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THE PUBLIC TRUST DOCTRINE AND LIABILITY FOR
HISTORIC WATER POLLUTION IN SOUTH AFRICA

Loretta Feris

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1

INTRODUCTION

The public trust doctrine, which places natural resources under the custodianship of the state, has, in the post-constitutional era, become a permanent fixture of South African natural resources law. This predominance has largely played out in the realm of policy papers and legislation dealing with natural resource protection. Despite recent court cases on mineral rights,¹ which lend credence to popularised notions that the shift from private ownership to custodianship by the state amounts to compensable expropriation, the precise meaning and content of the doctrine remains, to some extent, a murky area, no doubt because neither policy papers nor legislation provide guidance in this regard. In particular it is not quite clear what kind of potential this doctrine holds for: 1) the protection and sustainable management of natural resources and 2) perhaps more controversially liability for damage to our natural resources.

Liability for pollution and environmental degradation traditionally lies within the realm of the polluter (and user) pays principle and it is generally accepted both in international law as well as in South African law that the polluter should in principle bear the cost of remediation measures to clean up the impacts of pollution. What may not be altogether clear is the relationship between the public trust doctrine and the polluter pays principle and the extent to which liability for pollution and degradation of natural resources also lies within the realm of the public trust doctrine. This relationship is particularly complicated in light of the different doctrinal realms at work when one engages with these concepts. Whereas the public trust doctrine operates primarily on a vertical level, that is the role and responsibility of the state vis-à-vis its citizens with regard to the protection of natural resources, the polluter pays principle is traditionally used in

domestic law by the state to hold polluters liable in their personal capacity.

This article sets out to explore the public trust doctrine in South African law and its potential for assigning liability in a natural resources law context. It does so in the context of South Africa's challenges in dealing with acid mine drainage (AMD), a legacy from defunct mines, but a continuing by-product of existing mining. It is a legacy that left South Africa with a water crisis, yet at the same time creating a liability vacuum as it has been demonstrated elsewhere that it is almost impossible to use the current laws to hold historical polluters accountable.² The article revisits the traditional scope of the public trust doctrine and argues for an expansive view in line not only with the constitutional imperatives embodied in South Africa's environmental right, but also by way of an analogy between the public trust doctrine and the common heritage of mankind principle as it present itself in international environmental law. In doing so it also explores the development of the doctrine in United States law which in some respects has set the course for its application with respect to natural resources law.

2

LIABILITY VACUUM – AMD AND WATER POLLUTION

South Africa faces numerous environmental challenges, ranging from current and proposed environmentally risky developments to threats to natural resources as a result of over harvesting and poaching. These challenges cause one to examine responsibilities for sustainable management of natural resources and ask the question who is ultimately responsible for natural resources. Stemming from this a further question arises, that is, who is responsible for damage and pollution of

1 *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy*, North Gauteng High Court, Judgment of 6 March 2009, 2010 (1) SA 104 (GNP).

2 L. Feris and L. Kotze, *So Many Laws, So Little Liability: AMD and the Liability Vacuum in South African Law* (Submitted for publication, currently on file with the author).

natural resources. As a rule one would look towards the polluter and user pays principle which holds that polluters and users of natural resources bear the full environmental and social costs of their activities.³ In essence the principle assigns liability for damage and pollution of natural resources to the users of these resources, but also specifically to those who caused the pollution. However, this rule bears some challenge when attempting to apply it in cases of historical pollution. The first difficulty with the latter of course is finding the polluter who is responsible for the pollution and the second is finding a legal hook for liability as courts are hesitant to apply legislation retrospectively.⁴

In South Africa the issue of AMD, a natural chemical reaction which occurs when minerals are exposed to air and water,⁵ is at present posing severe risks to water, but moreover raises questions of responsibility and liability as it originates not only from present mining activities, but also past mining activities. As a rule the mining process involved dewatering of mine shafts to access minerals and in the process removing polluted water. However, at mine closure most mines cease pumping and simply abandon the mines. The threat of AMD for water resources in South Africa has been known for decades, but has recently received more attention due to the imminent nature of risk to water resources in certain areas of the country.⁶ Whilst the causes and impacts of AMD for both the environment and

humans have been set out in detailed reports,⁷ little has been written on the legal nature of the problem. Legally AMD poses an interesting conundrum. In essence AMD is a historical problem which is aggravated by present mining practices. Whilst AMD remains a future concern given its potential to occur in perpetuity, and its long term socio-economic and environmental impacts beyond mine closure, the most imminent threats stemming from AMD are linked to mines which are no longer operational. These mines are not only defunct, they are also ownerless as companies ceased to exist at the time when mining operations came to an end.

This temporal conundrum is vividly illustrated in real terms by the substantial number of mines that have been left abandoned in South Africa after the completion of mining during a time when insufficient legislation and regulatory practices were in place to ensure their proper rehabilitation. These temporal challenges of AMD coupled with the fact that defunct mines are usually ownerless, create notorious difficulties for laws and liability regimes which aim to facilitate mining rehabilitation and general environmental protection. In essence, it creates a liability vacuum. South African legislation now holds polluters liable for rehabilitation and remediation of water pollution, including historic pollution.⁸ However, it is trite that an effective liability regime can only operate if its addressees are identifiable and actually still exist. Tracking down owners and holding them responsible is an almost impossible task which places the problem of AMD squarely on the shoulders of the South African government. This means that, comprehensive as it may be, the current statutory liability regime driven

3 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* 484 (New York: Foundation Press, 4th ed. 2011).

4 See, for example, *Bareki NO and another v Gencor Ltd and others*, Transvaal Provincial Division, Judgement of 19 October 2005, [2006] JOL 16600 (T) where the court held that fairness mitigates against applying the National Environmental Management Act, which holds polluters strictly liable, retrospectively.

5 S.R. Jennings, D.R. Neuman and P.S. Blicher, *Acid Mine Drainage and Effects on Fish Health and Ecology: A Review 1* (Bozeman MT: Reclamation Research Group Publication, 2008), available at http://www.pebblescience.org/pdfs/Final_Lit_Review_AMD.pdf.

6 The Witwatersrand Goldfields area has been identified as an area that faces imminent risks. See Report to the Inter-ministerial Committee on Acid Mine Drainage - Mine Water Management in the Witwatersrand Goldfields with Special Emphasis on Acid Mine Drainage (December 2010) [AMD Report].

7 See, for instance, H. Coetzee, F. Winde and P.W. Wade, *An Assessment of Sources, Pathways, Mechanisms and Risks of Current and Potential Future Pollution of Water and Sediments in Gold-mining Areas of the Wonderfonteinsspruit Catchment (Water Research Commission, Report No. 1214/06, 2006)* and K. Pinetown and R. Boer, *A Quantitative Evaluation of the Modal Distribution of Minerals in Coal Deposits in the Highveld Area and the Associated Impact on the Generation of Acid and Neutral Mine Drainage (Water Research Commission, Report No. 1264/1/06, 2006)*.

8 See South Africa, National Environmental Management Act of 107 1998, s 28 and South Africa, National Water Act 36 of 1998, s 19.

by the polluter pays principle cannot effectively be applied to all liabilities stemming from AMD.

Who then should be held responsible and ultimately accountable for pollution in situations such as AMD? Is the state as custodian of water resources responsible for the sustainable management of water and as such also liable for pollution? Or is there another model for liability? Can the state's custodial responsibilities with regard to water as a natural resource be extended to private citizens? Or is there at a minimum a shared responsibility by users of water, especially users within the mining industry?

A report commissioned by the South African government has suggested that the mining industry should bear some of the short-term costs towards addressing remediation stemming from historical pollution.⁹ It specifically recommended an examination into the viability of an environmental levy on all operating mines to 'fund the environmental legacies of the mining industry, including the management of acid mine drainage'.¹⁰

Taking its cue from this recommendation, this article, without delving into the particulars of the above recommendation, explores the legal basis for liability for the mining industry. In particular it suggests that liability lies in an expanded view of the public trust doctrine, one which incorporates a shared responsibility for the environment, including responsibility for pollution prevention and remediation. The article thus engages in an interrogation of the doctrine's conceptualisation in US jurisprudence, its manifestation in international law, and finally its development in South African water law and governance and scope for an expanded formulation thereof.

3

PUBLIC TRUST DOCTRINE

The public trust doctrine creates a legal obligation for the sovereign to hold certain natural resources

in trust for its people, and at the same time it places a custodial duty on the sovereign to protect and preserve these resources for present and future generations. The public trust doctrine has been described as 'an ancient legal precept of public ownership of important natural resources'.¹¹ It has however evolved significantly from its earlier genesis and has taken on a profound meaning within the context of natural resources law.

Roman law distinguished between that which belonged to no one, *res nullius* and that which was 'common to mankind', *res communes*. While these concepts applied equally to natural resources such as animals, the complexity of this division was found predominantly around ownership of water, including groundwater. Overall surface water in rivers and lakes was regarded as *res communes*, which had the effect that it could not be appropriated for private use and use thereof was common to everyone.¹² This concept eventually became part of English law as the public trust doctrine. According to the laws of medieval England, the King officially owned all 'public' land, but the public trust doctrine established the commoners' right to use the King's land.¹³ In the landmark English case of *Gann v Free Fishers of Whitstable* it was held that navigable rivers vested in the crown for the benefit of the subject and cannot be used in a way that would derogate from or interfere with the right to navigation.¹⁴ From England the public trust doctrine made its way into other common law jurisdictions, including the United States of America where it has in recent years created robust debates around its scope and application.

It is important to keep in mind that Roman law and its adaptations into English law were essentially

11 Michael Blumm, 'The Public Trust Doctrine - A Twenty First Century Concept' 16 *Hastings West-Northwest Journal of Environmental Law and Policy* 105, 105 (2009).

12 For a historical overview of legal systems underlying water law, see Hubert Thompson, *Water Law* 17 (Cape Town: Juta and Company Ltd, 2006).

13 Anna Kaspersen, 'The Public Trust Doctrine and the Impossibility of 'Takings' by Wildlife' 23/2 *Boston College Environmental Affairs Law Review* 357, 360 (1996).

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

⁹ See AMD Report, note 6 above, at 80.

¹⁰ *Id.*

concerned with trying to create some form of ownership over those natural resources that fall outside the realm of private ownership. It was certainly not an attempt to protect natural resources from over exploitation. In fact one can argue that it sets the framework for the type of exploitation that posed a threat to the long-term sustainability of natural resources. The modern day conception of the public trust doctrine has moved beyond notions of ownership of shared resources. Instead, it creates a public right in property where certain rights vest in the citizens of the state as an entity, but citizens can demand the realisation and protection of that interest as individuals.¹⁵ It thus requires from the state a custodial commitment not only to guard against unlawful appropriation by private citizens, but also to protect and conserve natural resources such as water.

3.1 Public Trust Doctrine in the United States

The doctrine made its first jurisprudential introduction in the United States in a case dating back to 1821 that addressed the rights of riparian owners and notably held that tidal waters, including the riverbed, were common property, which significantly diminished the rights of riparian owners to benefit from its resources, in this case the right to harvest oysters.¹⁶ It thus introduced the notion of limits to ownership, but more importantly limits to the utilisation of resources regarded as 'common' and their utilisation for the benefit of the public. In this regard the court stated:

Everything susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them

are divided among the individuals of the nation, and become *private property*. Those things not divided among the individuals still belong to the nation, and are called *public property*. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "*the domain of the crown or of the republic*;" others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called *common property*. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. *Vattel lib. i, 20. 2 Black Com. 14*. But inasmuch as the things which constitute this *common property* are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.¹⁷

More recently, Joseph Sax, in 1970, in his seminal article *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*¹⁸ revived the doctrine in the context of natural resources law. He argued that the U.S. Supreme Court's decision in *Illinois Central Railroad v Illinois*¹⁹ which held that

15 E. Van der Schyff, 'Unpacking the Public Trust Doctrine: a Journey into Foreign Territory' 13/5 *Potchefstroom Electronic Law Journal* 1 (2010). This explanation is primarily with reference to how the doctrine operates in terms of American law. She believes that less clarity exists with regard to its operation in terms of South African law.

16 *Arnold v Mundy*, Supreme Court of New Jersey, Judgement November 1821, 6 N.I.L. 1 (1821).

17 *Ibid*, at 71.

18 Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' 68 *Michigan Law Review* 471, 476 (1970). See, on the work of Sax, among others, Barton H. Thompson, 'Water Law as a Pragmatic Exercise: Professor Joseph Sax's Water Scholarship' 25/1 *Ecology Law Quarterly* 363-383 (1998) and Carol M. Rose, 'Joseph Sax and the Idea of the Public Trust' 25/1 *Ecology Law Quarterly* 351-362 (1998).

19 US Supreme Court, Judgment of 5 December 1892, 146 U.S. 387 (1892).

state holds permanent title to all submerged lands within its borders and holds these lands in public trust, essentially laid the foundation for other courts, that is, Massachusetts, Wisconsin and California to prevent privatisation of public resources like parks, submerged lands, and wetlands.²⁰ He accordingly views it as a way to democratise access to natural resources.

According to Sax, the doctrine had its conceptual birth in a variety of theories.²¹ 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'.²² In essence, this would require that a small group of people should not have exclusive use and control over these interests. Second, 'certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace'.²³ Third, 'certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate'.²⁴ This would particularly apply in the context of private rights to water where the owner's rights are limited by the rights of other users and his/her rights are akin to a *usufruct* in water. This emphasises the traditional focus of the public trust doctrine which centred on common ownership of certain natural resources and the role of the state in preventing a common resource being utilised in the interest of a few to the detriment of many. As such, it limited the prerogatives of private ownership.²⁵

Blumm accurately describes the public trust doctrine as 'a dynamic vehicle protecting both public access to natural resources and to decision makers with the authority to allocate those resources'.²⁶ In line with

this dynamic nature, Sax argued for the development of the public trust doctrine to include 'controversies involving air pollution, dissemination of pesticides, etc',²⁷ that is, the state should be required to protect common sources from environmental threat. Sax's view of the public trust doctrine departed from the strict narrow confines bestowed upon it by Roman, English and American law. Sax's goal was '...to loosen the public trust doctrine from its historical connection with navigation and waterways, and turn the doctrine instead into a more general device for managing change and recognizing community values in diffuse resources'.²⁸

This view was supported in a second groundbreaking case in 1983 when the California Supreme Court in *National Audubon Society v Superior Court*²⁹ stated that

the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters' and in doing so enjoined diversion of water from Mono lake so as to protect ecological values. Moreover, the court placed a 'continuous' supervisory duty on the state 'to take such uses into account in allocating water resources'.³⁰

As such it mandated a consideration of the public trust in decision-making and governance of water resources.

Sax's liberated take on the public trust doctrine, together with jurisprudential developments in subsequent years in America, resulted in the extension of the doctrine to environmental governance:

The new public trust laid claim to the seed of the *jus publicum*, the notion that certain resources are of so common a nature that

20 See Sax, note 18 above, at 491-495.

21 *Ibid.*, at 484.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Ibid.* at 471.

26 Michael C. Blumm, 'Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine' 19 *Environmental Law* 573, 595 (1989) and Blumm, note 11 above, at 1 in which he quotes David C. Slade, *The Public Trust Doctrine in Motion: Evolution of the Doctrine, 1997-2008* (2008), building on Coastal States Organization, *Putting the Public Trust Doctrine to Work* (1st ed. 1990 & 2nd ed. 1997).

27 See Sax, note 18 above, at 484.

28 Carol M. Rose, 'Joseph Sax and the Idea of the Public Trust' 25/1 *Ecology Law Quarterly* 351, 355 (1998).

29 Supreme Court of California, Judgment of 17 February 1983, 685 P.2d 709.

30 *Ibid.*, at 728 and 732.

they defy private ownership in the classical liberal sense. But where the traditional doctrine evolved to protect common rights to access for commerce purposes (hence the criteria of navigability), the new public trust heralded conservationist principles.³¹

The extension of the public trust doctrine to include the state's duty to manage, preserve, and to protect certain resources for the benefit of its citizens is now generally accepted,³² albeit not without some criticism.³³ Yet, its scope remains limited and at its most expansive level has been used to limit the development rights of private landowners.³⁴ It has also never been recognised as a federal concept and developments have been relegated to the jurisdictions of a few states. In this regard, Blumm makes the point that 'although there have been significant expansions in the scope of the public trust doctrine over the last three decades in the United States, more remarkable decisions have come from abroad'.³⁵ The

public trust doctrine generates much more potential. To what extent for example does a state's responsibility vis-à-vis natural resource protection include a responsibility and indeed liability for damages to environment? In the next section the article looks toward international law which addresses access to and benefits from common resources in much the same way as the public trust doctrine by way of the principle of the common heritage of mankind. Agreements that have incorporated this principle have clarified states' responsibility vis-à-vis shared natural resources and have included liability for environmental damage. This, it will be argued, is instructive for the development of the public trust doctrine in domestic jurisdictions, especially in light of the liability vacuum with regard to shared natural resources.

3.2 Common Heritage of Mankind: A Form of Public Trust?

In international law, the so-called 'common property' doctrine was traditionally used to claim common ownership in common spaces such as the high seas and the superjacent airspace which may not be usurped to the exclusive sovereignty of any one state.³⁶ In essence these are areas outside of national jurisdiction which contain natural resources that as a result also fall beyond national jurisdictions and can thus not be appropriated for exclusive use. These common spaces are, however, open for legitimate and reasonable use by all states,³⁷ and international law allocates rights of access to and control over natural resources by way of a set of legal rules.³⁸

The idea of common ownership of common spaces and by extension living resources found in spaces

31 Erin Ryan, 'Public Trust and Distrust: the Theoretical Implications of the Public Trust Doctrine for Natural Resource Management' 31/1 *Environmental Law* 477, 479 (2001).

32 See, for example, Allan Kanner, 'The Public Trust Doctrine; Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources' 16/1 *Duke Environmental Law and Policy Journal* 57, 62 (2005), Blumm, note 26 above and M. Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift' 39 *Environmental Law* 43 (2009).

33 Huffman has consistently challenged the historical development and the application of this doctrine and has gone so far as to question the constitutional premise of the doctrine. See, in this regard, James L. Huffman, 'A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy' 19 *Environmental Law* 527 (1988-1989), James L. Huffman, 'Speaking of Inconvenient Truths: A History of the Public Trust Doctrine' 18/1 *Duke Environmental Law and Policy Forum* 1 (2007) and Richard Lazarus, 'Changing conceptions of property and sovereignty in natural resources: Questioning the public trust doctrine' 71 *Iowa Law Review* 631 (1986-1986).

34 Michael C. Blumm and R.D. Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision' 44 *University of California: Davis Law Review* 15 (2012).

35 *Ibid.*, at 16.

36 Patricia Birnie and Alan Boyle, *International Law and the Environment* 141 (Oxford: Oxford University Press, 2nd ed. 2002). See also Convention on the High Seas, Geneva, 29 April 1958, 450 UNTS 11; United Nations Convention on Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 3 [UNCLOS] and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, New York, 19 December 1966, 610 UNTS 205.

37 See Birnie and Boyle, note 36 above, at 141.

38 Richard Bilder, 'Natural Resource Policies' 20 *Natural Resources Journal* 451, 452 (1980).

such as the high seas can be traced to the ideas of Hugo Grotius who professed the freedom of the seas.³⁹ Basing his arguments in natural law he claimed that the seas must be free for navigation and fishing and that the law of nature proscribes the ownership of common things and essentially that nature has provided all things to all people.⁴⁰ However, as observed by Hardin, the 'inherent logic of the commons remorselessly generates tragedy' as the availability of free natural resources inevitably leads to over harvesting and over-exploitation.⁴¹ In essence it establishes use rights without a corresponding duty to protect or conserve the resource. There is, therefore, no state interest in conservation or sustainable management of resources.

A shift in how ownership regarding common spaces became apparent in the *Icelandic Fisheries* cases⁴² where the International Court of Justice (ICJ) for the first time introduced the concept of a duty in customary law to not only access common resources on an equitable basis, but also to conserve them in a sustainable manner for future benefits.⁴³ This was expanded through the development of the principle of common heritage of mankind. Some argue that this principle harks back to Roman law conceptions of *res communis* where the global commons, that is, the high seas, the air space above them and outer space belongs to all nations.⁴⁴ Such an explanation

is, however, simply another formulation of the common ownership principle and does not address the challenges raised by Hardin.

In contrast to this view, early expressions of this principle are indicative of a more expanded view which incorporates some duties on states vis-à-vis the protection of natural resources. For example the preamble of the Convention Concerning the Protection of the World Cultural and Natural Heritage states: 'Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world,' and 'Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.'⁴⁵ The principle was also applied in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,⁴⁶ and eventually more prominently in the Antarctic Treaty⁴⁷ and its Protocol on Environmental Protection,⁴⁸ and recently in the 1982 *United Nations Law of the Sea Convention* (UNCLOS).⁴⁹ UNCLOS states in Article 136: 'The Area and its resources are the common heritage of mankind.'⁵⁰ This 'Area' is defined as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction

39 His two books *De Jure Belli ac Pacis Libri Tres* (Washington: Carnegie Institution of Washington, 1913 - 1925) and *Mare Liberum (The Hague: Carnegie Endowment for International Peace)* explain his conception of this idea.

40 J. Van Dyke and C. Yuen, 'Common Heritage v Freedom of the High Seas: Which Governs the Seabed' 19 *San Diego Law Review* 493, 508 (1982). It has to be mentioned of course that Grotius developed these ideas whilst working as a lawyer for the Dutch East India Company, who had great interest in establish dominium in international trade in natural resources.

41 Garrett Hardin, 'The Tragedy of the Commons' 162:1243-1248 *Science* 95 (1968).

42 *United Kingdom of Great Britain and Northern Ireland v Iceland*, International Court of Justice, Judgement of 25 July 1974, ICJ Reports (1974) and *Federal Republic of Germany v Iceland*, International Court of Justice, ICT Reports (1974).

43 See Birnie and Boyle, note 36 above, at 142.

44 Kemal Baslar, *The Concept of the Common heritage of Mankind in International Law* 38-43 (The Hague: Martin Nijhoff, 1998).

An important difference between the concept of common property and common heritage of mankind (CHM) is that unlike the concept of common property, CHM does not allow for common ownership of resources or even access to resources outside the narrow conventions of membership to a treaty which incorporates the principle. It seems

45 Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, 1037 UNTS 151.

46 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, New York, 5 December 1979, 1363 UNTS 3, art 5, 7 and 11.

47 The Antarctic Treaty, Washington, 1 December 1959, 402 UNTS 71, Preamble.

48 The Protocol on Environmental Protection to the Arctic Treaty, Madrid, 4 October 1991, 30 ILM 1455 (1991), Preamble, art 1, 3 and 13.

49 See UNCLOS, note 36 above, art 136, 137 and 140.

50 *Id.*, art 136.

that the CHM principle features at least four characteristics:⁵¹ non-appropriation which contains the idea of shared ownership; shared benefits, which provides for use and exploitation of natural resources; reservation for peaceful purposes and international management for the benefit of “mankind” and protection of resources.⁵² This latter characteristic is an important development away from the Grotian view of common property as it sets out a system for sustainable use and management of common natural resources, including the duty to preserve and protect these resources.

These characteristics, so one can argue, contain notions of public trusteeship. It essentially places a duty on all state parties as a collective to act as custodians of common spaces. In this sense it casts the collective entity in the same role as the government when acting in its domestic capacity as custodian of natural resources. The principle, like the public trust doctrine, also provides access and use rights, but bars claims of sovereignty, that is individual ownership. Thus the collective (all state parties) act as custodian, whereas in its individual capacity a state may benefit from natural resources in common spaces. Like the public trust doctrine, the CHM principle specifically places a duty on state parties to prevent, reduce and control pollution and to protect and conserve natural resources. This duty is placed on the state parties as a collective, but would in practice also apply to those states that actually operate (via private actors) in the commons space and that access resources in this area. In effect, an obligation is placed on those states that harvest and exploit resources to do so in a manner that would prevent pollution and environmental degradation, but importantly also in a manner that would ensure that such harvesting and exploitation is not done in a manner that would disadvantage both present and future generations. Thus in the CHM there is a clear link between the ability to benefit from shared resources, control and management of such resources in a custodial capacity, but also responsibility, as custodian for the conservation of such resources, including pollution prevention and control.

⁵¹ See Hunter et al, note 3 above, at 455.

⁵² See UNCLOS, note 36 above, art 140 read with art 145; see also art 263 in respect of marine scientific research.

It is well established in international law that state responsibility is a rather wide concept and state responsible for a wrongful act⁵³ is not only required in international law to cease such act, but to also make reparation for injury caused.⁵⁴ Thus liability is inferred through recourse to the general principle of law that every violation of an obligation entails a duty of reparation. The operation of this principle of state responsibility and liability in the environmental context was confirmed by the ICJ in the *Case Concerning the Gabčíkovo-Nagymaros Project*⁵⁵ where the Court stated:

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

This responsibility includes liability for acts of private persons as a function of that state’s control over the activities concerned.⁵⁶ This is reiterated in Principle 21 of the Declaration of the United Nations Conference on the Human Environment of the 1972 UN Stockholm Conference, which sets out the basic rule governing the international responsibility of states with regard to the environment and commits them ‘to insure that activities within their jurisdiction or control do not cause damage to areas beyond the limits of national

⁵³ See International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, article 1.

⁵⁴ *Ibid*, art 30 and 31. For a general overview of state liability for environmental damage, see Philippe Sands, *Principles of International Environmental Law* 872 (Cambridge: Cambridge University Press, 2nd ed. 2003).

⁵⁵ *Hungary v Slovakia*, International Court of Justice, Judgement of 25 September 1977, ICJ Reports 1997, p. 7, at para 152.

⁵⁶ Gunther Handl, ‘State Liability for International Damage’ 74 *American Journal of International Law* 525, 529 (1980).

jurisdiction'.⁵⁷ Thus, states as beneficiaries of common resources via private persons engender liability in their capacity as states.

In essence, this liability that a state may incur for environmental damage is arguably part of the fourth characteristic of CHM, that is, international management. In line with this, those treaties that do contain the CHM principle create state liability for environmental damage as can be seen in the 1972 Convention on International Liability for Damage Caused by Space Objects, Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty and Part XI of UNCLOS.⁵⁸ If one then takes the position that the CHM principle is in its nature analogous to the public trust doctrine it begs the question whether the latter similarly provides a basis for liability for environmental damage. The next section therefore explores the public trust doctrine in the South African context with a view to address the issue of liability for pollution of natural resources.

4

EVOLUTION OF THE PUBLIC TRUST DOCTRINE IN SOUTH AFRICA WITH SPECIFIC REFERENCE TO WATER LAW

4.1 Pre-Constitutional Dispensation

Water law in South Africa and the state's role in water governance evolved over time.⁵⁹

Indigenous and customary law treated water as part of the 'commons' in the sense that it was not privately owned.⁶⁰ Colonial rule introduced private rights to water in South Africa for the first time in a limited sense by the Dutch.⁶¹ The prevailing legal system at the time was Roman Dutch law which, heavily influenced by Roman law, distinguished between state owned and privately owned water. It thus favoured the position that water was *res publicae*.⁶² The state was regarded as *dominus fluminis* and retained the sole right to allocate water. Under the later British rule, however, the principle of riparian rights was introduced to South African law which also recognised private entitlements to water.⁶³

The riparian rights system was retained in the *Water Act* of 1956,⁶⁴ which clearly distinguished between private and public water. Private water was defined as all water which rises or falls naturally on any land or naturally drains or is led onto one or more pieces of land which are the subject of separate original grants, but is not capable of common use for irrigation purposes.⁶⁵ The owner of private water enjoyed almost unfettered and exclusive use and enjoyment of such water on his or her land,⁶⁶ but

⁵⁷ Declaration of the United Nations Conference on the Human Environment, Stockholm, 5 - 16 June 1972, 11 ILM 1416 (1972), principle 21.

⁵⁸ See, in this regard, Convention on International Liability for Damage Caused by Space Objects, New York, 29 November 1971, 961 UNTS 187; The Protocol on Environmental Protection to the Arctic Treaty, note 46 above and UNCLOS, note 36 above, art 139(2).

⁵⁹ See, for a succinct historical account, Department of Water Affairs and Forestry, *White Paper on Sanitation and Water Supply* (1994), at 4-5, available at <http://www.dwaf.gov.za/Documents/Policies/WSSP.pdf>. See also, for a rare yet interesting perspective, C.G. Hall and A.P. Burger, *Hall on Water Rights in South Africa* (Oxford: Oxford University Press, 3rd ed. 1957).

⁶⁰ S. Burman, *Cape Policies Towards African Law in Cape Tribal Territories 1872 - 1883*, PhD Thesis (University of Oxford, 1973).

⁶¹ The Dutch landed in South Africa in 1652 and established a half way station en route to the East.

⁶² Ownership was not clear. According to authors such as Voet, it belonged to citizens in common property whilst Van Leeuwen argued that it belonged to the state. See Thompson, note 12 above, at 27.

⁶³ D.D. Tewari, 'An Analysis of Evolution of Water Rights in South Africa: An Account of Three and a Half Centuries from 1652 AD to Present' 35/ 5 *Water SA* 693, 698 (2009). In the landmark decision of *Retief v Louw*, Supreme Court of the Cape of Good Hope, Judgement of 12 January 1856, (1874) 4 Buch 165, the upstream owner diverted the whole of the stream's summer flow and thus deprived the downstream owner of water for drinking purposes and irrigation. The Court held that for perennial streams running over several adjoining land parcels, landowners 'have each a common right in the use of water which use, at every stage of its exercise by any one of the proprietors, is limited by a consideration of rights of other proprietors'.

⁶⁴ South Africa, Act 54 of 1956.

⁶⁵ *Id*, s 1. According to section 5 the words 'which rises ... naturally on land' were required to be taken to mean that point on land where water rises onto the surface from its sources.

⁶⁶ *Ibid*, s 5(1).

was not allowed to pollute the water.⁶⁷ Public water was defined as any water flowing or found in or derived from the bed of a public stream, whether visible or not.⁶⁸ With regard to public water, riparian owners were granted an entitlement to the reasonable use of the water for agricultural and urban purposes.⁶⁹ The latter included mining. This share in public water was either determined by the water court or could be lawfully acquired from another person.⁷⁰

At the dawn of democracy, the majority of South Africans did not have access to land and riparian ownership and access to private and public water therefore represented a minority of South Africans. In addition, as a result of inadequate enforcement and the lack of a regulatory system that provided for liability for environmental damage, the country faced deteriorating water quality and severe water pollution, including AMD. This is undoubtedly related to the fact that mining was deemed to be of tremendous economic importance as it effectively became the mainstay of the South African economy. This was exacerbated by the political and economic exclusion from the world at the time. Mining companies thus often escaped liability for environmental damage.⁷¹ The resulting effect is that due to the pre-constitutional regime's allowance of virtually unfettered water use and lack of restrictive ecological limitations on mines with respect to their

activities, the current problem of AMD and the liability vacuum now presents itself.

4.2 Constitutional Dispensation

The *Constitution of the Republic of South Africa, 1996* (Constitution) ushered in a new paradigm through its inclusion of environmental human rights. Section 24(a) guarantees a right to an environment that is not harmful to human health or well-being and to environmental protection for the benefit of present and future generations. Section 24(b) directs the state to take reasonable legislative and other measures to prevent pollution, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. With respect to water section 27 guarantees every South African the right of access to sufficient water and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.⁷² Together these rights require of the state to ensure that water is conserved and protected and that sufficient access to the resource is provided. More profoundly, section 24 creates, for the first time in South African law, a direct link between the public trust doctrine and the Constitution.

This synergy between constitutional rights and the public trust doctrine is of vital importance and in this respect it has been stated:

Once we label something as a fundamental right or an inviolable right, it is much less likely to come up short in a balancing test. The more fundamental the right is considered, the more non-derogable are duties to protect those rights, and the heavier the weight of international shaming falls upon the violator. Fulfilment of these rights supervenes any legislation that conflicts with such fulfilment.⁷³

In essence by inserting an environmental right into the Constitution, a duty is placed on the state to

⁶⁷ *Ibid*, s 23.

⁶⁸ *Ibid*, s 1. This section defined public stream as a natural stream of water which flows in a known and defined channel, whether or not such channel is dry during any period of the year and whether or not its conformation has been changed by artificial means, if the water therein is capable of common use for irrigation on two or more pieces of such land and also on state land which is riparian to such stream, provided that a stream which fulfils the foregoing conditions in part only of its course shall be deemed to be a public stream as regards to that part only.

⁶⁹ *Id*. 'Urban purposes' was defined in section 1 as the use of water in an area under the jurisdiction of a local authority for purposes for which water was ordinarily used by a local authority or by the inhabitants of the area.

⁷⁰ *Ibid*, s 9(1) read with s 1.

⁷¹ See further, W. Du Plessis and W.L.J. Kotzé, 'Absolving Historical Polluters from Liability through Restrictive Judicial Interpretation: Some Thoughts on *Bareki No v Gencor Ltd*' 18/1 *Stellenbosch Law Review* 161 (2007) and L.J. Kotzé and N. Lubbe, 'How (Not) to Silence a Spring: The Stilfontein Saga in Three Parts' 16/2 *South African Journal of Environmental Law and Policy* 49 (2007).

⁷² South Africa, Constitution of the Republic of South Africa Act 108 of 1996, section 27(2).

⁷³ David Takacs, 'The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property' 16 *New York University Environmental Law Journal* 711, 733 (2008).

affirmatively protect natural resources such as water from pollution and degradation and to provide for the sustainable management of the resource. At the same time it severely curtails private rights to natural resources and proscribes uses that may be detrimental to the resource. Linked to this, it will be argued below, imbibed in this duty to protect is the duty to ensure that liability for pollution or damage is established.

The custodial obligation on government as the public trustee of South Africa's water resources is constitutionally prescribed by way of section 24(b) which not only places an environmental governance obligation on the state, it also demands that when exercising that obligation it should take into consideration the imperatives of sustainable development. Thus, despite the important economic contribution of mining to the economy as mentioned elsewhere, sustainable development demands a more integrated approach to governance⁷⁴ and requires that environmental issues are considered alongside aspects of the development process that have traditionally had more influence on economic and political decision-making.⁷⁵ Most importantly, these constitutional imperatives make it incumbent on government as the public trustee of natural resources to ensure that these resources do not harm the health and well-being of people.⁷⁶ This obligation to protect

the resource in order to ensure that access is not compromised is particularly important in light of the risks posed by AMD in densely populated areas such as the Western, Central and Eastern Basins of the Witwatersrand Goldfields.⁷⁷

A range of legislation has been enacted to give effect to sections 27 and 24 of the Constitution, including the *National Environmental Management Act*⁷⁸ (NEMA) which regulates the protection of all environmental sources, including water; the *Water Services Act*⁷⁹ (NWSA) which regulates access to water; the *National Water Act*⁸⁰ (NWA) which ensures the protection and conservation of water resources, and the *National Environmental Management: Waste Act*⁸¹ which provides for the management of waste, including mining related waste that may impact on water resources. Together this bundle of legislation has brought about the return of the public trust doctrine to water law by translating the constitutional obligations into statutory terms.

NEMA, which governs the environment in its totality, entrenches the public trust doctrine as a crucial component of South African environmental governance by providing that: '[T]he 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.'⁸² In the AMD context, this would require public governance efforts which promote protection of environmental resources and beneficial use of these resources in a way that promotes public interest.

74 Principle 4 of the Rio Declaration captures the integration principle and states: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. See Rio Declaration on Environment and Development, Rio de Janeiro, 31 ILM 874 (1992). It has been argued that the principle of integration is central to the attainment of sustainable development and indeed, it forms the backbone of sustainable development. See D. French, *International Law and Policy of Sustainable Development* 54 (Manchester: Juris Publishing Manchester, 2005) quoting the Division for Sustainable Development - Paper No 3: Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development (Geneva Switzerland 26-28 September 1995, for the fourth session of Commission on Sustainable Development 18 April-3 May 1996, New York).

75 See French, note 74 above.

76 There are similarities between the wording of the South African Constitution and the Constitution of the State of Pennsylvania (article 1, section 27) in this respect. See further Ryan Erin, 'Public Trust and Distrust: the Theoretical Implications of the Public Trust Doctrine for Natural Resource Management' 31/1 *Environmental Law* 477 (2001).

77 See AMD Report, note 6 above, at v. The report indicates that during rainy seasons the volume of decant in the Western Basin has peaked at 60 megalitres per day (ML/d) and that basic treatment of this water currently permits the release of 12 ML/d into the Crocodile (West) and Marico drainage system. Alarming it notes that the existing pumping and treatment capacity is inadequate to effectively manage the impact of AMD, with the excess volume flowing untreated into the receiving aquatic environment.

78 South Africa, Act 108 of 1998.

79 South Africa, Act 108 of 1997.

80 South Africa, Act 36 of 1998.

81 South Africa, Act 59 of 2008.

82 NEMA, note 78 above, s 2(4)(o).

The operation of the public trust doctrine in the context of water is indicated in a number of policy documents on water. The 1997 *White Paper on a National Water Policy for South Africa*⁸³ (White Paper) makes it clear that the state acts as custodian of the 'public trust' in managing, protecting and determining the proper use of South Africa's scarce water resources and that the public trust doctrine is in fact a central part of the post-constitutional approach to water governance.⁸⁴ The duties of the state as custodian were summarised in the National Water Resources Strategy as follows:

As custodian of the Nation's water resources, the National Government shall ensure that the development, apportionment, management and use of those resources is carried out using the criteria of public interest, sustainability, equity and efficiency of use in a manner which reflects its public trust obligations and the value of water to society while ensuring that basic domestic needs, the requirements of the environment and international obligations are met.⁸⁵

This in essence captures the requirements of sections 27 and 24 of the Constitution with regard to ensuring equitable access to water and the concomitant obligation to govern the ecological aspects of water in a sustainable manner. More specifically though, according to the White Paper, the public trust doctrine includes three central obligations. First, it creates an obligation to provide for the basic needs of citizens.⁸⁶ The second obligation is related to the duty to protect the resource itself. In this regard, it states: '[A]fter providing for the basic needs of citizens, the only other water that is provided as a right, is the Environmental Reserve - to protect the ecosystems that underpin our water resources, now and into the future'⁸⁷ (Principle 9). It is the duty of

national Government, as part of its public trust function, to assess the needs of the Environmental Reserve and to make sure that this amount of water, of an *appropriate quality*, is set aside.⁸⁸ Third and in line with international law, it creates an obligation to ensure that water allocation for downstream users in shared river basins is respected.⁸⁹

In relation to the problem of AMD, all of these three obligations are crucial. First, AMD has the potential to pollute water used for household purposes and threaten human health and well-being which would clearly violate the first obligation. Second, AMD can potentially contaminate water resources as excess volumes of AMD are already flowing into aquatic environments such as rivers and wetlands.⁹⁰ Third, some of the water courses that are under threat of contamination by AMD such as the Crocodile River⁹¹ and the Marico River,⁹² are shared watercourses. In terms of the SADC Protocol on Shared Watercourses,⁹³ such pollution would be in violation of article 4(2)(a) and (b) which, *inter alia*, requires Member States to

prevent, reduce and control the pollution and environmental degradation of a shared watercourse that may cause significant harm to other Watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse.

This would infringe the third public trust obligation of the South African government.

The public trust doctrine is reiterated in Section 3 of the NWA, which declares that the National Government, acting through the Minister, is the public trustee of the nation's water resources, and

83 Department of Water Affairs and Forestry, *White Paper on a National Water Policy for South Africa* (1997).

84 *Id.*, para 5.1.2.

85 Department of Water Affairs and Forestry, *National Water Resource Strategy* (September 2004), at A1, available at <http://www.dwaf.gov.za/Documents/Policies/NWRS/Sep2004/pdf/General.pdf>.

86 *White Paper*, note 83 above, para 5.2.1.

87 *Id.*

88 Own emphasis.

89 *White Paper*, note 83 above, para 5.2.3.

90 AMD Report, note 6 above, at vi.

91 The Crocodile River is a major tributary of the Limpopo River which discharges into the Indian Ocean in Mozambique.

92 The Marico is also a tributary of the Limpopo River and forms the border between South Africa and Botswana.

93 SADC Revised Protocol on Shared Watercourses, Adopted by the Summit Heads of States in August 2000.

must ensure that water is, *inter alia*, protected, conserved and managed in a sustainable and equitable manner for the benefit of all. The buck therefore stops at the Minister since she is ultimately responsible to address AMD. Chapter 1 of the NWA makes it clear that sustainability and equity are the central guiding principles in the protection, use, development, conservation, management and control of water resources.⁹⁴ It also emphasises the role of the Minister⁹⁵ who is empowered to act on behalf of the nation and has the ultimate responsibility to fulfil obligations relating to use, allocation and protection of and access to water resources.⁹⁶

Through these statutes, in particular the NWA and NWSA, landowners have been divested of all property rights to the resource. However, the implications of this from a property law perspective and hence the nature of ‘custodianship’ of a natural resource under the public trust doctrine remains murky. In respect of mineral rights, the courts have held that the effect of the Act⁹⁷ that brings previously privately owned mineral rights under state regulation is that such rights have been expropriated in the public interest, but that: ‘it matters not what the right is called in the hands of the expropriator. The essential inquiry is whether the substance of the rights has been acquired by the expropriator.’⁹⁸ Here the rationale of the court is that because the nature of the rights that can now be granted by the state is substantially the same as so-called old order rights, the state therefore acquired the substance of the property rights. It goes on to say: ‘The fact that the State’s competencies are collectively called custodianship matters not.’⁹⁹ In respect of water it has been argued that whilst the NWA has not expropriated water *per se*, a constitutionally valid deprivation has occurred and

that the provisions of the NWA can give rise to inverse condemnation or constructive expropriation in specific circumstances.¹⁰⁰ If one follows the rationale of the court in the *AgriSA* case, an important difference between the mineral resources regime and the water regime is that water, unlike mineral rights, is no longer capable of being privately owned, nor is it the subject of commercial enterprise. Its use is however regulated and use rights are regulated through a licensing system.¹⁰¹

What does this mean for responsibility for water, water as a natural resource and liability for pollution? The prevailing view of the courts is that the role of the state vis-à-vis certain natural resources is that of custodian.¹⁰² Therefore, as trustee of water as a national asset, the South African government has ultimately to assume responsibility for dealing with any threat to that asset. AMD is arguably one of the biggest threats to water that South Africa has ever encountered. Inevitably this means that government must assume responsibility and pick up the tab for historic pollution. However, while the above analysis supports arguments to solely hold the state responsible for addressing the AMD crisis, is there also room for sharing that liability?

5 PUBLIC TRUST DOCTRINE AND LIABILITY

South African law extensively provides for the regulation of mining impacts on the environment

94 NWA, note 80 above, introductory paragraph to Chapter 1.

95 In 2009 the departments of Environmental Affairs and Water Affairs were joined under one ministry and whilst the departments remain separate, they operate under a single Minister.

96 NWA, note 80 above, introductory paragraph to Chapter 1.

97 South Africa, The Mineral and Petroleum Resources Development Act 28 of 2002 [MPRDA].

98 *AgriSouth Africa v Minister of Minerals and Energy*, note 1 above, para 81.

99 *Ibid*, para 82.

100 G.J. Pienaar and E. van der Schyff, ‘The Reform of Water Rights in South Africa’ 3/2 *Law, Environment and Development Journal* 179 (2007).

101 NWA, note 80 above, sections 4, 21, and 39.

102 See, for example, *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others*, Eastern Cape Division, Judgment of 20 November 2001, 2004 1 All SA 636 (E) 658; *De Beers Consolidated Mines v Ataquia Mining (Pty) Ltd and Others*, High Court of South Africa Orange Free State Provincial Division, Judgment of 13 December 2007, Case No: 3215/06 and *Meepo v Kotze*, Northern Cape Division, Judgment of 29 June 2007, 2008 (1) SA 104 (NC).

and these provisions are also applicable to water resources in the AMD context. To this extent, it includes detailed pollution prevention, minimization and remediation provisions as well as liability provisions. Mines causing AMD can therefore be held liable for water pollution or the threat thereof as a result of AMD. This the court has done for instance in *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* (hereafter 'Harmony case')¹⁰³ where it upheld a government directive to a number of mines that contributed to AMD that had the potential to pollute a watercourse without the required remedial measures. As such the court endorsed the polluter and user pays principle. However, there the pollution was temporal in nature and the courts did not have to address the thorny issue of AMD related historical pollution. To address this issue one has to return to the South African Constitution.

The regulatory regime pertaining to mines is premised on the environmental right and thus derives its constitutional validity and force from this right. This includes the positive obligation placed on the executive and legislature, as well as other organs of state, captured in section 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.¹⁰⁴ As argued above, the custodial role of the state vis-à-vis natural resources is ultimately derived from the environmental right and specifically section 24(b) which clearly delineates the role of the state in protecting the environment. With respect to the application of the right, section 24(b) can clearly only be applied against the state and thus have vertical effect. Section 24(a) of the environmental right on the other hand is couched in terms which allude to the fact that it is capable of being horizontally construed. In this regard consideration must be given to section 8 of the Constitution, the so-called 'application clause', as it determines who is bound by the Constitution. Section 8(1) makes the Constitution applicable to the legislature, the executive, the judiciary and all organs of state. In

this regard it adheres to the traditional view that a Constitution should protect citizens against unwarranted interference by the state. Section 8(2) deviates from this traditional view and provides that a provision of the Bill of Rights also binds natural and juristic persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right'. This would mean that a right cannot only be asserted against the state, but also against private individuals.

In *McCarthy v Constantia Property Owners Association and Others*,¹⁰⁵ Judge Dennis Davis noted that:

Section 8(2) provides that the provision in the Bill of Rights binds all natural and juristic persons, if and to the extent, that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Whatever the interpretation of this opaque phrase, it is clear that its intention was to extend the scope of application of the Bill of Rights. In short, the Bill of Rights was not only designed to introduce the culture of justification in respect of public law but intended to ensure that the exercise of private power should similarly be justified. Accordingly the carefully constructed but artificial divide between public and private law which might have dominated our law prior to the constitutional enterprise can no longer be sustained in an uncritical fashion and hence unquestioned application.

In essence this means that where a private actor commits an act that pollutes a natural resource such as water, a violation of section 24(a) can be alleged.¹⁰⁶

¹⁰³ Supreme Court of Appeal, Judgment of 29 May 2006, [2006] SCA 65 RSA.

¹⁰⁴ R. Stein, 'Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System' 83 *Texas Law Review* 2167, 2173 (2005).

¹⁰⁵ Cape Provincial Division, Judgment of 19 July 1999, 1999 (4) SA 847 (C).

¹⁰⁶ See *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others*, note 102 above, at 34. The court interpreted the duty of care as laid down in s 28 of NEMA in light of s 24(a) of the Constitution and stated with regard to emission of a substance by a tannery that created a nuisance to neighboring businesses 'one should not be obliged to work in an environment of stench and, in my view, to be in an environment contaminated by H₂S is adverse to one's "well-being"'. I am therefore satisfied that the activities of the first respondent have caused "pollution" as defined in NEMA.'

It has been noted that section 24 is unique in this sense, since it contains aspects of both vertical rights and horizontal rights.¹⁰⁷ It could be argued therefore that section 24(a) purports that private actors shoulder some of the custodial duties vis-à-vis natural resources. Whilst the state's custodial duty is an all-encompassing duty to manage and protect natural resources, the duties flowing from section 24(a) and resting on private actors may be of a slightly more moderate nature. At a minimum, it includes the duty of care standard as it applies in environmental law and which is most aptly captured in section 2(4)(ii) of NEMA which mandates that: 'pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied.' The duty of care standard thus mandates protection of natural resources through prevention, minimisation and remediation. The effect of section 24(a) furthermore is that in the same way that we can hold the state liable for non-performance of duties delineated in section 24(b),¹⁰⁸ private actors can be held liable as well.

This is further supported by the analogy between the public trust doctrine and the CHM principle. Thus, whilst water is a common resource, private actors are able to use and benefit from it. As mentioned above, the same principle applies with regard to parts of what is considered to be the global commons by way of the CHM principle. The CHM principle provides access to resources, but at the same time specifically creates a duty to prevent, reduce and

control pollution and to protect and conserve natural resources; applying to state parties as a collective and passed on via state actors to private actors operating in these areas. Moreover, states can be held liable for damage to such common spaces and resources.

This view is supported by the approach taken by the court in the aforementioned Harmony case. The directive issued in terms of section 19(3) of the NWA was interpreted to include the obligation to take clean-up measures on land belonging to another to prevent AMD from polluting a water source. The case pertained to the type of duties befalling a mining company when it benefits from a shared resource and also contributes to the threat of pollution of that shared resource. The court held that whilst one may not be responsible for the pollution on someone else's land, a person can be directed to take 'reasonable anti-pollution measures to prevent groundwater from defunct mines reaching the active ones'. In this respect the court argued that the constitutional and statutory anti-pollution objectives would be obstructed if the measures required of the persons referred to in section 19 were limited to measures on the land mentioned in that subsection.¹⁰⁹ The court in essence provided for a shared responsibility for water pollution stemming from AMD.

Thus section 24 of the Constitution from which the South African public trust doctrine is derived, including section 24(a) which is susceptible to horizontal application, provides the basis for an overarching duty towards pollution prevention and remediation. The South African public trust doctrine like its US equivalent which evolved from a narrow property rights construct to a doctrine used in the protection of natural resources, is dynamic and capable of extension. It is submitted that the South African public trust doctrine is capable of such amplification. Through the duty established by section 24(a) of the Constitution, it creates a shared responsibility borne by private actors, for the management and conservation of natural resources in the public interest and beyond, in the interest of future generations.

That shared responsibility is already encapsulated in an array of environmental legislation that provides

¹⁰⁷ See Louis J. Kotze, 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection' 16/3 *Review of European Community & International Environmental Law* 298 (2007). See also M. Kidd, *Environmental Law* (Cape Town: Juta, 2nd ed. 2011); J. Glazewski, *Environmental Law in South Africa* (Durban: LexisNexis Butterworths, 2nd ed. 2005) and T.P. Van Reenen, 'Constitutional Protection of the Environment: Fundamental (Human) Right or Principle of State Policy?' 4 *South African Journal of Environmental Law and Policy* 270 (1997).

¹⁰⁸ This can be done by way of the broadened standing provisions enshrined in section 38 of the Constitution and particularly section 38(d) in terms of which 'anyone acting in the public interest' may approach the court. See also L. Feris, 'Human Rights and Locus Standi', in L. Kotze and A. Paterson eds, *Environmental Compliance and Enforcement in South Africa: A Legal Perspective* (Cape Town: Juta, 2009).

¹⁰⁹ *Id.*, para 33.

for the polluter and user pays principle and in some instances specifically provides for historical liability.¹¹⁰ In essence an expanded public trust doctrine confers responsibility beyond the current user/polluter binary and requires a group of actors to assume responsibility for the past practices of that group. Whilst the state as custodian must assume responsibility for remediation of the environmental legacy of past mining practices, so must the mining industry. This responsibility includes accountability for past practices, such as AMD, that allowed an industry to build its economic base, a base that it now benefits from. Whilst this argument by no means renders the mining industry solely liable for historical pollution, it does require an acknowledgment that it has a duty to address historical pollution, including the current crisis posed by AMD.

However, the public trust doctrine is capable of wider interpretation, especially when one visits the foundation of the doctrine in South African law, that is, the constitutional environmental right which places a duty on private individuals to uphold the right. The mining industry as a group must uphold its constitutional obligations and assume a shared responsibility for the conservation of natural resources, including pollution prevention and ultimately remediation to cover the costs of the legacies of past mining.

6 CONCLUSION

The protection and conservation of natural resources is crucial; especially a resource such as water which plays a vital role not only in economic development, but also in social upliftment. At present South Africa's water resources are under severe threat, primarily as a result of past mining practices that have generated extensive wealth for mining companies. In essence what is now required is that AMD water accumulating in mines be pumped out of those mostly abandoned mines and treated. This has profound cost implications.¹¹¹ This article acknowledges that by way of the public trust doctrine the state as custodian of water resources ultimately bears the responsibility for remediation of water pollution. As such government will inevitably have to foot the bill for historical pollution caused by AMD.

¹¹⁰ See, for example. NEMA, note 78 above, s 28, NWA, note 80 above, s 19 and MPRDA, note 97 above, s 38 and 45.

¹¹¹ In the Central Basin alone it will cost approximately R5.6 million rand to install the pumps and approximately R15 million per annum in operation costs. See AMD Report, note 6 above, at 97.

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