in certain respects. Perhaps the most important of these differences is that the statutory concept imposes fiduciary responsibilities on the national government as the public trustee that the common law does not. In terms of these fiduciary responsibilities, the national government is required to exercise its statutory powers in a manner that conserves and protects water resources for current and future generations.[31]

Despite arguing that section 3 of the NWA vests legal title to South Africa's water resources in the national government as the public trustee and thus reclassifies all water resources as statutory public property, in a 2019 article titled "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'," Viljoen has argued that if section 3 is interpreted in light of the German property concept of *öffentlichte Sache*, rather than the US Public Trust Doctrine, a radically different understanding of the water resources public trust may be developed.

German law, Viljoen explained, recognises different forms of public property, one of which is *öffentlichte Sache* or "public property proper".[33] This form of property encompasses those privately owned things that permanently serve the common good, the public administration or the public interest and, therefore, have been dedicated to the public via a special administrative decision known as a *Widmung*. A *Widmung* may be issued in terms of legislation, an administrative act or custom. Apart from dedicating the thing in question to the public, the *Widmung* also determines the "content and the extent of the [thing's] public beneficial function".[34]

Once a *Widmung* has been made, the owner's or holder's right to use and enjoy that thing is restricted by the public beneficial function it has been dedicated to fulfilling. These restrictions are attached to the thing itself and not to the owner or holder of the thing. This means that the restrictions run with the thing and bind future owners or holders. These restrictions are referred to as an *öffentlichte Dienstbarkeit* (public servitude). An important

[31] G Viloen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 195-196. See also G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities presented by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193 at 204. Apart from distinguishing the statutory concept of public property from the common law concept of public property, the fiduciary responsibilities of the state also distinguish the statutory concept of public property from the common law concept of private property

[32] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172.

[33] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 182.

[34] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 184.

consequence of dedicating a thing as an *öffentlichte Sache* is that the owner's rights are replaced with the state's power to control and manage the thing.[35]

Although the state acquires the power to manage *öffentlichte Sache*, it does not acquire ownership of that thing in the private law sense. Instead, the state acquires the power to manage the *öffentlichte Sache* on behalf of the nation as the *öffentlichte Sachherr.* As the *öffentlichte Sachherr,* the state is obliged to "ensure that the *öffentlichte Sache* is used, protected, conserved, managed and controlled" in a manner that serves the public interest.[36] The concept of *öffentlichte Sache*, therefore, "supplants the traditional rights of private property holders to use and dispose of their property, and vests control of property in the state".[37]

Despite the fact that it does not expressly refer to the concept of *öffentlichte Sache,* Viljoen explained that all water resources in Germany were dedicated as "public property proper" when the Federal Water Law (*Wasserhaushaltsgesetz* ("WHG")) was passed in 1957. An important consequence of this dedication is that the state is not regarded as the owner of the country's water resources, but rather as the *öffentlichte Sachherr* or manager of those resources on behalf of the nation. As such, the state is required 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".[38]

If section 3 of the NWA is interpreted in light of the German concept of *öffentlichte Sache,* Viljoen argued, it may be said that all of the country's water resources have been removed from the sphere of private ownership and vested in the state, not as a private or public owner whose powers and responsibilities are governed by private law, but rather as the manager of those resources whose powers and responsibilities are governed by public law. As the manager, the state is under a fiduciary duty to conserve, protect, develop, use, control and manage water resources in a sustainable manner for the benefit of all of the citizens of the Republic. More specifically, the state is under a fiduciary duty to promote equitable access to water, redress the results of past racial and gender discrimination and promote the efficient, sustainable and beneficial use of water in the interest of current and future generations.[39]

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[35] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 184.
[36] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at184.
[37] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 189.
[38] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 193.
[39] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 190.

(c) William Harding

Like Viljoen, Harding rejects the argument that the US Public Trust Doctrine has simply been incorporated into South African law, but agrees that it can be referred to as a persuasive source of law when it comes to interpreting the scope and content of the water resources public trust, especially in light of the history of the drafting of the NWA.[40] A detailed investigation of the drafting history, he argued in his 2022 doctoral thesis titled *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA*, clearly shows that the US Public Trust Doctrine played a significant role in the debates and discussions leading up to the adoption of the NWA and strongly influenced the decision to include section 3 in the Act.

The significant role that the US Public Trust Doctrine played in the drafting process, Harding argued further, is demonstrated by three key events:

- First, the members of the Water Review Strategy Team visited the United States on a fact-finding mission soon after being appointed in 1996 and were exposed to the US Public Trust Doctrine;
- Second, Professor Heinz Klug, a constitutional law scholar at the University of Wisconsin, published a position paper also in 1996 in which he outlined the role that the US Public Trust Doctrine could play in South African water law; and
- Third, Professor Joseph Sax was invited by Professor Kader Asmal, the Minister of Water Affairs and Forestry in the first democratic government, to participate in a Consultative Conference in 1997. Following this Conference, Sax continued to engage with the Water Review Strategy Team until the NWA was passed by Parliament.[41]

The impact that these events had on Professor Asmal's determination to include the public trust concept in the NWA, Harding goes on to argue, was revealed in a lecture he delivered in Washington, DC, in 1998. In this lecture, Asmal stated that "it is South Africa's intention to revive the lost role of government as public trustee of South Africa's water resources … a concept that acknowledges that water is an inherently public resource". The revival of the public trust, he stated further, "is linked to the more general constitutional goals of water law

[40] WR Harding *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022) at 152 and 161.
[41] WR Harding *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022) at 159-160.

reform [which] is an integral part of vindicating our Constitution". The inclusion of the public trust in the NWA, Asmal went on to state, "is a modest kind of legal renewal, a rebirth and expansion of the longstanding principles that were ignored in the previous political system to the detriment of people and the environment alike".[42]

Apart from accepting that the US Public Trust Doctrine is a persuasive source of law when it comes to interpreting the South African water resources public trust, Harding also traces the origins of the principles underlying the water resources public trust to the *Report of the Presidential Commission of Enquiry into South African Water Matters* (1970) and, in particular, Chapter 27 of the Report that dealt with the "Administration of Water Affairs". The purpose of this commission of enquiry was to "report upon and to submit recommendations on all aspects of water provision and utilisation with the Republic … with special reference to … available and potential water supplies and their systematic development … the future water requirements of the whole country in order to ensure balanced development and growth of the national economy …" and the "compilation of a broad, long-term national master plan for the coordinated development and conservation of and control over water resources …".[43] However, for the purposes of this thesis, it is not necessary to consider this Report in any detail.

6.3.4 Analysis and comment

As the discussion set out above illustrates, when it comes to the legal status of water resources in South Africa today, there is little disagreement among water resource public trust scholars. Instead, there is general agreement that:

(i) the distinction drawn between private and public water has been abolished, and all water resources are now classified as public property;

(ii) ownership of, or legal title in, water resources is vested in the state as the public trustee acting through the national government;

(iii) this legal title is not the same as the common law concept of public ownership with respect to *res publicae*, but is rather a statutory form of public ownership; and

(iv) this novel statutory form of public ownership imposes fiduciary duties on the state as the public trustee.

[42] WR Harding *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022) at 165.
[43] WR Harding *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022) at 155, footnote 544.

Perhaps unexpectedly, the argument set out in point (c) above, namely that the legal title vested in the state as public trustee is not the same as the common law concept of public ownership with respect to *res publicae*, but rather a new statutory form of public ownership was rejected by the Supreme Court of Appeal in its judgment in *Mostert and Another v S*.[44] Given the implication of this judgment, it is not surprising that it has been severely criticised by, *inter alia*, Van der Schyff, Young and Viljoen. Before considering these criticisms, it will be helpful to set out the facts and the reasoning of the Court.

6.3.5 Mostert v S 2010 (2) SA 586 (SCA)

(a) The facts

The facts of this case were as follows. The appellants were a father and son who owned a farm adjacent to the Lomati River in Mpumalanga Province. They grew sugar cane on the farm and drew water from the Lomati River to irrigate their land. The farm was included in the Lomati Irrigation District, which was established in terms of the pre-1994 apartheid-era Water Act.[45] This Irrigation District fell under the authority of the Lomati Irrigation Board, which was also established in terms of the Water Act.

The Board exercised control over the water in the Lomati River and regulated the amount of water farmers were entitled to draw from the River. To monitor the quantity of water being drawn from the River, farmers were required to register their pump stations with the Board and fit them with a water flow monitoring system. Each farmer was also required to read the meter on a periodical basis and then report the amount of water drawn from the River to the Board. These readings were verified from time to time by officials from the Board.

Although the appellants had registered a single pump station with the Board, it was subsequently discovered that they had built a second pump station on the farm which was not registered and which was not fitted with a water flow monitoring system. In addition, it was also discovered that the water flow monitoring system fitted to the registered pump station had been interfered with and the pumps could be operated without recording the amount of water being withdrawn from the Lomati River.

Following these discoveries, the appellants were charged in the Magistrates' Court with seven different offences. Five of these were statutory offences in terms of the NWA, and two were common law offences, namely fraud and theft. The charge of fraud was based on the false

[44] 2010 (2) SA 586 (SCA).
[45] 54 of 1956.

readings the appellants had submitted to the Board in respect of the registered pump, and the charge of theft was based on the water they had drawn from the Lomati River using the unregistered pump. The first appellant was found guilty on all of the charges, and the second appellant on all of the charges except one statutory charge. They were both sentenced to pay a substantial fine or undergo a period of imprisonment.

After they were sentenced, the appellants appealed to the Pretoria High Court. The High Court set aside all but two of their convictions and reduced their sentences on the two remaining convictions. Among the convictions set aside by the High Court were the convictions on the common law offences of fraud and theft. The appellants then appealed against their two remaining convictions and sentences to the Supreme Court of Appeal. At the same time, the state applied for and was granted leave to cross-appeal on a point of law against the High Court's decision to dismiss the charges of common law fraud and theft.

(b) The judgment

The Supreme Court of Appeal (per Leach AJA; Navsa, Mthiyane, Heher JJA and Griesel AJA concurring) dismissed the appeal against the two remaining convictions and the cross-appeal against the charge of theft, but upheld the cross-appeal against the charge of fraud. For the purposes of this thesis, it is not necessary to discuss the appeal against the two remaining convictions or the cross-appeal against the charge of fraud. This is because the Court was able to dispose of these appeals without having to consider the legal status of water. Insofar as the charge of theft was concerned, however, it was necessary for the Court to consider the legal status of water because the common law principles governing the crime of theft provide that a thing can be stolen only if it is capable of being owned.

In this respect, the Supreme Court of Appeal held that Roman law distinguished between things that were included in property and thus capable of being privately owned (*res in nostro patrimonio*) and things that were excluded from property and thus incapable of being privately owned (*res extra nostrum patrimonium*). Things that were incapable of being owned included those things that were classified as *res communes*, and this category of things included "public water running in a river or a stream". These Roman law principles, the Court held further, were adopted in Roman-Dutch law and later received into South African common law. It followed, therefore, that water running in a public river or stream could not be stolen. The Court itself put these points as follows:

> "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".[46]

Although it accepted that the principles set out above correctly reflected the common law, the Supreme Court of Appeal explained, the state argued that the common law classification of water running in a public river had been fundamentally changed by section 3 of the NWA, which appointed the national government, acting through the Minister, as the public trustee of the nation's water resources. An important consequence of these public trust provisions, the state argued further, is that the national government now owned the water running in a public river or stream.[47]

The problem with this argument, the Supreme Court of Appeal held, is that it misinterpreted the provisions of section 3 of the NWA. This section does not vest ownership of water running in a public river in the state. Instead, it simply places water under the control and administration of the national government, which was, in any event, the legal position with respect to public water before the Act came into operation. This meant, the Court concluded, that water running in a public river or stream was still classified as a *res communes* and thus not capable of being stolen. A riparian owner who draws more water from a water resource than the Act allows, therefore, is not guilty of theft, although he or she may be guilty of a statutory offence.[48] The Supreme Court of Appeal put this key finding as follows:

> "As water in a public stream was therefore incapable of being owned, it was also incapable of being stolen, and I did not understand the state to contend otherwise. However, it submitted that the fundamental changes brought about by the 1998 Act resulted in this no longer being an accurate reflection of our law. Its argument in this regard was based on the [National Water Act] having specifically placed water resources under the trusteeship of the national government ... But I do not see how the fact that the government now exercises administration and control over water flowing in a river means it must now be regarded as capable of being owned and thus capable of being stolen. Effectively the 1998 Act does no more than place all water within the aegis of state control, which control the state had in any event exercised over public water before it came into operation".[49]

[46] *Mostert v S* 2020 (2) SA 586 (SCA) at para 22.
[47] *Mostert v S* 2020 (2) SA 586 (SCA) at para 23.
[48] *Mostert v S* 2020 (2) SA 586 (SCA) at para 24.
[49] *Mostert v S* 2020 (2) SA 586 (SCA) at para 24.

Three significant points emerge from this passage:

(i) First, the public trust provisions set out in section 3 of the NWA regulate the administration and control of water flowing in a river.

(ii) Second, the public trust provisions set out in section 3 of the NWA do not determine the ownership of water flowing in a river.

(iii) Third, the ownership of water flowing in a public river continues to be determined by the common law principles governing *res communes*.

(c) Criticisms

As noted above, the Supreme Court of Appeal's judgment and especially the manner in which it classified water flowing in a public river or stream as *res communes* and defined the public trust provisions in section 3 of the NWA as managerial and administrative in nature has been criticised by water resource public trust scholars such as Van der Schyff and Van der Walt and Young.[50]

In their 2012 case note entitled "Is water flowing in a public river or stream 'a thing capable of being stolen'?", Van der Schyff and Van der Walt argue that the classification of water flowing in a public river or stream as a *res communis* is not as simple or straightforward as the Supreme Court of Appeal suggested for two key reasons.[51]

First, there was disagreement about the classification of flowing water (*aquae profluens*) among the Roman jurists and, in particular, among the classical jurists Gaius and Marcian. While Gaius classified flowing water as a *res publica* (*D* 1.8.2 pr),[52] Marcian classified it as a *res communis* (*D* 1.8.2.1). The Supreme Court of Appeal, therefore, was not

[50] See E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 and C 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),

[51] E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 at 301.

[52] Van der Schyff and Van der Walt's statement that Gaius classified flowing water as a *res publica* does not appear to be correct. Nowhere in *D* 1.8.2 pr does Gaius refer to flowing water as a public thing.Instead, he distinguishes, *inter alia*, between public things (i.e. things excluded from property and ownership) and private things (i.e. things included in property and ownership). He states that public things are those things that are "considered to be nobody's things for they belong corporately to the whole community", while private things are those things that "belong to individuals". Apart from the fact that he does not expressly refer to flowing water as a public thing, Gaius's list of public things does not distinguish between *res communes* and *res publicae*. This is because the concept of *res communes* was first articulated by Ulpian in his commentary on the Edicts, which was written more than 50 years after Gaius (see JB Ruhl and AJ McGinn "The Roman Public Trust Doctrine: What was it, and does it support an atmospheric trust" (2020) 47 *Ecology Law Quarterly* 117 at 165).

entirely correct when it stated emphatically that in Roman law, water flowing in a public river was classified as a *res communis*.[53]

Second, unlike in Roman law, there was no disagreement about the classification of public rivers among the Dutch jurists. Instead, they all agreed that public rivers should be classified as *res publica* and not as *res communis*. This consensus among the Dutch jurists is particularly significant because it is not Roman law, but rather Roman-Dutch law that is an official source of modern South African law.[54]

Although both *res communes* and *res publicae* were classified as things excluded from property and thus from private ownership, Van der Schyff and Van der Walt argued further, it was still important to distinguish between these two categories. This is because *res communes* were defined as ownerless things, whereas *res publicae* were defined as state-owned things. It followed, therefore, that in terms of the common law principles that applied before the NWA came into operation, "water did belong to a legal entity, namely the state".[55]

Even though the ownership vested in the state was not the same as private ownership, Van der Schyff and Van der Walt argued, it was a "pre-existing title" and, therefore, it could be argued that "water in public rivers and streams did belong to 'someone else' (i.e. the state) even before the promulgation of the NWA".[56] Given that the preamble to the NWA expressly declares that "water is a scarce natural resource that belongs to all people", they argued further, it can be assumed "that the water within the country's borders is still regarded as *res publicae*" and thus vests in the state as the juristic person that represents the people.[57]

In her 2017 doctoral thesis titled *Public Trusteeship and Water Management*, Young levelled similar criticisms against the judgment in *Mostert*. She argued that the Supreme Court of Appeal failed to properly analyse the distinction drawn in Roman and Roman-Dutch law between *res communes* and *res publicae*. While "running water" was classified as a *res communis*, "public water, running in a river or stream" was not. Instead, this type of water was

[53] E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 at 301-302.
[54] E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 at 302-303.
[55] E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 at 302-303.
[56] E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 at 303.
[57] E van der Schyff and T van der Walt "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297 at 304.

classified as a *res publica*.[58] In addition, she argued further, the reasoning of the Court was disappointing because it did not clarify "the confusion that exists in the context of *res publicae* and *res communes*".[59]

Despite levelling these criticisms against the Supreme Court of Appeal's judgment, Young went on to concede that the Court's findings are binding and, consequently, that going forward public water must be "treated as *res communes*". Given that the NWA has abolished the distinction between public and private water and that all water forms a part of a single integrated hydrological cycle, she asserted, an important consequence of the Court's findings is that all water resources in South Africa must now be classified as *res communes* and, as such, are incapable of ownership.[60]

Further on in her thesis, Young argued that the Supreme Court of Appeal did not thoroughly engage with the Roman and Roman-Dutch law classification of water in a public river or stream, and there is a chance that this judgment may be set aside at some point in the future. In terms of Roman and Roman-Dutch law, she argued further, water was classified as *res communes* in the context of running water and as *res publicae* in the context of perennial rivers. Given that the Lomati River is a perennial and thus public river, the water in the Lomati River should have been classified as a *res publica*. Following the judgment in *Mostert*, however, it is no longer possible to distinguish between running water and public rivers. Instead, all water must now be classified as *res communes*.[61]

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[58] C 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) at 138.

[59] C 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) at 139. Viljoen essentially endorses the criticisms levelled against the judgment in *Mostert* by Young. She agrees that the Supreme Court of Appeal failed to properly analyse the distinctions drawn between *res communes* and *res publicae*. While running water was classified in Roman and Roman-Dutch law as a *res communis*, a public river was not. Instead, a public river was classified as a *res publica*. Given that the preamble to the NWA expressly states that water is "a scarce resource that belongs to all people", she argues, it is much more likely that water resources should be classified as *res publicae* and not *res communes* (see G Viloen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 197; G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52 *VRU-WCL* 172 at 182; and G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities presented by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193 at 199).

[60] C 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) at 139-140.

[61] C 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) at 142.

Despite the fact that the decision in *Mostert* is inconsistent with the Roman and Roman-Dutch law classifications of water, Young asserted, the Supreme Court of Appeal's decision to classify all water resources as *res communes* may prove to be the correct one if the purpose underlying *res communes* and *res publicae* is taken into consideration. While *res communes* are aimed at excluding certain types of resources from ownership by anyone because of their importance to society as a whole, *res publicae* are aimed at ensuring that certain types of resources are regulated by the state because they serve an economic function.[62] In light of these different purposes, Young concluded, it may be more appropriate to classify water as a *res communis* because it is now regarded by environmental and natural resource practitioners as a "global resource, common to all, rather than a municipal or state-owned resource".[63] In addition, classifying water as a *res communis* would more accurately reflect the social mores of the modern South African constitutional state and the importance of water to society.[64]

(d) Analysis and comment

While it is true that running water was classified in Roman and Roman-Dutch law as a *res communis* and perennial rivers as *res publicae,* it is submitted that the criticisms levelled against the Supreme Court of Appeal's judgment in *Mostert* by Van der Schyff, Van der Walt and Young are misplaced. This is because they failed to ask why running water and perennial rivers were classified differently, given that they both consist of running water. Buckland suggests that there are three possible explanations. First, both the bed and the water of a perennial river were *res publicae*. Second, a perennial river as such was a *res publica*, but not the water, which was a *res communis*, nor the bed of the river, which belonged to the riparian owners. Third, neither the perennial river itself nor the water in the river were *res publica*. Instead, the right to access and use the river was the *res publica*. He puts these three explanations as follows:

> "As to rivers themselves the texts contain differences of opinion as to the sense in which they are public. According to one view, they are public, soil and all, but this can hardly be reconciled with the rule of *alluvio*,

[62] C 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) at 142.
[63] C 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) at 143.
[64] C 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) at 144.

insula nata, etc. Accordingly, it has been held that what was public was the river as such, not the water, which was common, or the soil of the bed, which belonged to the riparians. Others have held that the river was public only *quoad usum*".[65]

As Robbie argues, the second explanation is the most convincing. In terms of this explanation, a distinction may be drawn between the river itself as a permanent entity, or what she refers to as the "body of water", and the constantly moving individual particles of water which make up the river at any given time. An important consequence of this distinction is that the permanent entity of the river is treated almost like a separate tenement or thing. Unlike the river itself as a permanent entity, Robbie explains, the constantly moving individual particles of water are boundless and thus not susceptible to control. Given these characteristics, they cannot be classified as a thing that can be owned, either by private persons or the state. Instead, they are classified as common things.[66] Running water, therefore, includes not only the constantly flowing particles of water flowing over or through the surface of the earth but also the constantly flowing particles of water flowing in a river or stream.[67]

The distinction between the river itself as a permanent entity and the constantly moving individual particles of water may be traced back to the Dutch jurist Arnoldus Vinnius (1588-1657). In his *Institutionum Imperialum Commentarius*, Vinnius states that "it is to be noted there is a distinction between a river and flowing water, whence from the use of each a difference emerges. The river is the whole entity, one and the same body, which has existed for a thousand years. Finally, it is under the control of those within whose boundaries it is confined".[68] These statements by Vinnius were referred to with approval by the Scottish Court of Session in *Fairly v. Earl of Eglinton*[69] and *Hamilton v. Edington & Co.,*[70] where the Court held that "whatever may be said of the [running] water or *aqua profluens,* the stream or *flumen* continues the same from one age to another, and is therefore the object of [property]".[71]

In light of these points, it is submitted that the references to "public water, running in a river or a stream", "water in a public stream" and "water running in a public river" in *Mostert* are not references to the Lomati River itself as a permanent entity, but rather to the constantly flowing particles of water that that the appellants unlawfully extracted from the Lomati River.

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[65] WW Buckland *A Textbook of Roman Law from Augustus to Justinian* 2ed (1950) at 185.
[66] J Robbie *Private Water Rights in Scots Law* (PhD, Edinburgh University, 2013) at 14.
[67] J Robbie *Private Water Rights in Scots Law* (PhD, Edinburgh University, 2013) at 47.
[68] A Vinnius, *Institutionum Imperialium Commentarius* (1642) II.1.2 (translated by N Whitty "Water law regimes" in K Reid and R Zimmermann (eds) *A History of Private Law in Soctland* (2000) 420 at 455).
[69] (1744) Mor. 12780.
[70] (1793) Mor. 12824.
[71] *Hamilton v. Edington & Co* (1793) Mor. 12824 at 12825.

If this submission is correct, then it follows that the Supreme Court of Appeal correctly classified the water in question as a *res communis* and not as a *res publicae*. It also follows that the criticisms levelled against the judgment by Van der Schyff, Van der Walt and Young rest on shaky foundations.

6.3.6 The ownership provisions of the NEM: ICMA

Taking the points set out above into consideration, the following concluding points may be made with respect to the classification and legal status of water resources and the implications for the ownership provisions of section 11 of the NEM: ICMA:

First, although *Mostert* has introduced an element of uncertainty into the legal principles governing the classification and legal status of water resources, the judgment makes it quite clear that the public trust provisions in section 3 of the NWA are not concerned with the legal status of water resources, but rather with the management and administration of those resources. The same approach, it is submitted, is followed in sections 11 and 12 of the NEM: ICMA. While the public trust provisions in sections 11 and 12 focus on the management and administration of coastal public property, the ownership provisions in section 11 focus on the legal status of coastal public property. The application of the public trust concept in both the NWA and the NEM: ICMA is thus restricted to the management and administration of water resources and coastal public property only.

Second, given that the water resources public trust concept applies only to the management and administration of water resources, and not to the classification and legal status of water resources, very little, if any, reliance should be placed on the US Public Trust Doctrine when it comes to determining the legal status of water resources in South Africa. Or, to put it another way, when it comes to determining the scope and content of the managerial and administration duties of the state as public trustee of water resources, the US Public Trust Doctrine serves as an important persuasive source of law, but not when it comes to determining the legal status of those resources. The argument put forward by Van der Schyff, Viljoen and Harding, namely that the NWA vests a novel statutory right of public ownership in the state, and that this statutory right of public ownership imposes fiduciary duties on the state, therefore, is open to some doubt.

Third, since the public trust provisions in section 3 of the NWA have nothing to do with the classification and legal status of water resources, the Supreme Court of Appeal held in *Mostert* that the ownership of water flowing in a public river continues to be determined by the common law principles governing common and public things. These principles provide that

while a perennial river in its entirety is classified as a *res publica*, the constantly moving particles of water flowing in the river are classified as *res communes*. As Young points out, the problem with this approach is that it overlooks the fact that the distinction between public and private rivers has been abolished by the NWA, and all water resources are now considered to be a part of one integrated hydrological cycle.

While the SCA's failure to take this significant change into account has introduced an element of uncertainty into the classification and legal status of water resources, it may not be as problematic as Young imagines for the following reasons:

(i) The obligation to treat all water resources as part of a single integrated hydrological cycle is imposed on the state in its capacity as the manager and administrator of all water resources and not in its capacity as the owner of all water resources.

(ii) Given that the state's authority to control and manage all water resources is derived from and regulated by the NWA rather than the common law, it is very unlikely that the state's common law ownership of public rivers confers any substantial entitlements on it. The state's common law ownership, therefore, may be described as a "bare" or "nude" right of ownership. A bare or nude right of ownership is one that does not confer any significant entitlements on the owner.

(iii) While this does mean that it is currently not possible to successfully charge someone with stealing water from a public river, this gap in the law may be remedied, not by developing the common law principles governing common and public things, but rather by developing the common law principles governing the crime of theft.[72] In any event, the statutory provisions governing water resources appear to be sufficient to punish the unauthorised extraction of water.

Apart from these arguments, it is submitted that the judgment of the Supreme Court of Appeal in *Mostert* may be reformulated in a manner that not only retains some of its key findings (i.e. that the legal status of public rivers continues to be governed by the common law classifications and that the water resources public trust is concerned only with the management and administration of those resources), but also accommodates the fact that the NWA has abolished the distinction between public and private water and thus applies to all water resources in the country. This reformulation may be set out as follows:

[72] In *S v Ndebele* 2012 (3) SA 226 (GSJ), for example, the Johannesburg High Court developed the common law to make it possible to steal electricity by extending the definition of theft to include incorporeals rather than the definition of a thing (*res*) to include incorporeals.

(a) first, in light of the fact that the NWA expressly states in its preamble that "water is a natural resource that belongs to all people", the common law classifications governing water have been codified by the Act;[73]

(b) second, this process of codification has abolished the classification of *res communes* as it relates to running water and extended the classification of *res publicae* to include, not only public rivers, but running water and all other water resources as well;[74] and

(c) third, given that the preamble refers to "the people" and not to "the state", the statutory classification of all water resources as *res publicae* is based, not on the way in which that classification was defined in Roman-Dutch law, but rather on the way in which it was defined in Roman law, namely as a thing owned by the citizen or the people and not by the state.

Although the public ownership vested in the citizen or the people would be a "bare" or "nude" ownership, as stated above, it is still significant for two reasons. The first reason is that it would mirror the approach followed in section 11 of the NEM: ICMA and thus deal with the legal status of freshwater and saltwater resources in a similar way. The second reason is that the classification of freshwater resources as a thing belonging to the citizens or the people would promote some of the same goals that classifying coastal public property as a thing belonging to the citizens will achieve. These goals are set out and discussed in Chapter 4 of this thesis.

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[73] Viljoen argues that the NWA has not simply codified or (re-) introduced the common law concept of public things (*res publicae*) into South African water law. Instead, the NWA has created a new statutory form of public property which is similar to, but not exactly the same as the common law concept. One important difference is that this new statutory form of a public property imposes a fiduciary duty on the state as the public trustee in terms of which the state "must ensure that water is allocated equitably and used beneficially in the public interest" (see G Viljoen "Construing the transformed property paradigm of South Africa's water law: New opportunities presented by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193 at 204). In light of the argument made in this thesis, namely that the water resources public trust is not concerned with the legal status or ownership of water resources, but only with the management and administration of those resources, it is submitted that the NWA has in fact codified or (re-) introduced the common law concept of public things (*res publicae*) into South African water law and, in addition, that it has extended that concept to encompass all water resources and not just public rivers.

[74] The reclassification of running water from *res communes* to *res publicae* will not affect the finding in *Mostert*, namely that that an accused person cannot be convicted of the common law crime of theft for stealing running water. This is because the common law principles governing the crime of theft provide that only *res in commercio* can be stolen. Given that *res communes* and *res publicae* are classified as *res extra* commercium and not as *res in commercio*, it follows that neither category of things can be stolen (see SV Hoctor "Criminal Law" in *Law of South Africa (LAWSA) Vol 11* 3ed (2023) at para 348).

6.4 THE FIDUCIARY OBLIGATIONS OF THE STATE AS THE PUBLIC TRUSTEE[75]

6.4.1 Introduction

Having found that the public trust provisions in section 4 of the NWA and sections 11 and 12 of the NEM: ICMA are not concerned with the classification and legal status of water resources or coastal public property, respectively, but rather with the conservation, protection, management and administration of these resources, and accordingly that the state's fiduciary duties as the public trustee do not arise out of its status as the owner, but rather its status as the manager and administrator of all water resources and of coastal public property, we may now turn to consider the scope and content of those fiduciary duties. This discussion will focus, first, on water resources, and, second, on coastal public property, which is the key focus of this part of Chapter Six. As with the examination of the classification and legal status of water resources set out above, this investigation will also rely heavily on the water resources public trust scholarship that has been produced since the NWA was enacted by Parliament in 1998.

6.4.2 Van der Schyff, Viljoen, Young and Du Plessis

Apart from the legal status of water resources, water resource public trust scholars such as Van der Schyff, Viljoen, Young and Anel du Plessis have also investigated the duties and responsibilities that section 3 of the NWA imposes on the state as the public trustee. For the most part, these investigations have tended to gloss over the specific provisions of the Act and, instead, have attempted to identify general duties and obligations that may be derived from the Constitution, the purpose and objects of the Act or the principles of environmental management.

Van der Schyff, for example, argues that section 3 of the NWA imposes a fiduciary duty on the state (as the owner) to protect, manage and administer water resources in the "public interest".[76] The content and scope of the public interest are defined by the values and fundamental rights guaranteed in the Constitution, as well as the objectives of the NWA.[77]

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[75] This section is based on W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1.

[76] E van der Schyff "Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?" (2013) 130 *SALJ* 369 at 382. See also E van der Schyff and G Viljoen "Water and the Public Trust Doctrine – A South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern Africa* 339 at 345.

[77] The objects of the NWA are set out in section 2 of the Act. This section provides that the purpose of the Act is to "ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled", taking into account various factors. Among these factors are the needs of present and future generations,

More specifically, the public interest imposes an obligation on the state to regulate access to and the use of water resources in an equitable manner for the benefit of current and future generations by "preventing pollution and ecological degradation, securing ecologically sustainable development and justifying economic and social development".[78]

For her part, Viljoen also argues that section 3 of the NWA imposes a fiduciary duty on the state (not as owner, but as the manager and administrator) of careful management in terms of which it is required to conserve, protect, develop, use, control and manage water resources in a sustainable manner for the benefit of all of the citizens of the Republic. More specifically, the state is under a fiduciary duty to exercise its powers as trustee to meet the basic human needs of present and future generations, promote equitable access to water, redress the results of past racial and gender discrimination and promote the efficient, sustainable and beneficial use of water in the public interest. In addition, the state is also under a duty to ensure that its decisions are constitutionally valid and that they comply with the principles and objects of the NWA.[79]

Unlike Van der Schyff and Viljoen, Young does not rely as heavily on the objects and public trust provisions of the NWA to define the fiduciary duties of the state. Instead, she relies on the principles of environmental management. She argues in this respect that the water resources public trust "incorporates the most modern legal principles in the context of environmental management, including the principles of inter- and intra-generational equity, the precautionary principles and the polluter-pays principle".[80] In addition, when the state exercises its managerial and administrative powers as the public trustee of all water resources, it is "required to promote the goals of sustainability, equity and efficiency", while also complying with its constitutional mandate.[81]

Du Plessis also relies on the principle of intergenerational equity to describe the fiduciary duties of the state.[82] The public trust doctrine, she argues, has added an inter-temporal

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ensuring equitable access to water, redressing past racial and gender discrimination, promoting social and economic development, protecting aquatic ecosystems and their biological diversity, and reducing and preventing pollution and the degradation of water resources.

[78] E van der Schyff "Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?" (2013) 130 *SALJ* 369 at 383.

[79] G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" (2019) 52(2) *VRU-WCL* 172 at 190 and 194.

[80] C 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) at 172.

[81] C 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) at 176 and 229.

[82] A du Plessis "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260.

approach to the conservation and protection of the environment, and this inter-temporal approach places a fiduciary obligation on the state to preserve the environmental rights and interests of future generations from the exploitative practices of the present generation.[83]

The fiduciary obligation placed on the state to preserve the environment for present and future generations, Du Plessis argues further, encompasses three principles, namely the "conservation of options", the "conservation of quality" and the "conservation of access":

(i) the conservation of options imposes a public trust obligation on the state to protect the biodiversity of the natural resource base, so that the present generation does not unduly limit the choices available to the next generation to solve its problems.

(ii) the conservation of quality imposes a public trust obligation on the state to bequeath the natural resource base of the planet to the next generation in as good a condition as the present generation received it.

(iii) the conservation of access imposes a public trust obligation on the state to ensure that both present and future generations have equal access to natural resources.[84]

Besides adding an intertemporal approach to the conservation and protection of the environment, Du Plessis goes on to argue that the public trust doctrine also grants concerned citizens access to a legal instrument that can be used to constrain the manner in which the state manages and administers natural resources to preserve them for future generations. It may confidently be said, therefore, that a legal mechanism now exists in South Africa that "bestows on the state the responsibility to manage the collective duty of existing generations and to act as guardian of certain interests to the benefit of nations and succeeding generations as a whole".[85]

Although the arguments set out above accurately reflect many of the fiduciary duties and responsibilities imposed on the state as the public trustee of water resources, it is submitted that this approach to describing the state's responsibilities is not as helpful as it could be. This is because Van der Schyff, Viljoen, Young and Du Plessis' arguments suggest that the fiduciary duties and responsibilities imposed on the state by the water resources public trust are derived almost entirely from the Constitution, the provisions of the NWA itself, other

[83] A du Plessis "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260 at 273.
[84] A du Plessis "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260 at 275.
[85] A du Plessis "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260 at 279–280.

environmental statutes such as NEMA and the principles of environmental management. An unfortunate consequence of this approach is that it does not envisage a separate and self-standing role for the public trust concept when it comes to determining the duties and responsibilities of the state as the manager and administrator of public trust resources, and thus obscures the unique contribution that the public trust can potentially make in this respect.

6.4.3 The public trust provisions of the NEM: ICMA

(a) Introduction

In order to address this concern, it is submitted that the public trust concept, at least insofar as it applies to coastal public property, should be approached in a more structured manner. In terms of this more structured approach, a distinction may be drawn between the state's enumerated public trust duties and its residual public trust duties. The state's enumerated public trust duties are those that were identified by the drafters of the NEM: ICMA and set out either expressly or implicitly in various provisions of the Act. As such, they reflect the manner in which the drafters have understood and chosen to give concrete and specific effect to the broad and general public trust provisions in sections 11 and 12 of the Act. Unlike the enumerated public trust duties, the residual public trust duties are those not identified by the drafters and set out in the various provisions of the Act. Instead, they will be identified as and when the public trust provisions in sections 11 and 12 of the Act are interpreted and applied by the courts over time. As such, they will reflect the manner in which the courts progressively understand and give effect to sections 11 and 12.[86]

Given that the state's residual public trust duties cannot be derived from the various provisions of the NEM: ICMA, an important question that arises is where they are derived from. In this respect, it is submitted that the state's residual public trust duties are derived from the national environmental management principles listed in section 2 of NEMA and especially from the principle that the "environment is held in public trust for the people" in section 2(4)(o) of the Act. As Oosthuizen et al correctly state, these principles are neither legal rules that must be followed blindly, nor policies that may be conveniently ignored. Instead, they are "fundamental norm[s] within a value system or a system of belief and which [inform] a rational or logical chain of reasoning".[87] The public trust principle in section

[86] W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-16.
[87] M Oosthuizen, M van der Linde & E Basson "National Environmental Management Act 107 of 1998 (NEMA)" in ND King, HA Strydom & FP Retief (eds) *Fuggle and Rabie's Environmental Management in South Africa* 3ed (2018) 125 at 134.

2(4)(o), it is submitted further, is given effect by the various public trust concepts in the public trust suite of statutes. The public trust concepts are, in turn, given concrete content by the various provisions of each public trust statute. However, the concrete content of the public trust concepts and, thus, the public trust principle cannot be exhausted by the various provisions of the public trust statutes. To give full effect to the public trust principle as a fundamental norm, the courts are empowered to identify further residual public trust duties.

(b) The coastal public trust's enumerated duties

As stated above, the coastal public trust's enumerated duties are those that are set out either explicitly or implicitly in the various provisions of the NEM: ICMA and give concrete and specific effect to the public trust provisions in sections 11 and 12. Among the most prominent of these enumerated duties are those that: (i) prohibit the alienation of coastal public property, (ii) promote access to coastal public property, (iii) protect and preserve the coastal environment, and (iv) require public participation in decision-making processes that affect the coastal environment. Although the provisions in which these enumerated duties are explicitly set out have been discussed in Chapter Three, they will be briefly discussed here again for illustrative purposes.

(i) The public trust duty not to alienate coastal public property

The alienation of coastal public property is prohibited in section 11(2) of the NEM: ICMA. Apart from providing that coastal public property cannot be alienated or sold, section 11(2) also provides that it cannot be "attached or acquired by prescription and rights over it cannot be acquired by prescription". The state's public trust duty not to alienate coastal public property, therefore, appears to go further than the US Public Trust Doctrine, which does allow the state to alienate public trust resources where this would not substantially impair the public interest in that resource.[88] The section 11(2) public trust duty not to alienate coastal public property can thus be described as robust.

(ii) The public trust duty to promote access to coastal public trust property

In the same way that the public trust duty not to alienate coastal public property may be described as robust, so too may the public trust duty to promote access to coastal public

[88] See *Illinois Central Railroad Co v Illinois* 146 US 387 (1892) at 452 and *Shively v Bowlby* 152 US 1 (1894) at 57-58.

property. This is because the NEM: ICMA provides both horizontal access *along* coastal public property and vertical access *to* coastal public property. While all of the coastal States in the US provide for horizontal access, very few provide for vertical access because it is difficult for a State to acquire access over private property without paying just compensation in accordance with the Fifth Amendment of the US Constitution.[89]

As far as horizontal access is concerned, section 13(1) of the NEM: ICMA provides that every natural person "has a right of reasonable access to coastal public property"; and is "entitled to use and enjoy coastal public property", provided such use does not "adversely affect the rights of other members of the public to use and enjoy coastal public property", or "hinder the state in its duty to protect the environment", or "cause an adverse effect".

As far as vertical access is concerned, section 18(1) of the NEM: ICMA provides that "[e]ach municipality whose area includes coastal public property must … make a bylaw that designates strips of land as coastal access land in order to secure public access to that coastal public property". Those strips of land that have been designated as coastal access land, section 18(2) provides further, are "automatically subject to a public servitude in terms of which members of the public may use that land to gain access to coastal public property".

(iii) The public trust duty to protect and preserve coastal public property

When it comes to protecting and preserving coastal public trust resources, the NEM: ICMA has introduced a number of regulatory mechanisms whose purpose is to achieve this public trust goal. One of these is coastal management lines. Coastal management lines may be defined as lines that demarcate an area adjacent to the littoral zone in which development is prohibited or restricted. Coastal setback standards have been adopted in two-thirds of coastal and Great Lakes states in the US and are widely recognised as an aspect of integrated coastal zone management.[90] American scholars have also argued that the Public Trust Doctrine requires the state to preserve coastal land in its natural state from sea-level rise by imposing coastal setbacks on private land and prohibiting coastal armouring by landowners.[91]

Section 25(1) of the NEM: ICMA provides in this respect that a MEC must "establish or change coastal management lines (a) to protect coastal public property, private property and

[89] See AD Tarlock "United States of America" in R Alterman and C Pellach (eds) *Regulating Coastal Zones: International Perspectives of Land Management Institution* (2021) 355 at 362.
[90] See AD Tarlock "United States of America" in R Alterman and C Pellach (eds) *Regulating Coastal Zones: International Perspectives of Land Management Institution* (2021) 355 at 364.
[91] See C Angelis "The Public Trust Doctrine and sea level rise in California: Using the public trust to restrict coastal armoring" (2013) 19(2) *Hastings Environmental Law Journal* 249.

public safety; (b) to protect the coastal protection zone; (c) to preserve the aesthetic values of the coastal zone; or (d) for any other reason consistent with the objectives of this Act". When an MEC establishes or changes a coastal management line, section 25(1A) provides further, he or she may "prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of the management line".

(iv) The public trust duty to facilitate public participation

Finally, the public trust duty to facilitate public participation in decision-making processes that affect the coastal environment is expressly provided for in section 53(1) of the NEM: ICMA. This section provides that

> "[b]efore exercising a power, which this Act requires to be exercised in accordance with this section, the Minister, MEC, municipality or other person exercising that power must:
>
> (a) consult with all Ministers, MEC's or municipalities whose areas of responsibilities will be affected by the exercise of the powers in accordance with the principles of cooperative governance as set out in Chapter 3 of the Constitution;
>
> (b) publish or broadcast his or her intention to do so in a manner that is reasonably likely to bring it to the attention of the public; and
>
> (c) by notice in the *Gazette*:
>
> (i) invite members of the public to submit, within no less than 30 days of such notice, written representations or objections to the proposed exercise of power; and
>
> (ii) contain sufficient information to enable members of the public to submit representations or objections".

These public participation provisions must be followed by the Minister, MEC, municipality or other person before making various decisions.[92]

Apart from the provisions discussed above, the following sections of the NEM: ICMA also give concrete and specific effect to the broad and general public trust provisions in sections 11 and 12 of the Act: section 7A, which explicates the purpose of coastal public

[92] The public participation requirements set out in section 53(1) must be follow by the Minister before approving an application for the reclamation of land for a purpose other than the development of state infrastructure (s 7C(3)); the Minister before approving an application to impose a fee to access coastal public property (s 13(4)); the Minister or an MEC before designating a strip of land as coastal access land or withdraws such a designation (s 19(b)); the Minister before declaring an area that is wholly or partially in the coastal zone as a special management area or withdraws or amends such a declaration (s 23(2)); an MEC before issuing a notice establishing or changing coastal management lines or issues a regulation prohibiting or restricting development in the buffer zone created by such a line (s 25(2)(b)); the Minister, an MEC or a municipality before determining or adjusting a coastal boundary (s 26(4)(a); the Minister before publishing a national estuarine management protocol (s 33(g); and the responsible body before developing a estuarine management plan (s 34(a)).

property;[93] section 17, which explicates the purpose of the coastal protection zone;[94] and section 18, which provides for coastal access land.[95] These sections were discussed in Chapter Three of this thesis.

(c) The coastal public trust's residual duties

Apart from imposing enumerated duties on the state, the coastal public trust concept also imposes certain residual duties on the state. While it is relatively easy to identify the enumerated duties that the coastal public trust imposes on the state, it is not so easy to identify the residual duties. This is largely because the South African courts have not yet had the opportunity to consider the sort of residual duties and obligations the coastal public trust imposes on the state.

In this respect, however, it may be argued that, like the US (or perhaps more accurately, the Californian) Public Trust Doctrine, one of the residual duties that the coastal public trust doctrine imposes on the state is a *continuous supervisory duty to preserve* public trust assets. As we have already seen, in *National Audubon Society v Superior Court of Alpine County*,[96] the California Supreme Court held that this continuous supervisory duty means, among other things, that:

- the state is obliged to take steps to protect public trust assets from substantial harm;
- the transfer of public trust assets must always take place subject to the public trust doctrine; and,
- perhaps most importantly, the state is not confined by past erroneous decisions and may revoke previously granted rights.

In addition to a continuous supervisory duty to protect public trust assets, there is no doubt that our courts will identify other general residual duties as and when they are required to do so. In this respect, it is interesting to note that, besides the USA, the public trust doctrine has been adopted in a number of other foreign jurisdictions and that the judgments handed down in these countries should provide South African courts with a rich source of comparable material.[97]

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[93] This section is discussed in more detail in Chapter 3, section 3.3.2 of this thesis.
[94] This section is discussed in more detail in Chapter 3, section 3.3.3 of this thesis.
[95] This section is discussed in more detail in Chapter 3, section 3.3.4 of this thesis.
[96] *National Audubon Society v Superior Court* 658 P.2d 709 (California 1983). This case is discussed in detail in Chapter 5.
[97] See M Blumm & RD Guthrie "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (2012) 45 *University of California Davis Law Review* at 741.

For example, in *Advocates Coalition for Development and Environment (ACODE) v Attorney*,[98] the High Court of Uganda at Kampala held that the public trust doctrine imposes an obligation on the state, among other things, to act in a transparent and accountable manner. This meant, the High Court went on to explain, that the state could transfer the right to use and exploit public trust assets only with the consent of the local community.

And in *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay*,[99] the Philippines Supreme Court held that the public trust doctrine imposes an obligation on the state to, through education, "inculcate in the minds and hearts of students and, through them, their parents and friends, the importance of their duty toward achieving and maintaining a balanced and healthful ecosystem in the Manila Bay and the entire Philippine archipelago".

6.4.4 Conclusion

One possible benefit of the structured approach set out above relates to the observations made by Van der Schyff, Viljoen and Harding at the beginning of this chapter, namely that the water resources, coastal and other public trust concepts suffer from a lack of judicial attention. While this is correct insofar as the residual public trust duties are concerned, it is not entirely correct insofar as the enumerated duties are concerned. There is a small but hopefully growing body of case law on the enumerated duties imposed on the state by the public trust provisions of the NEM: ICMA. Perhaps the most significant of these is the judgment of the Supreme Court of Appeal in *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC*.[100] Although this judgment does not expressly refer to the coastal public trust, it does give effect to the coastal public trust principle of public participation in decision-making processes that affect the coastal environment.

The facts of this case were as follows. In 2014, the Minister of Mineral Resources and Energy (Minister) granted an exploration right to Impact Africa Limited (Impact) in terms of the Mineral and Petroleum Resources Act (MPRDA).[101] In accordance with the terms of this

[98] *Advocates Coalition for Development and Environment (ACODE) v Attorney General* Miscellaneous Cause No 0100 of 2004 (13 July 2005).
[99] *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* GR No 171947–48, 574 SCRA 661 (SC 18 December 2008).
[100] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024). See also *Border Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others* [2021] ZAECGHC 111 (3 December 2021); *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk); and *Adams v Minister of Mineral Resources and Energy* [2022] ZAWCHC 24 (1 March 2022).
[101] Mineral and Petroleum Resource Development Act 28 of 2002.

right, Impact was entitled to explore for oil and gas in the seabed off the Wild Coast in the Eastern Cape Province using seismic surveys. This exploration right was renewed in 2017 and again in 2020.

Shortly after the second renewal was granted, Impact's operating partners, Shell Exploration and Production South Africa BV and BG International Limited (Shell), gave notice that they intended to commence with the seismic surveys. After they became aware of this notice, the respondents, all of whom were either members or representatives of indigenous and other communities living along the Eastern Cape coast, applied successfully to the High Court in Makhanda for an order declaring the Minister's decision to grant the exploration right was unlawful and invalid.

The respondents based their application on three grounds, one of which was that Impact and Shell had failed to consult or adequately consult with them before the Minister took the decision to grant the exploration right and, consequently, that the Minister's decision infringed the right to procedural fairness in the Constitution, the MPRDA and the Regulations made under the MPRDA. Despite the fact that they had not registered as interested and affected parties, the respondents argued that Impact and Shell had failed to consult or adequately consult with them because the consultation process conducted with interested and affected parties did not take into account the nature and structure of the respondent communities and the manner in which decisions are taken by indigenous communities.

After the High Court granted this order, the Minister, Impact and Shell appealed to the Supreme Court of Appeal. The Court (per Ponnan JA; Mocumie and Matojane JJA and Smith and Seegobin AJA concurring) found against the appellants and dismissed the appeal. In arriving at this decision, the Court began by confirming that the Minister's decision to grant the exploration right was administrative action and that it materially and adversely affected the customary rights of the respondents, and especially their customary fishing rights. It followed, therefore, that the Minister's decision had to comply with the requirements of procedural fairness set out in the MPRDA and its Regulations, as well as the Promotion of Administrative Justice Act[102] (PAJA).[103]

In terms of section 3 of PAJA, the Supreme Court of Appeal held, a person whose rights may be materially and adversely affected by administrative action must be given adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to

[102] 3 of 2000.
[103] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 19.

make representations. In addition, section 79(4) of the MPRDA imposes an obligation on an applicant for an exploration right to consult with any affected party.[104] The general principles that govern the consultation requirement when the affected party is a community, the Court held further, were set out in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*.[105]

In this case, the Constitutional Court held, first, that interested and affected parties must be provided with sufficient detail of the planned exploration or mining activity and what they will involve, so that they can correctly identify their impact; and, second, that the consultation process must be "meaningful". In the same judgment, the Constitutional Court also held that any administrative decision taken in terms of the MPRDA must comply with the provisions of PAJA, including the provisions governing procedural fairness.[106]

Having set out these principles, the Supreme Court of Appeal turned to apply them to the facts. In this respect, the Court found that Impact and Shell had not properly notified the respondent communities of their application for an exploration licence. This is because notice of the application was published in four newspapers that were inaccessible to many members of the respondent communities, and those newspapers were published in languages (English and Afrikaans) that very few members of the respondent communities could read or speak.[107] In addition, no information was communicated via the radio, even though the majority of members of the respondent communities received their news from radio stations.[108]

An important consequence of the inadequate consultation process conducted by Impact and Shell, the Supreme Court of Appeal held, was that a number of relevant factors were not considered by the Minister when he made his decision. These factors included the harmful impact that the seismic surveys would have on the cultural and religious practices of the respondent communities; the livelihood of the members of the respondent communities, especially in light of the fact that the sea was their primary source of food and income; and, the provisions of the NEM: ICMA which include specific measures for the conservation and

[104] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 20.
[105] 2011 (4) SA 113 (CC).
[106] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 21.
[107] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 23.
[108] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 24.

protection of the coastal zone.[109]

Apart from failing to follow a fair procedure, the Supreme Court of Appeal concluded, the Minister's decision should be declared unlawful and set aside also on the grounds that he failed to take relevant considerations into account as required by section 6(2)(e)(ii) of PAJA.[110]

6.5 THE COASTAL PUBLIC TRUST AS A STANDARD OF ADMINISTRATIVE REVIEW[111]

6.5.1 Introduction

Although the lack of judicial attention may not be as pronounced as Van der Schyff, Viljoen and Harding suggest, the water resource and coastal public trust jurisprudence in South Africa is nevertheless disappointing, given that the water resource public trust has been a part of South African water law since 1998 and the coastal public trust since 2008. This lack of interest may be addressed, it is submitted, by envisaging the public trust concept as a standard of administrative review. As discussed in Chapter Five of this thesis, the notion that the public trust concept can serve as a standard of administrative review may be traced back to Joseph Sax himself. In his 1970 article titled "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention", Sax noted that decisions affecting public trust resources were increasingly being made by administrative agencies and not by legislative bodies. While this approach had several advantages, it also suffered from certain disadvantages. One of these is that administrative decisions were more likely to threaten public trust resources than legislative ones. This is because administrative agencies were vulnerable to the phenomenon of "administrative capture".[112] In order to address this phenomenon, Sax argued, the courts classified the public trust doctrine as a principle of environmental law that required a "hard

[109] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 25.
[110] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84 (3 June 2024) at para 26.
[111] This section is based on W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-21.
[112] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 495.

look" at administrative decisions that adversely affected public trust resources.[113]

6.5.2 Administrative review in the United States

After his election as President in 1933, Franklin D Roosevelt (1882-1945) and the Democratic Congress passed a number of statutes creating new federal agencies and expanding the power of others as a part of his New Deal programme to address the effects of the Great Depression. However, as the power of these federal agencies expanded, Congress became concerned about their lack of accountability and inconsistent procedures. To address these concerns, it passed the Administrative Procedure Act (APA) in 1946.[114]

The APA sets out the procedures that federal agencies[115] must follow when they formulate a rule or make an order. The process of formulating a rule is referred to as "rulemaking"[116] and the process of making an order as "adjudication".[117] Apart from setting out the procedures for rulemaking and adjudication, the APA also confers the authority on the federal courts to review and set aside these kinds of decisions on various grounds. The Act provides in this respect that the decision to formulate a rule or an order may be set aside if it is found to be:

> "(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (b) contrary to constitutional right, power, privilege, or immunity;
> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (d) without observance of procedure required by law;
> (e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court".[118]

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[113] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471 at 560. See also MC Blumm "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573 at 589.

[114] 5 US Code §§ 551-559.

[115] Subject to certain exclusions, agencies are defined in the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency". Among those institutions that are excluded from this definition are the Congress of the United States and the courts of the United States (5 US Code §§ 551(1)).

[116] Adjudication is defined in the APA as the "agency process for the formulation of an order" (5 US Code § 551(7)), and an order is defined as "the whole or a part of a final disposition … of an agency in a matter other than rule making but including licensing" (5 US Code §551(6)) Adjudication is divided into two categories, namely formal and informal adjudication. Each category has its own procedural requirements.

[117] Rulemaking is defined in the APA as the "agency process for formulating, amending, or repealing a rule" (5 US Code §551(5)), and a "rule" is defined as

> "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..."

(5 US Code §551(4)). Like adjudication, rulemaking is also divided into formal rulemaking and informal rule making. Again, each category has its own procedural requirements.

[118] 5 US Code §706(2).

When interpreting and applying the "arbitrary and capricious" ground of review, the US federal courts initially adopted a deferential approach towards the decisions made by federal agencies. In terms of this deferential approach, the federal courts held that a decision simply had to have a rational relationship to the agency's statutory mission. Given its deferential nature, it is not surprising that the federal courts hardly ever set aside an agency's decision using this minimalist standard of review.[119]

This deferential approach towards administrative decisions began to change in the 1970s when the US Court of Appeals for the District of Columbia Circuit[120] adopted a heightened standard of review in terms of which it imposed an obligation on federal agencies to provide "reasoned explanations" for their decisions.[121] This change came about mainly as a response to the growing realisation that federal agencies were prone to being captured by the industries they regulated and would inevitably favour the private interests of these industries over the public interest.[122]

The hard look approach was embraced by the US Supreme Court for the first time in *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co*.[123] In this case – which is still regarded as the leading judgment on arbitrary and capricious review – the Supreme Court reviewed and set aside a decision by the Department of Transport repealing a rule requiring vehicle manufacturers to install airbags or automatic seatbelts in passenger cars. The Court based its decision on the grounds that the Department of Transport had not considered alternative ways of achieving its goals, and the reasons provided by the Department of Transport for repealing the rule were not supported by the evidence.

In arriving at this decision, the Supreme Court held that a federal agency must "examine the relevant data and articulate a satisfactory explanation for its action". When it reviews that explanation, a court must determine whether the agency's decision was based on a "consideration of the relevant factors". An agency's decision will be arbitrary and capricious,

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[119] See *Pacific States Box & Basket Company v White* 296 US 176 (1935) at 186. See also PM Grey "Judicial review and the 'hard look; doctrine" (2006) 7 *Nevada Law Review* 151 at 153 and 156.

[120] Apart from the fact that a large part of the District of Columbia Circuit's case load was devoted to administrative appeals, some statutes provided that appeals could be made only to that Court (see E Fisher and S Shapiro *Administrative Competence: Reimagining Administrative Law* (2020) at 249).

[121] See, for example, *Greater Boston Television Corporation v Federal Communications Commission* 444 F.2d 841 (D.C. Circ. 1970). This was the first case in which the phrase "hard look" review was used (at 851). See also *Natural Resources Defense Council Incorporated v Morton* 458 F.2d 827 (D.C. Circ. 1972) and *International Harvester v Ruckelshaus* 478 F.2d 615 (D.C. Circ. 1963).

[122] PM Grey "Judicial review and the 'hard look; doctrine" (2006) 7 *Nevada Law Review* 151 at 161 and N Oydanich "Chief Justice Roberts's hard look review" (2021) 89 *Fordham Law Review* 1635 at 1640.

[123] 463 US 29 (1983).

the Court held further, if it has "relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence … or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise".[124] In addition, an agency must explore any "alternative ways of achieving" its goals[125] and give a "reasoned analysis" for changing a policy.[126]

In light of this judgment, it may be said that hard look review requires federal agencies to base their decisions on substantial evidence, consider all relevant factors, including alternative perspectives, justify departures from past practices and provide clear, detailed and reasonable explanations for their decisions. To satisfy this last requirement, an agency also had to set out its policy position, its reasoning and the facts on which it based its decision. An important consequence of the hard look approach is that agencies have to conduct "paper hearings" and compile detailed and comprehensive "paper records" of their decision-making process that could serve as the basis of judicial review, irrespective of whether they are required by the relevant statute.

Finally, it should be noted that the US Supreme Court has gradually moved away from hard look review. For example, in its most recent judgment on the arbitrary and capricious standard of review, namely *Federal Communications Commission v Prometheus Radio Project*,[127] the Court held that this standard of review is a deferential one and that "a court may not substitute its own policy judgment for that of the agency".[128] Instead, a court simply has to ensure that the decision falls within a "zone of reasonableness" and that the agency has "reasonably considered the relevant issues, and reasonably explained the decision".[129]

6.5.3 Administrative review in South Africa

Although most of the requirements of hard look review discussed above form a part of South African administrative law and have been included as grounds of review in the PAJA, they

[124] *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co* 463 US 29 (1983) at 43.
[125] *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co* 463 US 29 (1983) at 48.
[126] *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co* 463 US 29 (1983) at 57.
[127] 592 US _ (2021).
[128] 592 US _ (2021) at 7.
[129] 592 US _ (2021) at 8. See also *Department of Commerce v New York* 588 US _, 139 S.Ct. 2551 (2019) at 2569 and *Department of Homeland Security v Regents of the University of California* 591 US 1, 140 S.Ct. 1891 (2020) at 1933.

do not all have a fixed content. Instead, the obligations that some of these grounds impose on administrators can vary depending on the circumstances of each case. Procedural fairness, for example, is a highly flexible concept. The more serious a matter and its consequences for those affected, the more demanding and elaborate the procedure must be.[130] A similar point may be made about the requirement of reasonableness, which operates as an umbrella concept and thus encompasses several grounds of review, including rationality on the thin and less intrusive end of the spectrum and proportionality at the thick and more intrusive end.[131] The obligation to provide adequate reasons also varies from case to case.[132]

In light of these points, it is submitted that the coastal public trust may be understood as a standard of environmental administrative law that imposes an obligation on the courts to apply the grounds of review in the PAJA in a less flexible and, thus, more searching manner when administrative action threatens coastal public property. The benefit of this interpretation of the coastal public trust is that it enables the courts to adopt a less deferential approach to the discretionary powers that environmental statutes routinely confer on administrators[133] by subjecting them to a higher standard of review. In this way, the courts can steer these discretionary powers towards meeting the ecological and environmental interests of present and future generations, rather than the financial and economic interests of politically powerful groups.[134]

The role that the public trust doctrine can play in frustrating environmentally destructive actions but financially lucrative interests of politically powerful groups is clearly illustrated in the Pretoria High Court's judgment in *Mining and Environmental Justice Community*

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[130] See I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 89; See I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 89; C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 364; and G Quinot et al *Administrative Justice in South Africa: An Introduction* (2015) at 154. Section 3(2)*(b)* of PAJA provides that a person who may be adversely and materially affected by administrative action must, at a minimum, be given:

> "*(a)* adequate notice of the nature and purpose of the proposed administrative action; *(b)* a reasonable opportunity to make representations; *(c)* a clear statement of the administrative action; and *(d)* adequate notice of the right to request reasons in terms of section 5".

[131] See I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 89; C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 340; and G Quinot et al *Administrative Justice in South Africa: An Introduction* (2015) at 171.

[132] See I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 136; C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 463; and G Quinot et al *Administrative Justice in South Africa: An Introduction* (2015) at 195.

[133] Environmental statutes are characterised by broadly formulated rules which typically confer a wide discretion on administrators, especially when it comes to balancing environmental concerns against economic and social objectives when making regulations or decisions in individual cases.

[134] See MC Wood *Nature's Trust: Environmental Law for a New Ecological Age* (2014) at 230.

Network v Minister of Environmental Affairs (*MEJCON*)[135] and the Mbombela High Court's recent judgment in *Mining and Environmental Justice Community of South Africa v MEC for Agriculture, Rural Development, Land and Environmental Affairs* (*MEJCOSA*).[136]

6.5.4 Mining and Environmental Justice Network v Minister of Environmental Affairs (MEJCON)

(a) The facts

The facts of this case were as follows. The applicants (a coalition of non-governmental and non-profit community, environmental and human rights organisations) applied to the Pretoria High Court for an order reviewing and setting aside a decision by the first respondent (Minister of Environmental Affairs) together with the second respondent (Minister of Mineral Resources) to grant the third respondent (a mining company named Atha-Africa Ventures (Pty) Ltd)[137] permission in terms of section 48 of the NEM: PAA to establish an underground coal mine on four properties situated within the Mabola Protected Environment in Mpumalanga Province.[138]

Section 48(1)(b) of the NEM: PAA provides that:

> "no person may conduct commercial prospecting, mining, exploration, production or related activities in a protected environment without the written permission of the Minister [of Environmental Affairs] and the Cabinet member responsible for minerals and energy affairs".

Section 48(4) goes on to provide that when the Minister applies this section, he or she

> "must take into account the interests of local communities and the environmental principles referred to in section 2 of [the NEMA]".

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[135] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP).

[136] [2024] ZAMPMBHC 48 (18 July 2024).

[137] Atha-Afrika Ventures was the South African subsidiary of Atha Ventures, a multi-national company registered in India. It's application for a right to mine coal on the affected properties was granted by the Department of Mineral Resources in terms of section 23(1) of the MPDRA on 14 April 2015. This mining right came into effect on 28 June 2016 when the Environmental Management Programme (EMP) was approved by the Regional Manager of the Department of Mineral Resources.

[138] The Mabola Protected Environment was declared as a protected environment by the Member of the Executive Council (MEC) for Agriculture, Rural Development, Land and Environmental Affairs in Mpumalanga Province on 22 January 2014 in terms of section 28(1)(a)(i) and section 28(1)(b) of the NEM: PAA. The declaration was aimed at protecting a critical water catchment and high biodiversity area in the Mpumalanga grasslands. The Mpumalanga grasslands are one of the most diverse biomes in South Africa and contains rare and threatened species.

The applicants based their application on a number of grounds. Among these were:

(i) the Ministers' decision was unlawful because they had misconstrued their duties and obligations in terms of section 48 of the NEM: PAA;

(ii) the Ministers' decision was procedurally unfair because they did not comply with the provisions of section 3 or 4 of the PAJA;

(iii) the Ministers' decision was unreasonable because it was taken in the absence of a final management plan for the Mabola Protected Environment; and

(iv) the Ministers had taken into consideration irrelevant considerations and failed to take into account relevant considerations, one of which was South Africa's international responsibilities relating to the environment.

(b) The judgment

The High Court (per Davis J) found in favour of the applicants and set aside the Ministers' decision. Before turning to consider each of the grounds of review raised by the applicants, however, the Court considered the manner in which section 48(1)(b) of the NEM: PAA should be interpreted. The applicants argued that the section must be interpreted contextually and purposively and that such an interpretation provided, first, that the Ministers could grant permission to mine only after all the other required authorisations had already been obtained by a mining applicant;[139] and, second, that permission to mine could be granted by the Ministers only in "exceptional circumstances".[140]

In response, the respondents argued that, unlike other statutes, such as the MPRDA, there is no prescribed hierarchy or sequence of authorisations in the NEM: PAA. A mining applicant, therefore, could "test the waters" by ascertaining the views of the Ministers and their consent could be made subject to obtaining other authorisations. In addition, section 48(1)(b)[141] does not impose an obligation on the Ministers to grant permission to mine "only in exceptional circumstances". Instead, it simply imposes an obligation on the Ministers to apply a "stricter measure of scrutiny".[142]

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[139] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 10.2.

[140] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 10.1.

[141] Section 48(1) of the NEM: PAA states as follows: "Despite other legislation, no person may conduct commercial prospecting or mining activities: (a) in a special nature reserve or nature reserve; (b) in a protected environment without the written permission of the Minister; and (c) in a protected area referred to in section 9(b) or (d)".

[142] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 10.4.

The High Court accepted that section 48(1)(b) must be interpreted contextually and purposively[143] and agreed with the applicants that the Ministers could grant permission to mine only after all of the other required authorisations had already been obtained. However, the Court did not agree with the applicants that the Ministers could grant permission to mine only in "exceptional circumstances". The problem with this argument is that it sets the bar too high. Instead, the Ministers had to act as custodians of protected environments and apply the factors listed in section 48(4) with a "strict measure of scrutiny".[144] The Court put this point as follows:

> "To purposively give effect to the envisaged environment within and manner in which the Ministers are obliged to exercise their discretions, section 48(1)(b) and 48(4) should be interpreted to mean the following: despite the fact that a person may have obtained all the necessary authorisations required in terms of all other applicable statutory provisions in order to lawfully conduct mining activities on a certain portion of land, should that land fall within a protected environment as contemplated in NEM: PAA, then such a person would, in addition, need to obtain the written permission of both the Ministers of Environmental Affairs and Mineral Resources to do so. In considering a request for such permission, the ministers shall act as *custodians* of such protected environment and with a *strict measure of scrutiny* take into account the interests of local communities and the environmental principles referred to in section 2 of NEMA".[145]

After setting out these principles, the High Court turned to consider each of the grounds on which the applicants based their application. As set out above, one of these grounds was that the Ministers had failed to take relevant considerations into account, in particular, that they had failed to take South Africa's international responsibilities relating to the environment into account. Although it was unnecessary to decide whether this ground was valid or not, the Court held that it was important to emphasise that, as the trustee of vulnerable environments:

(i) the state was obliged to apply a higher level of scrutiny when considering whether mining should be permitted in a protected environment;

(ii) that as a part of this higher level of scrutiny, the state was required to take into consideration South Africa's international responsibilities relating to the environment; and

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[143] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 10.5.
[144] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 10.7.
[145] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 10.7.

(iii) that a failure to do so would infringe its obligations as the trustee, particularly in light of the fact that "most people would agree, when thinking of the tomorrows of unborn people that it is a present moral duty to avoid causing harm to the environment".[146]

6.5.5. Mining and Environmental Justice Community of South Africa v MEC for Agriculture, Rural Development, Land and Environmental Affairs (MEJCOSA)

(a) The facts

The facts of this case were as follows. Approximately two years after the judgment in *MEJCON* was handed down, the MEC for Agriculture, Rural Development, Land and Environmental Affairs in Mpumalanga Province excluded four properties from the Mabola Protected Environment in terms of section 29(2)(b) of the NEM: NPAA. The MEC did so to allow mining activities in the area and, particularly, to enable the second respondent (Uthuka Energy (Pty) Ltd)[147] to establish the same underground coal mine that was the subject of the dispute in *MEJCON*.

After the MEC excluded the four properties from the Mabola Protected Area, the applicants (essentially the same coalition of non-governmental and non-profit organisations in *MEJCON*) applied for an order reviewing and setting aside the MEC's decision on the grounds that it was unlawful, irrational or unreasonable. The applicants based their application on eight different grounds, one of which was that the MEC's decision unlawfully circumvented sections 48(1)(b) and 48(4) of the NEM: PAA and thus usurped the powers of the Minister of Environmental Affairs and the Minister of Mineral Resources.

In response to this argument, Uthuka Energy (the only party to oppose the application) argued that it raised a point of law and was not a ground for review. A review is aimed at deciding whether a decision is lawful, rational or reasonable. It is not aimed at deciding whether a decision is correct. Before he made his decision, Uthuka Energy argued further, the MEC consulted with an advisory panel and considered the submissions made by interested and affected parties. He also gave a full explanation for his decision, namely that it would promote the socio-economic interests of the community and the co-existence of mining and conservation in the area.

[146] *Mining and Environmental Justice Community Network v Minister of Environmental Affairs* [2019] 1 All SA 491 (GP) at para 11.1.

[147] Uthuka Energy was the successor-in-title to Atha-Afrika and thus the holder of the mining right.

(b) The judgment

The High Court (per Moleleki AJ) agreed with the applicants and found that the MEC's decision did contravene section 48 of the NEM: PAA and, therefore, was unlawful. In arriving at this decision, the Court wholeheartedly agreed with the interpretive approach followed in *MEJCON* towards section 48. When faced with an application in terms of section 48, both Ministers must act as custodians of the protected environment in question and apply the factors listed in section 48(4) with a "strict measure of scrutiny".[148]

Although it is true that the declaration of Mabola as a protected environment did not amount to a complete ban on mining in that area, mining could take place only with the written consent of both Ministers. When it comes to deciding whether to grant such permission, the High Court held, both Ministers must act as the custodians of protected areas and strictly scrutinise the facts listed in section 48(4) of the NEM: PAA before making a decision. Regrettably, the MEC's conduct did not live up to the strict standard of scrutiny required by section 48(1)(b), given that the Mabola Protected Environment included "irreplaceable critical biodiversity areas".[149]

6.5.6 Analysis and comment[150]

In her 2015 article titled "Climate Change, public trusteeship and the Tomorrows of the Unborn", Du Plessis wrote that much still needs to be done in terms of the judicial development of the concept of public trusteeship",[151] and that judicial engagement "is necessary to strengthen the [public trust] concept in our constitutional legal order" and, consequently, that the time has thus come for a "public trust jurisprudence".[152] The obligation that the judgments in *MEJCON* and *MEJCOSA* have imposed on the state as the public trustee to apply a strict standard of scrutiny to administrative decisions that affect public trust resources is an important step in this direction.

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[148] *Mining and Environmental Justice Community of South Africa v MEC for Agriculture, Rural Development, Land and Environmental Affairs* [2024] ZAMPMBHC 48 (18 July 2024) at para 33.1.

[149] *Mining and Environmental Justice Community of South Africa v MEC for Agriculture, Rural Development, Land and Environmental Affairs* [2024] ZAMPMBHC 48 (18 July 2024) at para 33.1.

[150] This section is based on W Freedman "Conservation, sustainable use of natural resources and the notion of public trusteeship" in A du Plessis (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1 at 8-26.

[151] A du Plessis "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260 at 288–289.

[152] A du Plessis "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260 at 293.

6.6 CONCLUSION

The public trust provisions of sections 11 and 12 of the NEM: ICMA were critically analysed in this chapter. The analysis was based on and engaged with the approach adopted by South African water resources public trust scholars to the public trust provisions in section 3 of the NWA. More particularly, the analysis was based on and engaged with the approach adopted by South African water resources public trust scholars to the classification and legal status of water resources and the fiduciary obligations imposed on the state as the public trustee of water resources.

Insofar as the classification and legal status of water resources are concerned, water resources public trust scholars have argued that section 3 of the NWA has vested legal title of these resources in the state as the public trustee acting through the national government. This legal title, they have argued further, is not the same as the common law concept of public ownership with respect to *res publicae*. Instead, it is a statutory form of public ownership that imposes fiduciary duties on the state as the public trustee.

Relying on the judgment in *Mostert v S*, it was argued that section 3 of the NWA does not vest legal title of water resources in the state. This is because the public trust provisions of section 3 do not regulate the classification and legal status of water resources. Instead, they simply regulate the management and administration of water resources. In this respect, the public trust provisions of section 3 of the NWA are mirrored by the public trust provisions of sections 11 and 12 of the NEM: ICMA.

At the same time, it was argued that the classification of running water as *res communes* and public rivers as *res publicae* cannot be correct because the distinction between private and public rivers has been abolished by the NWA, and all water resources are now considered to be part of one integrated hydrological cycle. Given that the NWA expressly states in its preamble that "water is a natural resource that belongs to all people", it would be more correct to say that water resources have been classified as *res publicae*, as that concept was defined in Roman law and not Roman-Dutch law. In this respect, it may once again be said that the ownership provisions of the NWA are mirrored in section 11 of the NEM: ICMA.

Insofar as the fiduciary duties of the state as public trustee are concerned, water resource public trust scholars have argued that the water resources public trust concept imposes a duty on the state to conserve, protect, manage and administer water resources in a manner that promotes the values of the Constitution, the purpose and objects of the NWA and environmental management principles such as inter- and intra-general equity, the precautionary

principle and the polluter pay principle. It also imposes an obligation on the state to promote equitable access to water, redress the results of past racial and gender discrimination and promote the efficient, sustainable and beneficial use of water in the public interest.

Although these arguments correctly reflect many of the fiduciary duties imposed on the state as the public trustee of water resources, it was argued that they do not identify an independent and unique role for the public trust concept. Instead, the public trust concept simply encompasses many of the duties and obligations imposed on the state by other legal instruments such as the Constitution, the NWA, the NEMA and so on. An unfortunate consequence of the arguments made by water resource scholars, therefore, is that they obscure the unique contribution the public trust concept can potentially make to the conservation, protection, management and administration of, not only water resources, but also coastal public property.

In order to address this concern, at least insofar as coastal public property is concerned, it was argued that a distinction should be drawn between the state's enumerated public trust duties and its residual public trust duties. The state's enumerated public trust duties are those set out in various provisions of the NEM: ICMA, and which reflect the manner in which the drafters of the Act have given concrete and specific effect to the public trust provisions in sections 11 and 12 of the Act. The state's residual public trust duties are those that will be identified by the courts as and when they interpret and apply the public trust provisions in sections 11 and 12 and which reflect the manner in which the courts will give concrete and specific effect to sections 11 and 12 over time. Examples of both types of duties were also discussed.

Finally, it was argued that the lack of judicial interest in the public trust concept may be addressed by viewing it as a standard of administrative review. Relying on the arguments made by Joseph Sax, and the US concept of "hard look" review, it was proposed that the public trust concept should be classified as a standard of environmental administrative review that imposes an obligation on the courts to apply PAJA in a searching manner when confronted with administrative action that adversely affects coastal public property. The benefit of this interpretation is that it empowers the courts to adopt a non-deferential approach to the discretionary powers that environmental statutes routinely confer on administrators. In this way, the courts can steer these discretionary powers towards meeting the ecological and environmental interests of present and future generations.

CHAPTER SEVEN

FINDINGS AND RECOMMENDATIONS

7.1 INTRODUCTION

The purpose of this chapter is to extract and summarise the findings made in this thesis and, in light of those findings, to answer the research questions. In addition, the purpose of this chapter is to make recommendations for law reform (if any) and identify areas of further study. This chapter is divided into four sections. Apart from the introduction, the key findings are extracted and summarised in section 7.2, the research questions are addressed in section 7.3 and recommendations for law reform (if any) are discussed in section 7.4. Areas of further study are identified in section 7.5.

7.2 SUMMARY AND KEY FINDINGS

7.2.1 Chapter One: Introduction

The key findings made in each chapter of this thesis are extracted and summarised in this section.

7.2.2 Chapter Two: The classification and legal status of the sea and the seashore

The purpose of Chapter Two was to provide a historical context within which the ownership provisions of section 11 of the National Environmental Management: Integrated Coastal Management Act[153] (NEM: ICMA) could be critically analysed. In order to achieve this goal, the legal principles and rules governing the classification and legal status of the sea and the seashore, the public's right to access and use these things, the state's power to regulate them, and the boundaries of the sea and the seashore in Roman law were discussed. Following this discussion, the legal principles and rules governing the same four issues in Roman-Dutch law and South African law prior to the coming into operation of the NEM: ICMA were explored. The exploration of pre-NEM: ICMA South African law focused largely on the provisions of the Seashore Act.[154] Among the key findings that emerged from this chapter are the following:

[153] 24 of 2008.
[154] 21 of 1936.

First, the classification and ownership of the sea and the sea-shore underwent a centuries-long process of étatisation. In terms of this process, the classification of the sea and the sea changed from common property to regalian property and finally to state property. Over the same period of time, the ownership of the sea and the seashore was bestowed at first on no one, centuries later on the prince and finally on the state.

Second, while the classification and ownership of the sea and the seashore underwent a process of étatisation, the public's rights to access and use these things did not. Instead, these rights were separated from the right of ownership in Roman-Dutch law and the Seashore Act and retained by the public. The public's right to access and use the sea and the seashore included simple commercial and recreational purposes such as bathing, fishing and drying nets.

Third, although the public retained its common law rights to access and use the sea and the seashore, the state, as the custodial owner, was entitled to regulate the manner in which the public exercised these rights. However, the state's regulatory authority was restrained. It could not exercise its regulatory powers in a manner that seriously prejudiced the public interest in the use and enjoyment of the sea and the seashore.

Fourth, apart from regulating the public's common law rights to access and use the sea and the seashore, the state could also alienate and grant other special rights to private persons that went beyond those enjoyed by the public, including the right to prospect and mine. The state's authority to do so was derived from its police powers as the sovereign and not its common law powers as the custodial owner and, as such, had to be authorised by legislation.

Fifth, the state's power to alienate, lease and grant other special rights in the sea and the seashore was, in fact, authorised by legislation in the form of the Seashore Act. Although this Act did impose some restrictions on the Minister's general and specific powers to do so, these restrictions were procedural and not substantive in nature. It is not surprising, therefore, that they proved to be ineffective in preventing the Minister from implementing the Act in a racially discriminatory manner.

Last, neither the common law principles governing the sea and the seashore nor the Seashore Act was aimed at conserving or protecting the sea and the seashore as a complex, biologically diverse and highly productive, but also vulnerable and threatened ecosystem. It is not surprising, therefore, that they did not provide a legal framework within which a system of integrated coastal management could be adopted and implemented.

7.2.3 Chapter Three: The classification and legal status of coastal public property

The purpose of Chapter Three was to critically analyse the ownership provisions of section 11(1) of the NEM: ICMA in light of the historical analysis in the previous chapter. In order to achieve this goal, the background and objects of the Act were briefly discussed. Following this discussion, the composition and boundaries of the coastal zone, as well as the classification and legal status of coastal public property, were examined. This examination was followed by an exploration of the constitutional institutions, coastal management programmes and coastal regulatory and enforcement mechanisms envisaged by the Act. The implications of the Supreme Court of Appeal's judgment in *Gongqose v Minister of Agriculture, Forestry and Fisheries*[155] for the provisions of the NEM: ICMA and its relationship to African customary law were also investigated. Among the key findings that emerged from this chapter are the following:

First, the sea and the seashore have been replaced with a new thing or *res,* namely coastal public property. This new thing consists of several components and embraces a much broader area than the sea and the seashore, especially on its seaward side, which includes, not only South Africa's territorial waters, but also its exclusive economic zone and continental shelf. In addition, coastal public property forms part of a series of adjacent and overlapping zones that comprise the coastal zone. The area encompassed by the NEM: ICMA thus contains a much larger portion of the coastal ecosystem than the Seashore Act did, and this facilitates the implementation of a system of integrated coastal management.

Second, instead of the State President, section 11(1) of the NEM: ICMA vests ownership of coastal public property in the "citizens of the Republic". Despite arguments to the contrary, this provision has retained the classification of coastal public property as a *res publicae* (public thing) as that concept was defined in Roman law (i.e. as things owned by the people) and not in Roman-Dutch law (i.e. as things owned by the prince or the state, but which the people were still entitled to access and use). An important consequence of this subtle change is that section 11 of the Act has brought to an end the centuries-long process of étatisation.

Third, apart from strengthening the public nature of coastal public property, Freedman,[156] Sowman and Rebelo[157] have argued that the purpose underlying the ownership

[155] 2018 (5) SA 104 (SCA).
[156] W Freedman "On the beach: The legal status of the sea and the seashore in light of the National Environmental Management: Integrated Coastal Management Act 24 of 2008" in M Kidd and S Hoctor (eds) *Stella Iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 275 at 292.
[157] M Sowman and X Rebelo "The coastal environment" in J Glazewski (ed) *Environmental Law in South Africa* 3ed (2023) at para 11.6.1.

provisions is to address the state's failure, during the colonial and apartheid eras, to exercise its ownership to promote access to the opportunities and benefits of coastal public property, irrespective of race, and to conserve and protect the coastal environment for current and future generations, by divesting the state of its ownership of coastal public property and emphasising its duties and responsibilities as the public trustee, rather than its authority as an owner

Fourth, like its predecessor (viz. the Seashore Act), the NEM: ICMA distinguishes between the ownership of coastal public property and the right to access and use these natural resources and vests them in the citizenry and all "natural persons", respectively. At the same time, it expressly imposes limits on the manner in which the right to use and enjoy coastal public property may be exercised. Given that these limits are included in the same provision that established the right itself, they may be regarded as inherent limits and the right as an inherently limited right.

Fifth, in direct contrast to the Seashore Act, the NEM: ICM expressly prohibits the alienation, sale and acquisition by prescription of coastal public property. This prohibition represents a significant diminution of the authority of the state to alienate, lease and grant other rights in coastal public property and flows from the change in the legal status of coastal public property. It thus strengthens the public nature of coastal public property.

Last, a careful examination of the NEM: ICMA reveals that none of its provisions refer to customary law. Given this fact, it can be said that the Act does not "specifically deal" with customary law and, consequently, that it has not extinguished any existing customary law rights of ownership of the coast or any customary law rights to access, use, manage or administer the coast. In terms of Bishop's six-step analysis, therefore, a community or person who wished to assert such a right would simply have to prove that the "right" being asserted is, in fact, a customary law right and not a cultural practice.[158]

7.2.4 Chapter Four: The classification and justification of public property in Anglo-American-Australasian jurisdictions

The purpose of Chapter Four was to go beyond the doctrinal and positivist approach adopted in Chapter Three and critically analyse the ownership provisions of section 11(1) of the NEM: ICMA from a non-doctrinal and normative perspective. In order to achieve this goal, the different types of property regimes that are found in common law jurisdictions were discussed,

[158] M Bishop "Asserting customary fishing rights in South Africa" (2021) 47(2) *Journal of Southern African Studies* 291.

namely common property, public property and private property. Following this discussion, the scope and content of public property was examined. In light of Page's scholarship on public property, this examination focused on the incidents of public ownership, the spectrum of public ownership and rethinking public ownership.[159] This examination was followed by an exploration of the normative justifications identified by Anglo-American-Australasian scholars such as Gray,[160] Rose,[161] and Alexander.[162] Among the key findings that emerged from this chapter were the following:

First, like the Anglo-American-Australasian legal systems, the South African legal system also distinguishes between private property, common property and public property. In light of its civil law roots, however, the notion that certain categories of property are *res extra commercium* and thus excluded from private ownership has never disappeared from view. Instead, the concept of non-private property has always been accepted as a fundamental aspect of South Africa's system of property law.

Second, when compared to the Anglo-American-Australasian common property and public property regimes, South African property law has tended to adopt a narrow focus. Insofar as the common property regime is concerned, the focus in South Africa has fallen largely on *res communes* and not on other forms of open-access or limited-access common property. Insofar as the public property regime is concerned, the focus has fallen largely on *res publicae* and not on property owned by the state in its capacity as a juristic person (i.e. government *property*).

Third, insofar as *res publicae* are concerned, legislation, case law and academic scholarship have tended to focus on the classification and legal status of these public things, rather than the nature of the right of ownership in them, the public's right to access and use them, and the state's duty to conserve, protect, manage and administer them for present and future generations. In addition, very little attention has been paid to the normative justifications underlying *res publicae*.

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[159] J Page *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021). See also J Page "Towards an understanding of public property" in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (2013) 195 and J Page and A Brower "The four dimensions of public property" in H Conway and R Hickey (eds) *Modern Studies in Property Law Volume 9* (2017) 544.

[160] K Gray "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45.

[161] C Rose "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53 *Chicago University Law Review* 711.

[162] G Alexander "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 and G Alexander "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451.

Fourth, as Page has demonstrated, there are various ways in which the nature of public ownership may be seen and understood. One of these is by identifying and describing the entitlements that public ownership confers on its holder. Another is by asking who owns public property and locating the different iterations of public ownership along a spectrum. This spectrum begins at one end, with the state as the sole legal owner. It then shifts to the middle of the spectrum, where legal and beneficial title are separated and vested in different entities. The spectrum ends with a beneficial-only version of ownership. One in which there is no legal title. Instead, the right to access and use the property is held by the "unorganised public".

Fifth, unfortunately, it has proved difficult to locate the ownership provisions of section 11(1) of the NEM: ICMA on Page's spectrum. Although section 11(1) does separate legal title (i.e. ownership of coastal public property) from beneficial title (i.e. the right to access and use coastal public property), it does not vest legal title in the state but rather in the "citizens of the Republic" who are an exemplar of Rose's notion of the unorganised public. Given that the citizenry does not enjoy legal personality and thus does not have the capacity to engage in juristic acts, it is unlikely that the ownership vested in the citizenry confers any entitlements or powers on them. Instead, it is in all likelihood a bare or nude ownership.

In light of these findings, it was argued that simply because the ownership vested in the citizenry is a bare or nude ownership and cannot serve an instrumental or practical purpose, it does not follow that the ownership provisions of section 11(1) of the NEM: ICMA do not serve any purpose at all. Instead, they may still serve a symbolic or normative purpose and rather than engaging in a futile search for an instrumental or practical purpose, it would be more productive to search for a normative one.

Apart from the arguments made by Freedman, Sowman and Rebelo, Rose's theory of inherently public property as socialisation provides a particularly strong justification in favour of vesting ownership of coastal public property in the citizens of the Republic. This theory argues that inherently public property, like coastal public property, exerts a socialising influence on people, which fosters interpersonal relationships and a sense of belonging to a democratic community, both of which are sorely needed in South Africa. In addition, it gives effect to the constitutional right to "an environment that is not harmful to well-being", which encompasses the concept of a "sense of place". This concept includes coastal public property.

Having arrived at the conclusion that the ownership provisions of section 11(1) of the NEM: ICMA do not have an instrumental or practical purpose, but rather a symbolic and normative one, as explicated above, this thesis turned to consider the public trust provisions in

sections 11 and 12 of the Act. These public trust provisions were analysed in Chapter 5 and Chapter 6.

7.2.5 Chapter Five: The United States Public Trust Doctrine

The purpose of Chapter Five was to critically analyse the legal principles and rules that govern the United States Public Trust Doctrine. In order to achieve this goal, the historical origins and key elements of the traditional Doctrine were discussed, largely through a detailed examination of the judgments in *Arnold v Mundy*,[163] *Martin v Waddell's Lessee*,[164] *Illinois Central Railroad Co v Illinois*[165] and *Shively v Bowly*.[166] Following this discussion, Joseph Sax's arguments in favour of broadening the Doctrine so that it could serve as an effective tool for conserving and protecting the environment were explored.[167] This exploration was followed by an investigation into the manner in which the Doctrine has evolved and expanded over the past five decades, particularly with respect to the scope of the modern Doctrine, the values protected by the modern Doctrine and the fiduciary duties and responsibilities imposed on the State by the modern Doctrine. Among the key findings that emerged from this Chapter are the following:

First, although the Public Trust Doctrine has undergone significant changes since the 1970s, the classification and legal status of public trust resources have remained constant. Ownership of public trust resources is vested in the State as the public trustee, while the right to access, use and enjoy those resources is vested in the general public as the beneficiaries. The Doctrine has thus retained a bifurcated concept of public ownership. While legal title is vested in the State, beneficial title is vested in the general public.

Second, unlike the classification and legal status of public trust resources, the scope of, and values protected by, the US Public Trust Doctrine have undergone a process of transformation over the past five decades. The scope has evolved to include, not only tidal and navigable waters and the land beneath them, but also non-navigable waters and other non-water related resources, for example, dry sand beaches, parklands and wildlife. At the same time, values protected by the Doctrine have expanded to include ecological, recreational and scenic values.

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[163] 6 NJL 1 (1821).
[164] 41 US (16 Pet) 367 (1842).
[165] 146 US 387 (1892).
[166] 152 US 1 (1894).
[167] J Sax "The public trust doctrine in natural resources law: Effective judicial intervention" (1970) 68 *Michigan Law Review* 471.

Third, the significant changes in the scope and values protected by the US Public Trust Doctrine have been accompanied by an equally significant change in the role of the State as the public trustee over the same period of time. Instead of concentrating on the State's discretionary authority over public trust resources, the Doctrine now emphasises the State's duties and responsibilities. Among the most important of these fiduciary duties is the duty to preserve the public trust resource so that it can sustain both present and future generations of beneficiaries.

Fourth, to address the danger of special interest groups capturing environmental and other administrative agencies that were supposed to be regulating them, the Public Trust Doctrine should also be conceptualised as a standard of administrative review, ideally along the lines of hard look review. In terms of this standard of review, administrative decision-makers are required to provide detailed explanations for their decisions, justify departures from previous decisions, promote effective public participation in the decision-making process"; and consider alternatives to the proposed action.

7.2.6 Chapter Six: The South African coastal public trust concept

The purpose of Chapter 6 was to critically analyse the public trust provisions of sections 11 and 12 of the NEM: ICMA. This analysis was based on and engaged with the approach adopted by South African water resource public trust scholars to the public trust provisions of section 3 of the National Water Act (NWA).[168] Although water resource public trust scholars such as Van der Schyff,[169] Young,[170] Viljoen[171] and Harding[172] have analysed various aspects of the water resources public trust provisions, this Chapter focused on their arguments with respect to two aspects only: first, the classification and legal status of water resources and, second, the

[168] 36 of 1998.
[169] CJ Pienaar and E van der Schyff "The reform of water rights in South Africa" (2007) 3 *Law and Environment and Development Journal* 181; E van der Schyff and G Viljoen "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern* Africa 339; E van der Schyff "South African natural Resources, Property Rights, and Public Trusteeship – Transformation in Progress" in D Grinlinton and P Taylor (eds) *Property Rights and Sustainability* (2011) 323; and E van der Schyff "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" (2013) 130 *SALJ* 369.
[170] C 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).
[171] G Viljoen "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176 at 190-191; G Viljoen "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" 2019 *VRU-WCL* 172 at 175; and G Viljoen "Critical perspectives on South Africa's groundwater law: Established practice and the novel concept of public trusteeship" (2020) 38 *Journal of Energy and Natural Resources Law* 391.
[172] WR Harding *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022.

fiduciary duties imposed by the water resources public trust on the national government as the public trustee. After setting out their arguments, this Chapter levelled certain criticisms against the approach adopted by the water resource public trust scholars and proposed alternative ways of analysing these two aspects. These alternative approaches were then applied to the coastal public trust provisions of sections 11 and 12 of the NEM: ICMA.

The key findings that emerged from this Chapter may be divided into two categories: first, those relating to the classification and legal status of water resources; and, second, those relating to fiduciary duties of the state as the public trustee of water resources

Insofar as the classification and legal status of water resources are concerned, water resources public trust scholars have argued that section 3 of the NWA has vested legal title of these resources in the state as the public trustee acting through the national government. This legal title, however, is not the same as the common law concept of public ownership with respect to *res publicae*. Instead, it is a statutory form of public ownership that imposes fiduciary duties on the state as the public trustee. In light of the judgment in *Mostert v S*,[173] it was contended in Chapter 6 that the argument made by water resources public trust scholars is wrong and that section 3 of the NWA does not vest legal title in the state. As the Supreme Court of Appeal correctly stated in *Mostert v S*, the public trust provisions of section 3 do not regulate the classification and legal status of water resources. Instead, they simply regulate the management and administration of those resources.

At the same time, it was also contended that while the Supreme Court of Appeal's statement in *Mostert v S* that public trust provisions of the NWA simply regulate the management and administration of water resources is correct, its statement that the classification and legal status of running water and/or public rivers continue to be governed by the common law is not correct. This is because the distinction between private and public rivers has been abolished by the NWA, and all water resources are now considered to be part of one integrated hydrological cycle. Given that the NWA expressly states in its preamble that "water is a natural resource that belongs to all people", it was contended in Chapter 6 that water resources are now classified by the NWA as *res publicae*, as that concept was defined in Roman law (i.e. as a thing owned by the Roman "people") and not in Roman-Dutch law (i.e. as a thing owned by the prince or the state).

A significant albeit unexpected consequence of the arguments made in Chapter 6 is that both the public trust provisions of section 3 of the NWA and the ownership provisions of the

[173] *Mostert v S* 2020 (2) SA 586 (SCA).

preamble to the NWA are mirrored by the public trust and ownership provisions of sections 11 and 12 of the NEM: ICMA.

Insofar as the fiduciary duties of the state as public trustee are concerned, water resource public trust scholars have argued that the water resources public trust concept imposes a duty on the state to conserve, protect, manage and administer water resources in a manner that promotes the values of the Constitution, the purpose and objects of the NWA and environmental management principles such as inter- and intra-general equity, the precautionary principle and the polluter pay principle. It also imposes an obligation on the state to promote equitable access to water, redress the results of past racial and gender discrimination and promote the efficient, sustainable and beneficial use of water in the public interest.

Although these arguments correctly reflect many of the fiduciary duties imposed on the state as the public trustee of water resources, it was contended in Chapter 6 that they do not identify an independent and unique role for the public trust concept. Instead, the public trust concept simply encompasses many of the duties and obligations imposed on the state by other legal instruments such as the Constitution, the NWA, the NEMA and so on. An unfortunate consequence of the arguments made by water resource scholars, therefore, is that they obscure the unique contribution the public trust concept can potentially make to the conservation, protection, management and administration, not only of water resources, but also coastal public property.

In order to address this concern, at least insofar as coastal public property is concerned, it was contended that a distinction should be drawn between the state's enumerated public trust duties and its residual public trust duties. The state's enumerated public trust duties are those set out in various provisions of the NEM: ICMA, and which reflect the manner in which the drafters of the Act have given concrete and specific effect to the public trust provisions in sections 11 and 12 of the Act. The state's residual public trust duties are those that will be identified by the courts as and when they interpret and apply the public trust provisions in sections 11 and 12, and which reflect the manner in which the courts will give concrete and specific effect to sections 11 and 12 over time. Examples of both types of duties were identified and discussed.

Finally, it was argued that the lack of judicial interest in the public trust concept may be addressed by viewing it as a standard of administrative review. Relying on the arguments made by Joseph Sax, and the US concept of "hard look" review, it was proposed that the public trust concept should be classified as a standard of environmental administrative review that

imposes an obligation on the courts to apply Promotion of Administrative Justice Act[174] (PAJA) in a searching manner when confronted with administrative action that adversely affects coastal public property. The benefit of this interpretation is that it empowers the courts to adopt a non-deferential approach to the discretionary powers that environmental statutes routinely confer on administrators. In this way, the courts can steer these discretionary powers towards meeting the ecological and environmental interests of present and future generations.

7.3 RESEARCH QUESTIONS

The goal of this thesis was to critically analyse the ownership and public trust provisions of sections 11 and 12 of the NEM: ICMA to investigate the classification and legal status of coastal public property; the legal nature and purpose underlying the right of ownership of coastal public property vested in the citizens of the Republic; the legal nature and purpose underlying the coastal public trust concept; and the powers, rights, duties and responsibilities this concept imposes on the state as the public trustee. More specifically, the goal of this thesis is to answer the following questions:

> *(a) Have the ownership provisions of section 11 codified the common law principles governing the classification and legal status of the sea and the seashore, or have they introduced a new form of statutory public ownership?*

A key argument in this thesis is that the public trust provisions in both section 3(1) of the NWA and sections 11 and 12 of the NEM: ICMA do not regulate the classification and legal status of water resources and coastal public property, respectively. Instead, the ownership of these public trust resources continues to be regulated by Roman and Roman-Dutch property law concepts that have been included in each statute in an amended form. In light of this argument, it is submitted that the ownership provisions of section 11 of the NEM: ICMA have not introduced a new form of statutory public ownership. Instead, the classification and legal status of coastal public property as a *res publicae* has been codified, but as that concept was defined in Roman law (i.e. as a thing that belongs to the people) and not in Roman-Dutch law (i.e. as a thing that belongs to the prince or the state). An important consequence of this classification is that the centuries-long étatisation of the sea and the seashore has been brought to an end.

[174] 3 of 2000.

(b) Have the ownership provisions of section 11 conferred any meaningful entitlements on the citizenry as owners?

Given that the right to access and use coastal public property, the right to manage and administer coastal public property and the right to alienate and sell coastal public property have either been separated from the right of ownership and vested in another entity or simply abolished, it was also argued in this thesis that the ownership provisions in section 11(1) of the NEM: IMCA do not confer any meaningful entitlements on the citizens as owners. In addition, it was also argued that, unlike the state, the citizens of the Republic do not have legal personality and thus lack the capacity to exercise or enforce any entitlements that might be conferred on them. As Page has pointed out, any attempt to identify and describe the entitlements of public ownership quickly runs into conceptual difficulties and ultimately falls into the trap of defining public ownership in private ownership terms. In light of these arguments, it is submitted that the ownership provisions of section 11 do not confer any meaningful entitlements on the citizenry as owners.

(c) If the ownership provisions have not conferred any meaningful entitlements on the citizenry, what is the underlying purpose of these provisions?

Despite the fact that the ownership provisions of section 11(1) of the NEM: ICMA do not have an instrumental or practical purpose, it was argued that they have an important symbolic and normative purpose. Freedman, Sowman and Rebelo suggested in this respect that the purpose underlying the ownership provisions is to address the state's failure, during the pre-democratic era, to promote access to coastal public property, irrespective of race, and to protect the coastal environment for future generations by divesting the state of ownership and emphasizing its duties as the public trustee. Although this suggestion is persuasive, it did not take into account existing public property scholarship and centred the state rather than the citizen. After reviewing Anglo-American-Australasian public property scholars, this thesis relied on Rose's theory of inherently public property as sociability to identify the underlying purpose of the ownership provisions in section 11(1). Rose's theory argues that inherently public property, like coastal public property, exerts a socialising influence on people, which fosters interpersonal relationships and a sense of belonging to a democratic community, both of which are sorely needed in South Africa.

(d) Have the public trust provisions of sections 11 and 12 incorporated the US Public Trust Doctrine into South African coastal law, or have they introduced a uniquely South African coastal public trust concept?

Apart from one or two suggestions to the contrary, all of the leading water resource public trust scholars agree that section 3(1) of the NWA did not simply introduce the US Public Trust Doctrine into South African water law for at least two reasons. First, US law is not an authoritative source of South African law and, consequently, it would be wrong to regard the US Public Trust Doctrine as a source of South African water law. Second, given that each individual State has its own public trust doctrine, it is difficult to say what exactly the US Public Trust Doctrine means and which principles should be applied in South Africa. For essentially the same reasons, it was argued in this thesis that sections 11 and 12 of the NEM: ICMA have not simply introduced the US Public Trust Doctrine as a whole into South African coastal law. Instead, they have established a uniquely South African coastal public trust concept. At the same time, however, it was noted that the US Public Trust Doctrine may serve as a persuasive source when it comes to interpreting the South African coastal public trust concept. This is because of its long history, rich jurisprudence and wide variety of concepts.

(e) If sections 11 and 12 have introduced a uniquely South African coastal public trust concept, what is the legal nature and underlying purpose of this concept?

Unlike the US Public Trust Doctrine, it was argued in this thesis that the South African coastal public trust concept is not concerned with the classification and legal status of coastal public property. Instead, it is concerned with the management and administration, and especially the conservation and protection, of this natural resource. In this respect, it was argued further that the coastal public trust concept, not only confers the power to manage and administer coastal public property on the state, but also imposes the responsibility on it to exercise these powers in a manner that conserves and protects the coast for current and future generations and thus gives effect to the environmental rights guaranteed in section 24 of the Constitution and the environmental management principles listed in section 2 of NEMA.

(f) Have the public trust provisions of sections 11 and 12 imposed additional powers, rights, duties and responsibilities on the state as the public trustee?

When it comes to powers, rights, duties and responsibilities imposed on the state as the public trustee, it was argued in this thesis that a distinction should be drawn between the state's enumerated public trust duties and its residual public trust duties. The state's enumerated public

trust duties are those set out in various provisions of the NEM: ICMA and which reflect the manner in which the drafters of the Act have given concrete and specific effect to the public trust provisions in sections 11 and 12 of the Act. The state's residual public trust duties are those that will be identified by the courts as and when they interpret and apply the public trust provisions in sections 11 and 12 and which reflect the manner in which the courts will give concreted and specific effect to sections 11 and 12 over time. These residual public trust duties could include additional obligations, such as the duty to educate the public about the importance of a healthy environment.

7.4 RECOMMENDATIONS

This thesis does not make any recommendations for law reform. However, together with Van der Schyff, Viljoen and Harding, it does rue the fact that both the water resources public trust concept and the coastal public property concept have largely been overlooked by the courts and legal practitioners and, consequently, that South Africa's public trust jurisprudence is still very much in its infancy. It thus calls on the courts and legal practitioners to play a more active role in interpreting, developing and applying the public trust concept. Hopefully, the suggestion made in this thesis that the public trust concept may be conceptualised as an environmental administrative standard of judicial review might assist in this respect.

7.5 AREAS FOR FURTHER RESEARCH

In light of the fact that the NEM: ICMA does not deal specifically with African customary law, customary law principles governing the ownership of the coast, as well as the right to access, use and enjoy the coast, have not been abolished or amended. Unfortunately, African customary law principles and rules relating to the ownership of the coast and the right to access, use and enjoy this natural resource have not been as thoroughly investigated as they deserve to be. This is an area of law that calls for further research.

BIBLIOGRAPHY

SECONDARY SOURCES

BOOKS

Archer R & Bouillon A *The South African Game: Sports and Racism* (1982) Zed Press, Westport.

Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* 5ed (2006) LexisNexis, Durban.

Barnes R *Property Rights and Natural Resources* (2009) Hart Publishing, Oxford.

Berman HJ *Law and Revolution: The Formation of the Western Legal Tradition* (1983) Harvard University Press, Cambridge.

Buckland WW *A Textbook of Roman Law from Augustus to Justinian* 2ed (1950) Cambridge University Press, Cambridge.

Clarke A & Kohler P *Property Law: Commentary and Materials* (2005) Cambridge University Press, Cambridge.

Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) Juta, Cape Town.

Chemerinsky E *Constitutional Law: Principles and Policies* 4ed (2011) Wolters Kluwer, New York.

Fisher E & Shapiro S *Administrative Competence: Reimagining Administrative Law* (2020) Cambridge University Press, Cambridge.

Fisher R & Whittal J *Cadastre: Principles and Practice* (2020) South African Geomatics Institute, Durban.

Glazewski J *Environmental Law in South Africa* 2ed (2005) LexisNexis, Durban.

Glazewski J *Environmental Law in South Africa* 3ed (2013) LexisNexis, Durban.

Hahlo HR & Khan E *The South African Legal System and its Background* (1968) Juta, Cape Town.

Hoexter C *Administrative Law in South Africa* 2ed (2012) Juta, Cape Town.

Kidd M *Environmental Law* 2ed (2011) Juta, Cape Town.

Lee RA *An Introduction to Roman-Dutch Law* 3ed (1931) Clarendon Press, Oxford.

Macpherson CB *Property: Mainstream and Critical Positions* (1978) University of Toronto Press, Toronto.

Marzano A *Roman Villas in Central Italy: A Social and Economic History* (2007) Brill, Leiden.

Marzano A *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (2013) Oxford University Press, Oxford.

Maisels IA *A Life at Law: The Memoirs of IA Maisels, QC* (1998) Jonathan Ball, Johannesburg.

Metraux GPR *The Roman Villa in the Mediterranean Basin* (2018) Cambridge University Press, Cambridge.

Moore S *A History of the Foreshore and the Law Relating Thereto* 3ed (2006) The Law Book Exchange, Clarke.

Muller G, Brits R, Pienaar J & Boggenpoel Z *Silberberg and Schoeman's The Law of Property* 6ed (2019) LexisNexis, Durban.

O'Douglas W *Of Men and Mountains* (1951) Harper and Brothers, New York.

Page J *Public Property, Law and Society: Owning, Belonging, Connecting in the Public Realm* (2021) Routledge, Abingdon-on-Thames.

Pennington K *The Prince and the Law 1200 – 1600: Sovereignty and Rights in Western Legal Tradition* (1993) University of California Press, Oakland.

Quinot G et al *Administrative Justice in South Africa: An Introduction* (2015) Oxford University Press, Cape Town

Stein P *Roman Law in European History* (1999) Cambridge University Press, Cambridge.

Stella A *The Libri Feudorum (the 'Bookf of Fiefs'): An annotated English translation of the Vulgata Recension with Latin Text* (2023) Brill, Leiden.

Thomas JAC *Textbook of Roman Law* (1976) North-Holland Publishing Company, Amsterdam

Van der Merwe CG "Things" in *Law of South Africa (LAWSA) Vol 27* 2ed (2014) LexisNexis, Durban.

Van Warmelo P *An Introduction to the Principles of Roman Civil Law* (1976) Juta, Cape Town.

Van Zyl D *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) Butterworths, Durban.

Van Zyl D *History and Principles of Roman Private Law* (1983) Butterworths, Durban

Whaley J *The Holy Roman Empire: A Very Short Introduction* (2018) Oxford University Press, Oxford.

Wood MC *Nature's Trust: Environmental Law for a New Ecological Age* (2014) Cambridge University Press, Cambridge.

CHAPTERS IN BOOKS

Batista CM "Coastal boundaries" in Finkl C & Makowski C (eds) *Encyclopedia of Coastal*

Science (2018).

Freedman W "Integrated coastal management boundaries and South Africa's new Integrated Coastal Management Act" in Couzens E & Honkonen T *International Environmental Law Making and Diplomacy Review 2008* (2009) 167.

Freedman W "On the beach: The legal status of the sea and the seashore in light of the National Environmental Management: Integrated Coastal Management Act 24 of 2008" in Kidd M & Hoctor S (eds) *Stella Iuris: Celebrating 100 years of Teaching Law in Pietermaritzburg* (2010) 275.

Freedman W "Conservation, sustainable use of natural resources and the notion of public trusteeship" in Du Plessis A (ed) *Environmental Law and Local Government in South Africa* 2ed (2021) 8-1.

Glavovic BC & Cullinan C "The coast" in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 868.

Glavovic BC, Cullinan C & Groenink M "The coast" in King ND, Strydom HA & Retief FP (eds) *Fuggle and Rabie's Environmental Management in South Africa* 3ed (2018) 653.

Kidd M "Environment" in Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 516.

Leopold A "Some fundamentals of conservation in the Southwest" in Flader SL & Callicott JB (eds*) The River of the Mother of God (and Other Essays by Aldo Leopold)* (1925).

Nield S "The New Forest: Ancient forest and modern playground" in E Cooke (ed) *Modern Studies in Property Law 2* (2003) 287.

Oosthuizen M, Van der Linde M & Basson E "National Environmental Management Act 107 of 1998 (NEMA)" in King NDA, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management in South Africa* 3 ed (2018) 128.

Page J "Towards an understanding of public property" in Hopkins N (ed) *Modern Studies in Property Law: Volume 7* (2013) 195.

Page J and Brower A "The four dimensions of public property" in Conway H & Hickey R (eds) *Modern Studies in Property Law Volume 9* (2017) 544.

Resta G "Systems of public property" in Graziadei M & Smith L (eds) *Comparative Property Law: Global Perspectives* (2017) 216.

Ryan E "The public trust doctrine, property, and society" in Graham N, Davies M & Godden L (eds) *The Routledge Handbook of Property, Law and Society* (2023)

Sowman M & Rebelo X "The coastal environment" in J Glazewski (ed) *Environmental Law in South Africa* 3ed (2023) 11-1.

Tarlock AD "United States of America" in Alterman R & Pellach C (eds) *Regulating Coastal*

Zones: International Perspectives of Land Management Institution (2021) 355.

Van der Schyff E "South African natural Resources, Property Rights, and Public Trusteeship – Transformation in Progress" in Grinlinton D & Taylor P (eds) *Property Rights and Sustainability* (2011) 323

Van der Vyver JD "The étatisation of public property" in Visser DP (ed) *Essays on the History of Law* (1989) 261.

Whitty N "Water law regimes" in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000) 420.

Wood M & Levitt G "The public trust in environmental decision making" in Paddock L, Glicksman RL & Bryner NS (eds) *Decision Making in Environmental Law* (2016) 451.

JOURNAL ARTICLES

Alexander G "The social obligation norm in American property law" (2009) 94 *Cornell Law Review* 745.

Alexander G "Ownership and obligations: The human flourishing theory of property" (2013) 43(2) *Hong Kong Law Journal* 451.

Angelis C "The Public Trust Doctrine and sea level rise in California: Using the public trust to restrict coastal armoring" (2013) 19(2) *Hastings Environmental Law Journal* 249.

Blumm MC & Schwartz TA "Mono Lake and the evolving public trust in Western water" (1995) 37 *Arizona Law Review* 701.

Blumm MC "Public property and the democratization of Western water law: A modern view of the public trust doctrine" (1989) 19 *Environmental Law* 573.

Blumm MC & Guthrie R "Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision" (2012) 44 *University of California Davis Law Review* 791.

Blumm MC & Schwartz ZA "The Public Trust Doctrine Fifty Years after Sax and Some Thoughts on its Future" (2021) 44 *Public Land and Resources Law Review* 1.

Bishop M "Asserting customary fishing rights in South Africa" (2021) 47 *Journal of Southern African Studies* 291.

Carr DR "Frederick Barbarossa and the Lombard League: Imperial regalia, prescriptive rights and the northern Italian cities" (1989) 10 *Quidditas* 29.

Clarke A "Creating new commons: Recognition of communal land rights within a private property framework" (2006) 59 *Current Legal Problems* 319.

Coing H "The Roman law as *Ius Commune* on the Continent" (1973) 89 *Law Quarterly Review*

505.

Deveney P "Title, *ius publicum* and the public trust: A historical analysis" (1976) 1 *Sea Grant LJ* 13.

Du Plessis A "South Africa's constitutional environment right (generously) interpreted: What is in it for poverty?" (2011) 27 *SAJHR* 279.

Du Plessis A "Climate change, public trusteeship and the tomorrows of the unborn" (2015) 31 *SAJHR* 260.

Epstein RA "Property rights: Long and skinny" (2020) 14 *International Journal of the Commons* 567.

Frier BW "The Roman origins of the Public Trust Doctrine" (2019) 32 *Journal of Roman Archaeology* 641.

Glazewski J "Towards a Coastal Zone Management Act for South Africa" (1997) 4 *SAJELP* 1.

Goble BJ, Lewis M, Hill T & Phillips M "Coastal management in South Africa: Historical perspectives and setting the stage of a new era" (2014) 91 *Ocean and Coastal Management* 32.

Gray K "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and the Environment* 45.

Grey PM "Judicial review and the 'hard look; doctrine" (2006) 7 *Nevada Law Review* 151.

Habdas M "Who needs a park or city square? The notion of public real estate as *res publicae*" 2011 *TSAR* 626.

Hardin G "The tragedy of the commons" (1968) 162 *Science* 1243.

Hahlo HR "The great South-West African diamond case: A discourse" (1959) 76 *SALJ* 151.

Layard A "Privatising land in England" (2019) 11 *Journal of Property, Planning and Environmental Law* 151.

MacGrady GJ "The navigability concept in the civil and common law: Historical development, current importance, and some doctrines that don't hold water" (1975) 3 *Florida State University Law Review* 511.

Magraw D & Thomure N "*Carte de Foresta*: The Charter of the Forest turns 800" (2017) 47 *Environmental Law Reporter* 10934 at 10935.

Nili S "The idea of public property" (2019) 129 *Ethics* 344.

Oydanich N "Chief Justice Roberts's hard look review" (2021) 89 *Fordham Law Review* 1635.

Pienaar CJ and Van der Schyff E "The reform of water rights in South Africa" (2007) 3 *Law and Environment and Development Journal* 181.

Raccagni G "When the emperor submitted to his rebellious subjects: A neglected and innovative legal account of the 1183 Peace of Constance" (2016) 131 *English Historical Review* 519.

Rodgers C "Towards a taxonomy for public and common property" (2019) 78 *Cambridge Law Journal* 124.

Rogerson JM "Kicking sand in the face of apartheid: Segregated beaches in South Africa" (2017) 35 *Bulletin of Geography – Socio-Economic Series* 94.

Rose CM "The comedy of the commons: Commerce, custom, and inherently public property" (1986) 53 *University of Chicago Law Review* 711.

Rose CM "Joseph Sax and the idea of the public trust" (1998) 25 *Ecology Law Quarterly* 351

Rose CM "Romans, roads and romantic creators: Traditions of public property in the information age" (2003) 66 *Law and Contemporary Problems* 89.

Rose CM "Property and language, or, the ghost of the Fifth Panel" (2006) 18 *Yale Journal of Law and the Humanities* 1.

Ruhl JB & McGinn AJ "The Roman public trust doctrine: What was it, and does it support an atmospheric trust" (2020) 47 *Ecology Law Quarterly* 117.

Ryan E "From *Mono Lake* to the atmospheric trust: Navigating the public and private interests in public trust resource commons" (2019) 10 *George Washington Journal of Energy and Environmental Law* 39.

Ryan E "A short history of the public trust doctrine and its intersection with private water law" (2020) 38 *Virginia Environmental Law Journal* 135.

Samuel G "On the beach: What can beaches reveal about legal reasoning and categorisation?" (2017) 12 *Journal of Comparative Law* 187.

Sax J "The public trust doctrine in natural resource law: An effective legal intervention" (1970) 68 *Michigan Law Review* 471.

Schermaier MJ "*Res Communes Omnium:* The history of an idea from Greek philosophy to Grotian jurisprudence" (2009) 30 *Grotiana* 20.

Sowman M & Malan N "Review of progress with integrated coastal management in South Africa since the advent of democracy" (2018) 40(2) *African Journal of Marine Science*121.

Takacs D "The public trust doctrine, environmental human rights, and the future of private property" (2008) 15 *New York University Environmental Law Journal* 711

Van der Schyff C & Viljoen G "Water and the public trust doctrine – a South African perspective" (2008) 4 *Journal for Transdisciplinary Research in Southern* Africa 339.

Van der Schyff E "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 13 *PER/PELJ* 122.

Van der Schyff E & Van der Walt T "Is water flowing in a public river or stream 'a thing capable of being stolen'?" (2012) 25 *SACJ* 297.

Van der Schyff E "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" (2013) 130 *SALJ* 369

Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 11 *SAJHR* 169.

Van der Walt AJ "Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state" (2001) 118 *SALJ* 258.

Viloen G "South Africa's water crises: The idea of property as both a cause and solution" (2017) 21 *Law, Democracy and Development* 176.

Viljoen G "The transformed property regime of the National Water Act 36 of 1998: Comparative reflections on South Africa's water in the 'public space'" 2019 *VRU-WCL* 172.

Viljoen G "Critical perspectives on South Africa's groundwater law: Established practice and the novel concept of public trusteeship" (2020) 38 *Journal of Energy and Natural Resources Law* 391.

Viljoen G "Construing the transformed property paradigm of South Africa's water law: New opportunities present by legal pluralism" (2022) 54 *Legal Pluralism and Critical Social Analysis* 193.

Waldron J "What is private property" (1995) 5 *Oxford Journal of Legal Studies* 313.

Yiannopolous AN "Introduction to the law of things: Louisiana and comparative law" (1961-1962) 22 *Louisiana Law Review* 757.

Ziha N & Sukacic M "Troubled waters: Croatian seashore as *res extra commercium in commercio*" 2023 *Pravni Vjesnik* 7.

ENCYCLOPEDIAS

Hoctor SV "Criminal Law" in *Law of South Africa (LAWSA) Vol 11* 3ed (2023) at para 348.

POLICY DOCUMENTS

Department of Environmental Affairs and Tourism *Our Coast, Our Future: Coastal Public Policy Green Paper: Towards Sustainable Coastal Development in South Africa* (1998).

Department of Environmental Affairs and Tourism *Draft White Paper for Sustainable Coastal Development* (1999).

Department of Environmental Affairs and Tourism *White Paper for Sustainable Coastal Development* (2000).

Department of Environmental Affairs *National Coastal Access Strategy for South Africa* (2014).

Department of Environmental Affairs *A Guide for the Designation and Management of Coastal Access in South Africa* (2014).

Department of Environmental Affairs *South Africa's National Coastal Management Programme* (2014).

Department of Environmental Affairs *National Guidelines Towards the Establishment of Coastal Management Lines* (2017).

United Kingdom Department of the Environment *Coastal Zone Management towards Best Practice* (1996).

PAPERS AND REPORTS

Ball J *The Boundaries of Property Rights in English Law* paper presented at the Electronic Journal of Comparative Law: XVIIth International Congress of Comparative Law (July 2006).

Craig RK "Navigability and Its consequences: State title, mineral rights and the public trust doctrine" in Proceedings of the 60th Annual Rocky Mountain Mineral Law Foundation Summer Institute (2015). Available at: https://ssrn.com/abstract=2449374, accessed 1 April 2022.

Cullinan C & Smith N *Review of Legal Arrangements Required to Implement the White Paper for Sustainable Coastal Development in South Africa* unpublished report by EnAct International (2000).

Department of Environmental Affairs and Tourism *The Integrated Coastal Management Bill: A Brief Guide to Assist the Public Participation Process* (2006).

Langton J "The Charter of the Forest of King Henry III" in *Forests and Chases of England and Wales c. 1000 to c 1850*. Available at http://info.sjc.ox.ac.uk/forests/Carta.htm, accessed 10 January 2022.

McSweeney TJ & Spike MK "The significance of the *Corpus Juris Civilis:* Matilda of Canossa

and the revival of Roman law" *William and Mary Law School Faculty Publications* (2015) available at: https://scholarship.law.wm.edu/facpubs/1736/, accessed 10 January 2021.

Møller V & Schlemmer L *Attitudes towards black integration: A comparative study of black and white reactions to multiracial beaches in Durban* (Centre for Applied Social Studies, University of Natal: 1982).

DISSERTATIONS AND THESES

Blackmore AC *The Rediscovery of the Trusteeship Doctrine in South African Environmental Law and its Significance in Conserving Biodiversity in South Africa*. (PhD Thesis, University of Tilburg, 2018).

Harding WR *Hydrological Connectivity as a Normative Framework for Aquatic Ecosystem Regulation: Lessons from the USA* (PhD, University of Cape Town, 2022),

Robbie J *Private Water Rights in Scots Law* (PhD thesis, University of Edinburgh, 2012).

Ryan MJ *The Libri Feudorum and the Roman Law* (PhD thesis, University of Cambridge, 1993).

Thompson G *Surfing, gender and politics: Identity and society in the history of South African surfing culture in the twentieth*-century (PhD thesis, University of Stellenbosch, 2015).

Viljoen G *Water as Public Property: A Parallel Evaluation of South African and German Law* (LLD Thesis, University of the North West, 2016).

Young C *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).

ONLINE SOURCES

Deumert A "Racism and the politics of the beach" *Diggit Magazine* (28 November 2019), available at https://www.diggitmagazine.com/column/politics-beach-racism, accessed on 13 March 2020.

Fordham University *Internet Medieval Sourcebook: Barbarossa and the Lombards*, available at: https://sourcebooks.fordham.edu/source/barbarossa-lombards.asp, accessed 10 January 2022.

Haffajee F "I swim where I like? Or does beach apartheid linger on?" *Daily Maverick* (8 January 2019), available at https://www.dailymaverick.co.za/article/2019-01-08-i-swim-where-i-like-or-does-beach-apartheid-linger-on/, accessed on 13 March 2020.

Mjo O "Timeline: Rites, racism and rights clash on Clifton's pristine sands" *Times Live* (31 December 2018), available at https://www.timeslive.co.za/news/south-africa/2018-12-31-timeline-rites-racism-and-rights-clash-on-cliftons-pristine-sands/, accessed on 13 March 2020.

Parliamentary Monitoring "Group Clifton Fourth Beach Closure to Public: Inquiry" (4 February 2019), available at https://pmg.org.za/committee-meeting/27819/, accessed 9 March 2020.

Portfolio Committee on Environmental Affairs "Report of the Portfolio Committee on Environmental Affairs on the Parliamentary Enquiry into the Alleged Eviction of the Beach Goers at Clifton Fourth Beach on 23 December 2018" (20 March 2019), available at https://pmg.org.za/committee-meeting/28190/, accessed on 9 March 2020 at 2.

Pringle H "How ancient Rome's 1% highjacked the beach" *Hakai Magazine* 5 April 2016, available at: https://hakaimagazine.com/features/how-ancient-romes-1-hijacked-beach/, accessed 19 January 2022.

Swart M "Drawing a line in the sand on racism" *Mail and Guardian* (3 January 2019), available at https://mg.co.za/article/2019-01-03-00-drawing-a-line-in-the-sand-on-racism/, accessed on 13 March 2020.

SA History Online "Clifton and Camps Bay Beaches, Cape Town", available at https://www.sahistory.org.za/place/clifton-and-camps-bay-beaches-cape-town, accessed 9 March 2020.

Staff Reporter (2018) "ANC slams private security company for ordering citizens off Clifton beach", available at https://www.iol.co.za/news/south-africa/western-cape/anc-slams-private-security-company-for-ordering-citizens-off-clifton-beach-18617023, accessed on 13 March 2020.

Thamm M "Clifton 4th beach: Of slaughtered sheep, drowned slaves and collective rituals" *Daily Maverick* 28 December 2018, available at https://www.dailymaverick.co.za/opinionista/2018-12-30-clifton-4th-beach-of-slaughtered-sheep-drowned-slaves-and-collective-rituals/, accessed 15 January 2024.

PRIMARY SOURCES

STATUTES

South Africa

Constitution of the Republic of South Africa, Act 200 of 1993.

Constitution of the Republic of South Africa, 1996.

Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990.

Environmental Conservation Act 73 of 1989.

Irrigation and Water Conservation Act 8 of 1912.

Knysna Municipality By-Laws: By-Law for the Recreational Use of Beaches and Bathing Areas (8 May 2017).

Marine Living Resources Act 18 of 1998.

Minerals Act 50 of 1991.

Mineral and Petroleum Resources Development Act 28 of 2002.

Mining Rights Act 20 of 1967.

National Water Act 36 of 1998.

National Environmental Management Act 107 of 1998.

National Environmental Management: Protected Areas Act 57 of 2003.

National Environmental Management: Biodiversity Act 10 of 2004.

National Environmental Management: Integrated Coastal Management Act 24 of 2008.

National Environmental Management: Waste Act 59 of 2008.

National Environmental Management: Air Quality Management Act 39 of 2004.

National Environmental Management: Integrated Coastal Management Amendment Act 36 of 2014.

National Forests Act 84 of 1998.

National Forests Amendment Act 1 of 2022.

Precious Metals Act 37 of 2005.

Precious Stones Act 73 of 1964.

Reservation of Separate Amenities Act 49 of 1953.

Reservation of Separate Amenities Amendment Act 10 of 1960.

Sea Fisheries Act 58 of 1973.

Sea Fishery Act 12 of 1988.

Seashore Act 21 of 1935.

Sea and Seashore Amendment Act 38 of 1972.

Spatial Planning and Land Use Management Act 16 of 2013.

Umlalazi Municipality By-Laws: Beach By-Laws (11 March 2010).

Water Act 54 of 1956.

World Heritage Conservation Act 49 of 1999.

United Kingdom

Countryside and Rights of Way Act of 2000 .

Crown Estate Act, 1961.

Marine and Coastal Access Act of 2009.

Natural Environment and Rural Communities Act of 2006.

United States

Administrative Procedures Act 5 US Code §§ 551-559.

Constitution of the Commonwealth of Pennsylvania (1968).

Constitution of the State of Florida (1968).

Constitution of the State of Hawaii (1978).

Other

General Code on Property of Public Bodies of 2006 (*Code Général de la Propriété des Personnes Publiques* 21 May 2006, *Journal Officiel* 460).

CASE LAW

South Africa

Adams v Minister of Mineral Resources and Energy [2022] ZAWCHC 24 (1 March 2022).

Anderson & Murison v The Colonial Government (1890-1891) 8 SC 293.

Border Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others [2021] ZAECGHC 111 (3 December 2021).

Bullock NO v Provincial Government of North West Province 2004 (5) SA 262 (SCA).

Butgereit v Transvaal Canoe Union 1988 (1) SA 759 (A).

Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC).

Colonial Government v Town Council of Cape Town (1902) 19 SC 87.

Consolidated Diamond Mines of South West Africa (Ltd) v Administrator, South West Africa 1958 (4) SA 572 (A).

Divisional Council, Port Elizabeth v Divisional Council, Uitenhage (1868) 1 Buch 40.

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996, 1996 (4) SA 744 (CC).
Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC).
Gongqose v Minister of Agriculture, Forestry and Fisheries 2018 (5) SA 104 (SCA).
Jacobs v Waks 1992 (1) SA 521 (A).
Linvestment CC v Hamersly 2008 (3) SA 283 (SCA).
Mining and Environmental Justice Community Network v Minister of Environmental Affairs [2019] 1 All SA 491 (GP).
Mining and Environmental Justice Community of South Africa v MEC for Agriculture, Rural Development, Land and Environmental Affairs [2024] ZAMPMBHC 48 (18 July 2024).
Minister of Minerals and Energy v Agri South Africa 2012 (5) SA 1 (SCA).
Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC [2024] ZASCA 84 (3 June 2024).
Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC).
Mostert v S 2010 (2) SA 586 (SCA).
Pharo v Stephen 1917 AD 1.
R v Carelse 1943 CPD 242.
Richards v Port Elizabeth Municipality 1990 (4) SA 770 (SE).
S v Naicker, S v Attawari 1963 (4) SA 610 (N).
S v Ndebele 2012 (3) SA 226 (GSJ).
South African Shore Angling Association v Minister of Environmental Affairs 2002 (5) SA 511 (SECLD).
Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others 2022 (6) SA 589 (ECMk).
Surveyor-General (Cape) v Estate De Villiers 1923 AD 588.
Telkom v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal 2003 (4) SA 23 (SCA).
Waks v Jacobs 1990 (1) SA 913 (T).

United Kingdom

Fairly v. Earl of Eglinton (1744) Mor. 12780.
Hamilton v. Edington & Co. (1793) Mor. 12824.

United States

Appleby v City of New York 271 US 364 (1926).

Arnold v Mundy 6 NJL 1 (1821).

Barney v Keokuk 94 US 324 (1876).

Borough of Neptune v Borough of Avon-by-the-Sea 294 A.2d 47 (New Jersey 1972).

Complaint of Steuart Transportation Company 495 F.Supp 3d (1980).

Department of Commerce v New York 588 US _, 139 S.Ct. 2551 (2019).

Department of Homeland Security v Regents of the University of California 591 US 1, 140 S.Ct. 1891 (2020).

Federal Communications Commission v Prometheus Radio Project 592 US _ (2021).

Glass v Goecke 703 N.W. 2d 58 (Michigan 2005).

Greater Boston Television Corporation v Federal Communications Commission 444 F.2d 841 (D.C. Circ. 1970).

Harrison v Starrett 4 H&McH 540 (1774).

Idaho v Coeur d'Alene Tribe of Idaho 521 US 261 (1997).

Illinois Central Railroad Co v Illinois 146 US 387 (1892).

In re Water Use Permit Applications (Waiahole Ditch) 9 P.3d 409 (Hawai'i 2000).

International Harvester v Ruckelshaus 478 F.2d 615 (D.C. Circ. 1963).

Juliana et al v United States 217 F. Supp. 3d 1224 (District of Oregon 2016).

Just v Marinette County 201 N.W. 2d 761 (Wisconsin 1972).

Marks v Whitney 491 P.3d 374 (California 1971).

Martin v Waddell's Lessee 41 US (16 Pet) 367 (1842).

Matthews v Bay Head Improvement Association 471 A.2d 355 (New Jersey 1984).

Mayor of Clifton v. Passaic Valley Water Commission 557 A.2d 299 (New Jersey 1989).

Mineral County v Department of Conservation and Natural Resources 20 P.3d 800 (Nevada 2001).

Montana Coalition for Stream Access Inc v Curran 682 P.2d 163 (Montana 1984).

Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co 463 US 29 (1983).

National Audubon Society v Superior Court, Alpine County 658 P.2d 709 (California 1983).

Natural Resources Defense Council Incorporated v Morton 458 F.2d 827 (D.C. Circ. 1972).

Pacific States Box & Basket Company v White 296 US 176 (1935).

Parsons v Walker 328 N.E.2d 920 (Ill. App. Ct. 1975).

Phillips Petroleum Company v Mississippi 484 US 469 (1988).

PPL Montana LLC v Montana 565 US 576 (2012).

Selkirk-Priest Basin Association v State 899 P.2d 949 (Idaho 1995).

Shively v Bowlby 152 US 1 (1894).

State ex rel. Thornton v Hay 254 Or. 584, 462 P.2d 671 (Oregon 1969).

The Daniel Ball 77 US 10 Wall. 557 (1870).

The Genesee Chief 53 US 12 How 443 (1851).

United States v Holt State Bank 270 US 49 (1926).

Vander Bloemen v State Department of Natural Resources 551 N.W.3d 869 (Wis. Ct. App. 1996).

Other

Advocates Coalition for Development and Environment (ACODE) v Attorney General Miscellaneous Cause No 0100 of 2004 (13 July 2005).

Metropolitan Manila Development Authority v Concerned Residents of Manila Bay GR No 171947–48, 574 SCRA 661 (SC 18 December 2008).

OLD AUTHORITIES

Bort P *Tractate van de Domeynen van Holland* in *Alle de Wercken van Mr Pieter Bort* 2ed (1702) Haaringh, Leiden.

Gaius *The Institutes of Gaius Part I Text with Critical Notes and Translation*, translated by De Zulueta F (1946) Clarendon Press, Oxford.

Grotius H *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (1625), translated by Lee RW *The Jurisprudence of Holland* (1926) Clarendon Press, Oxford.

Gudelinus P *Commentaria de Jure Novissimo* (1620).

Huber U *Heedendagse Rechtsgeleertheydt* (1686), translated by Gane P *The Jurisprudence of my Time* (1939) Butterworths, Durban.

Justinian *The Institutes of Justinian*, translated by Moyle JB 5ed (1913), Clarendon Press, Oxford.

Justinian *The Digest of Justinian* (Mommsen T & Krueger P (eds) (1920)), translated by Watson A (1985) University of Pennsylvania Press, Philadelphia.

Kemper JM *Ontwerp van het Burgerlijk Wetboek voor het Koningrijk der Nederland.aan de Staten-Generaal aangeboden den 22sten November 1820* 2ed (1864).

Van der Keessel DG *Praelectiones Iuris Hodierni ad Hugo Groti Introductionem ad*

Iurisprudentiam Hollandicam, translated by Van Warmelo P, Coertze IL and Gonin HL *Voorlesingge oor die Hedendaagse Reg na Annleiding van De Groot's "Inleiding tot de Hollandse Rechtsgeleerdheyd"* (1961-1975) AA Balkema Publishers, Amsterdam.

Groenewegen van der Made S *Tractus de Legibus Abrogatis et Inusitatis in Hollandia Vicniisque Regionibus* (1669), translated by Beinart B *A Treatise on the Laws Abrogated and No Longer in Use in Holland and Neighbouring Regions* (1974) Lex Patria Publishers, Durban.

Van Leeuwen S *Censura Forensis Theoretico-Practica* (1741), translated by Schreinder WP *Censura Forensis* (1883) Juta, Cape Town.

Van Leeuwen S *Het Roomsch-Hollandsch Recht* (1708), translated by CW Decker & JG Kotze *Commentaries on Roman-Dutch Law* (1881) Stevens & Hayes, London.

Vinnius A *Institutionum Imperialium Commentarius* (1642) Leyden.

Voet J *Commentarius ad Pandectas* (1829), translated by P Gane *The Selective Voet, being the Commentary on the Pandects* (1957) LexisNexis, Durban.