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THE USE OF THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL LAW

Patricia Kameri-Mbote



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TABLE OF CONTENTS

1. Introduction	197
2. Origins of the Public Trust Doctrine	197
3. Application of the Public Trust Doctrine Over Natural Resources	199
4. Conclusion	201

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1

INTRODUCTION

The assertion that the public trust doctrine (PTD) applied to South Africa's water law only by dint of the Constitution and to equate it to expropriation strikes me as very odd. PTD, a cornerstone of modern environmental law, relates to the ownership, protection and the use of essential natural and cultural resources. It holds that certain natural resources are held by the sovereign in trust and on behalf of all the citizens because of their unique characteristics and central importance. This follows the realisation that certain assets are inherently public and not subject to ownership by either the state or private actors. It relates to the ownership, protection and use of essential natural and cultural resources, serving as a check against allocation mistakes by the government with regard to public natural resources. It has been used to guarantee access to bodies of water, protect recreational lakes and beaches, wildlife preserves and even the air. A well structured and implementation framework for the public trust doctrine ensures that governmental action can be checked to ensure that it benefits the citizenry with regard to key environmental resources.¹

PTD operates as a superior right guaranteeing qualified access to property, whether owned privately, held by the state or unowned. The doctrine is widely accepted but its exact purview remains a matter of interpretation by courts. There is tension between accrued private rights in what is determined to be *res communes*. Within the South African context, the PTD has to be seen within the context of a regime that negated the rights of the majority of the citizenry (apartheid). The holding of public water and allocation of rights to water by the state favoured particular groups. To argue that rights to water granted by the state in apartheid South Africa are immune from the PTD negates the right to water for the majority of South Africans.

1 Patrick S. Ryan, 'Application of the Public Trust Doctrine and Principles of Natural Resource Management to Electro-magnetic Spectrum', 10 *Mich. Telecomm. & Tech. L. Rev.* 285 (2004).

Indeed in South Africa's law on property, the issue of restitution has been canvassed pointing to recognition that the grant of property rights (including water rights that run with the land) was flawed and needs to be corrected.

2

ORIGINS OF THE PUBLIC TRUST DOCTRINE

Most scholars identify the Justinian code of sixth century Rome as the genesis of the public trust doctrine - the doctrine of *res communes* which claims that some things are 'common to mankind - the air, running water, the sea, and consequently the shores of the sea [and] the right of fishing in a port, or in rivers, is common to all men'.² The title to these essential resources was vested in the state, as the sovereign, in trust for the people. *Res communes* were excluded from private control and the trustee was charged with the duty of preserving the resources in a manner that made them available for certain public purposes.³ These rules appear in the Justinian Institutes which are thought to be legal textbooks. Thus, there is some doubt as to their effect on Roman life, even though the Institutes drew upon formal laws found in the *constitutiones* and writings of Roman jurists compiled respectively in the Justinian Codex and Digests. Whether formal law or moral imperative, the concept that certain resources are common to all is prevalent today in such diverse areas as the open sea, wildlife, parks, historic monuments, and the electromagnetic spectrum.⁴

That legal or moral concept of common ownership later emerged as more of a reservation of 'a series of particular rights to the public' to engage in certain activities, thus limiting 'the prerogatives of private ownership'.⁵ There is therefore now a nearly

2 Joseph L. Sax, 'Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 68 *Michigan L. Rev.* 471 (1970).

3 *Id.*

4 *Id.*

5 *Id.*

universal notion that resources such as watercourses should be protected from complete private acquisition in order to preserve the lifelines of communal existence. Within this context and based on a philosophy of natural resource preservation, the Romans implemented a concept of 'common property' and extended public protection to the air, rivers, sea, and seashores. There existed common rights or easements to navigate and fish, and a presumption that the sovereign owned the submerged lands and the shores in trust for the people.⁶

Common property resources are those resources not controlled by a single entity and access to which is limited to an identifiable community of individuals or states. No one user has the right to abuse or dispose of the property. Any dealing with the property has to take into account the entitlements of others. Besides, users of common property share rights to the resource and are subject to rules and restrictions governing the use of those resources.⁷

In England, this concept appears in the common law, particularly through the writings of Bracton and Fleta, England's Magna Carta, and commentary by Blackstone. These sources are cited as precedent for the notions of common rights to navigation and fishing, but again questions arise over whether these statements accurately reflect the practices of the time given the prevalence of private fisheries. Paragraph 5 of the Magna Carta made explicit reference to the guardianship of land extending the guardianship to houses, parks, fish ponds, tanks, mills and other things pertaining to land. As early as 1865, the English House of Lords defined the concept of public trust in the case of *Gann v. Free Fishers of Whitstable* holding that the bed of all navigable rivers here the tide flows, and all estuaries or arms of the sea, is by law vested in the crown. But this ownership of the crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or

interfere with the right of navigation, which belongs by law to the subject of realm.⁸

This imposed a high fiduciary duty of care and responsibility upon the sovereign.⁹ The hallmarks of a fiduciary relationship are:

- The fiduciary has scope for the exercise of discretion;
- The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
- The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The vulnerability or disadvantage is seen to make the beneficiary place reliance on the other and therefore there are issues of equity.¹⁰ In private and charitable trusts the trustee as a fiduciary is held to an unusually high standard of ethical or moral conduct.¹¹

In further elaborating the concept of public trust, the English Common Law distinguished between property that was transferable to private individuals (*jus privatum*) and property that was held in trust for the public (*jus publicum*) – traditionally mainly navigable waterways. *Jus publicum* is the dominant estate and encapsulates the public's trust rights, ranging from fishing, fowling and navigation to other broader rights like recreation.¹² The second component, *the jus privatum* encompasses the proprietary rights for use and possession of property. Naturally the owners of the *jus privatum* may not use the property of the *jus publicum* to the exclusion of the public's rights.

6 *Id.*

7 John Gowdy, *Coevolutionary Economics - The Economy, Society and the Environment* (Boston: Kluwer, 1994). See Daniel W. Bromley & Michael M. Cernea, *The Management of Common Property Natural Resources - Some Conceptual and Operational Fallacies* (Washington, DC: The World Bank, Discussion Paper No. 57, 1989).

8 *Gann v Free Fishers of Whitstable*, House of Lords, 3 March 1865, 11 E.R. 1305 (1865) 11 H.L. Cas. 192.

9 Godber Tumushabe et al., *Sustainably Utilising our Natural Heritage: Legal Implications of the Proposed Degazettement of Butamira Forest Reserve* (Kampala, ACOE, Policy Research Series, No. 4, 2001).

10 *Hospital Products Ltd. v United States Surgical Corporation*, High Court of Australia, 25 October 1984, 55 A.L.R. 417, 58 ALJR 587.

11 Restatement (Second) of Trusts, 1959.

12 Gerald Torres, 'Who Owns the Sky?', 19 *Pace Env'tl. L. Rev.* 515, 530 (2002).

Whatever approach is taken, the fundamental emphasis is on communal rather than private rights. In cases where communal rights protector negates the rights of some, it implies a denial of the application of the PTD as argued by Pienaar and van der Schyff in this issue.

3 APPLICATION OF THE PUBLIC TRUST DOCTRINE OVER NATURAL RESOURCES

Natural resources have traditionally been found either under the sovereignty of a particular state or in the so-called global commons. Where the resources are held by a state, the essence of the PTD is that the state or governmental authority, as trustee, has a fiduciary duty of stewardship of the public's 'environmental capital'. These resources must be held in trust by the state for the benefit and use of the general public. This public includes current and future generations.¹³ The State must not alienate trust property unless the public benefit that would accrue outweighs the loss of the public use or 'social wealth' derived from it.

So neither can the King intrude upon the common property, thus understood, and appropriate it to himself or the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power, and that, in theory at least, could not exist in a free government.¹⁴

The trust imposes three kinds of restrictions on the state:

- the property subject to the trust must not only be used for a public purpose, it must

be held available for use by the general public;

- the property must not be sold, even for fair cash equivalent; and
- the property must be maintained for particular kind of uses, such as navigation, recreation, or fishery.¹⁵

The most fundamental duty that a trustee has is the duty of loyalty and an obligation to act solely in the interest of the beneficiaries. The trustee also has a duty to use care and skill to preserve the trust property (including the duty to protect against 'invasion of the trust'). In addition, the trustee has a duty to furnish information to the beneficiaries, a duty to make the trust productive, and a duty to deal impartially with beneficiaries. In meeting its duties, the trustee must act prudently, diligently, and in good faith.¹⁶

The public trust doctrine has been used to prevent governments from conveying public resources to private enterprises (prohibition on conveyance) as well as to guarantee the public access to natural resources after the resources have been conveyed to private interests for purposes such as fishing and navigation (prohibition with impression). In many African countries, the imperatives of prohibition on conveyance are assured through vesting critical natural resources such as water in the state implying a trust on behalf of the citizenry to ensure sustainable management of the resources.¹⁷ One implication of the trust is securing the right of the citizenry to access these resources.

The PTD's prohibition on conveyance can be used to defeat private ownership of natural resources. In the case of *Illinois Central Railroad v. Illinois*,¹⁸ the state legislature had transferred ownership of the

13 Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* 219 (Tokyo: UN University, 1989).

14 *Arnold v Mundy*, Supreme Court of Judicature of New Jersey, 6 N.J.L. 1, 10 Am.Dec. 356 (1821).

15 Note 9 above.

16 James T. Paul, 'The Public Trust Doctrine: Who Has the Burden of Proof', 9 (July 1996), available at: <http://www.rachel.org/library/getfile.cfm?ID=190>.

17 See e.g. Section 3 of the Kenya Water Act, 2002, available at: <http://www.ielrc.org/content/e0206.pdf>.

18 *Illinois Cent. R. Co. v State of Illinois*, Supreme Court of the United States, 146 US 387 (1892).

nearly the entire waterfront of Chicago (about 1,000 acres) to the railroad. Four years later, a new legislature sought to revoke the transfer but the railroad challenged the revocation. The United States Supreme Court upheld the revocation, returned the land to the state and stated as follows distinguishing this land as different in character from that which the state holds in lands intended for 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 the liberty of fishing therein freed from the obstruction or interference of private parties.¹⁹

This land was therefore different in character from other lands because of the presence of water on it. Any conveyance of that land had to be in furtherance of the public trust and

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.²⁰

The public's interest in the waterfront had to be weighed against the public gain from conveyance of the land to private parties.

PTD's conveyance with impression applies where rights are reserved for the public even after the state has made private conveyances of certain properties. It recognises the fact that superior public interests can supersede private-property interests. In many African countries, states have two residual powers that facilitate the regulation of property rights namely, police power (development control) and eminent domain (compulsory acquisition). Police power refers to the power of the state to regulate land use in the public interest. Its earliest manifestations included the right of the state to tax its citizens, 'taking' of property for necessities of war and the regulation of the use of or destruction of

land in the event of pestilence, thus interfering with private property.²¹ Police power may be invoked to secure proper environmental management. For the purposes of securing the public trust even after conveyance though, eminent domain seems to be more apt. Also referred to as compulsory acquisition, it derives from the Roman *dominium eminens* (sovereignty over territory).²² It entitles the state by dint of sovereignty to take private property for public purposes and flows from the fact that the state has radical title over all land in the territory and can therefore compulsorily acquire any part of it. The uses for which land has been traditionally acquired include defence, highways, hospitals and education.

In many countries, the power to compulsorily acquire land is provide for in the Constitution. It must be shown that the land will promote the public benefit, such benefit being weighed against the hardship that the acquisition will cause for the owner and prompt compensation must be paid for the acquisition. While the traditionally established bases for compulsory acquisition do not include access to water, one can argue that there is a public interest in availing water to all especially where denial of that had been justified by a discriminatory legal regime. In Kenya, the High Court in the case of *Peter Waweru v. The Republic* held that

In the case of land resources, forests, wetlands and waterways ... the Government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment'.²³

That balance cannot be maintained where water rights are apportioned in an unjust and discriminatory manner as was the case in apartheid South Africa.

21 Bondi Ogolla with John Mugabe, 'Land Tenure Systems and Natural Resources Management', in C. Juma & J.B. Ojwang eds, *In Land We Trust: Environment, Private Property and Constitutional Development* (Nairobi and London: Initiative Publishers and Zed Books, 1996) 85.

22 *Id.* at 107.

23 High Court of Kenya at Nairobi, Miscellaneous Civil Application No. 118 of 2004.

19 *Id.* at 452.

20 *Id.* at 453.

4

CONCLUSION

There is a need to consider ways of ensuring a systematic 'reaching back' of PTD to correct anomalies in governmental decisions of allocating natural resources, made over time and to recover the public estate. This has to be considered in the context where state holding of public resources as a trustee has been without clear definition of the trustee role. Additionally, the emergence of strong patrimonial and sometimes unaccountable states has resulted in wanton and illegal conversion of public land and resources to private ownership allocation in total disregard of the public interest.

There are an increasing number of cases where different communities seek the return of their property that has now become privatised. This calls for pro-active measures on the part of the state to avert possible instability in the institution of property as guaranteed in the Constitution.

With regard to South Africa, the application of the PTD needs to be considered in cases where it is acknowledged that allocation mistakes have been made and need to be corrected. There is recognition of the need for restitution in the realm of land in South Africa. Insulation of water rights from restitution dilutes the quantum of property rights of holders of restituted land. This cannot be the intention of the land reform programme architects in South Africa. In my view, restitution of public water rights allocated during apartheid is necessary for the realisation of the right to water enshrined in South Africa's Constitution.

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